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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

JACKIE CHEN, Plaintiff and Appellant, v. M&C HOTEL INTEREST, INC., Defendant and Respondent.	B266461, B267622 (Los Angeles County Super. Ct. No. BC544895)

APPEAL from a judgment and an order of the Superior Court of Los Angeles County, Richard Fruin, Judge. Affirmed in part; reversed in part with directions.

The Kruger Law Firm, Jackie Kruger and Vadim Yeremenko; The Law Office of Greg May and Greg May for Plaintiff and Appellant.

Masserman & Ducey and Mitchell F. Ducey; Collinson Law and Vicki Greco for Defendant and Respondent.

I. INTRODUCTION

Defendant M&C Hotel Interests, Inc. appeals from a judgment following a bench trial as to the existence and duration of an oral contract. Plaintiff Jackie Chen appeals from an attorney fees order. Plaintiff originally sued defendant for contract breach. She alleged she and defendant had an oral contract that provided that she would receive a 5 percent commission from defendant on the total revenue of any hotel room sales. Plaintiff obtained such a sale between China Southern Airlines and the Millennium Biltmore Hotel (the Biltmore), owned by defendant. China Southern Airlines and the Biltmore entered into an annual contract for flight crew rooms. Plaintiff terminated her employment with defendant while the contract between China Southern Airlines and the Biltmore was ongoing. Defendant did not pay her the commission. Plaintiff later amended her complaint to include a claim under Labor Code[1] section 203 for withheld wages.

Following a bench trial, the court determined an oral contract existed between plaintiff and defendant. It also found that the commission during the time period when plaintiff was employed by defendant fell within the definition of wages under the Labor Code and that the commission earned after plaintiff had terminated her employment constituted contractual damages.

Plaintiff subsequently moved for attorney fees under section 218.5. The trial court calculated plaintiff's statutory attorney fees as being the percentage of her recovery attributable

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[1] Further statutory references are to the Labor Code unless otherwise noted.

as wages reasoning that she initiated the action on a contract claim and thus her attorneys did not do work related to the Labor Code claim until later.

Defendant contends the trial court erred by finding a contract existed. Defendant additionally argues plaintiff should receive no attorney fees. Plaintiff asserts the trial court erred in its calculation of attorney fees.

We affirm the judgment. We reverse the trial court's order on attorney fees with instructions. The trial court did not properly apply the lodestar method when calculating the reasonable attorney fees attributable to the Labor Code claim. On remittitur issuance, the trial court should calculate plaintiff's reasonable attorney fees using the lodestar method as described in *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1131-1132.

II. BACKGROUND

A. *The Alleged Oral Contract*

Defendant, a subsidiary of Millennium Hotels and Resorts, manages 14 hotels, including the Biltmore in Los Angeles, California. Its corporate office and the Biltmore were on the same block in Los Angeles.

Plaintiff previously worked for the Hilton San Gabriel as the director of sales and marketing. She began working for defendant on September 30, 2010, as the Director of Central Procurement for the United States region. Her responsibilities included cost control and savings, for such things as furniture, fixtures, equipment, guest amenities, food, and beverage items. Plaintiff's immediate supervisor was Ryan Tai, defendant's

former vice president of asset management and operation support. Tai was the apparent supervisor to Swietlana Cahill, the general manager of the Biltmore, and Jamal Zoukari, the Biltmore's financial controller, and regularly acted on behalf of defendant's hotels.

In July 2011, Tai had a meeting involving Kwek Leng Beng, the chairman of defendant's parent company. At this meeting, he proposed the idea of bringing in more Chinese business to the hotels via plaintiff. Chairman Kwek requested that plaintiff assist in obtaining Chinese business. Tai subsequently met with plaintiff and requested that she help obtain sales. He told plaintiff that because sales was not part of her regular job, he would get her additional compensation.

About a month later, plaintiff informed Tai that she might be able to obtain a room sale with the China Southern Airlines crew. Sometime in September 2011, Tai and plaintiff discussed the current industry standard on commissions for room sales. Plaintiff indicated to Tai the standard was about 5 percent for groups with discounts.

China Southern Airlines through its agent Prosperity Holding Company sent a memorandum of understanding to the Biltmore. The airline agreed to a rate of $88 per room, per night, for 24 rooms, for one year. Cahill signed on behalf of the Biltmore on October 28, 2011.

After the memorandum of understanding between China Southern Airlines and the Biltmore was signed, Tai met with Cahill and Zoukari in early November 2011. According to Tai, they discussed plaintiff's commission for obtaining the China Southern Airlines' crew room agreement. Tai understood plaintiff's commission to be 5 percent for "everything she brings

in." He testified that plaintiff's additional sales work was beyond her normal job duties, but that her normal procurement duties were not diminished at all. Tai then went to plaintiff and told her that the Biltmore would pay her 5 percent for every room sale. Tai understood the oral contract to mean plaintiff was entitled to commissions on the China Southern Airlines deal for as long as the hotel would be benefitting from it. He did not discuss with her how long she would receive the commission. However, he understood the industry standard, citing defendant's New York hotel as an example, was a three-year term. Plaintiff continued working to get China Southern Airlines to sign a final contract and estimated 80 percent of the work on this project occurred after the memorandum of understanding was signed.

The Biltmore and China Southern Airlines eventually entered into their contract (the crew room agreement) on August 30, 2012, and it was to be in effect from October 1, 2012, until September 30, 2013. The crew room agreement was renewed at least two times, from October 1, 2013 to September 30, 2014 and from October 1, 2014 to September 30, 2015. Tai left his position with defendant on March 30, 2013.

On February 22, 2013, plaintiff sent her 2012 production report via e-mail to Zoukari requesting commission for room sales, including the crew room agreement. Zoukari asked plaintiff to split her report into crew and non-crew rooms. On April 22, 2013, plaintiff re-submitted a production report which included a request for China Southern Airlines crew commissions. Zoukari refused to pay her a commission for the crew room agreement. This prompted her to write a letter to the chairman on June 22, 2013, requesting her unpaid commission. At about this time defendant was moving its headquarters from

Los Angeles to Denver, Colorado. Plaintiff declined to move and resigned on June 28, 2013.

John Arnott, global senior vice president of human resources for defendant's parent company, responded to plaintiff's letter. Arnott asserted the Biltmore had a policy of not paying commission on crew room sales and claimed plaintiff was told this policy repeatedly. He also asserted commission is not paid on future sales to individuals who were no longer employed.

B. Plaintiff's Complaint

Plaintiff initiated her complaint against defendant on May 7, 2014. She alleged causes of action for declaratory relief, oral contract breach, and breach of the implied covenant of good faith and fair dealing (implied covenant breach). On July 29, 2014, plaintiff filed her first amended complaint alleging causes of action for oral contract breach, implied covenant breach, unjust enrichment, and for an accounting. A second amended complaint, the operative pleading, was filed on March 9, 2015. Plaintiff alleged two causes of action for oral contract breach and section 203 violation. She requested damages and any other relief as well as attorney fees on the Labor Code violation pursuant to section 218.5.

C. Trial and Judgment

Following a bench trial before Judge Richard Fruin on June 9, 2015, the court issued its judgment on July 1, 2015, and made the findings mentioned above. More specifically, it found Tai had actual authority to enter into the agreement on behalf of

the defendant. The court determined plaintiff was owed a 5 percent commission on all room sales, including the crew room agreement between China South Airlines and the Biltmore. It also decided defendant owed plaintiff a 5 percent commission for three years of the China Southern Airlines' business relationship with the Biltmore, from October 1, 2012 through September 30, 2015. The trial court found defendant did not willfully withhold plaintiff's wages under section 203. Nonetheless, it determined plaintiff accrued wages in the amount of $44,841.98. It calculated plaintiff's wages as being amounts due to her from October 1, 2012 through June 28, 2013, when she left her employment with defendant. And, as mentioned earlier, the court ruled the amounts owed to her after she had terminated her employment were contractual damages and calculated them to be $149,283.11.

D. Attorney Fees Motion

On August 19, 2015, plaintiff moved for $166,660 in attorney fees with a two multiplier under section 218.5. On September 16, 2015, the trial court held the fees hearing and adopted its tentative ruling. First, the trial court reduced the attorney fees to $145,000, based on its calculation of the reasonable hourly rate. The trial court then reduced that amount to 23 percent. It reasoned: "Plaintiff makes no adjustment for the fact that plaintiff's claim was primarily a contract claim (not entitling the prevailing party to legal fees), and only that portion of her recovery that was earned while plaintiff was employed could be categorized as a 'commission,' that is as a wage claim. Only 23% of plaintiff's total recovery of $194,125.09 was

recovered as a wage claim. Plaintiff, moreover, did not initially plead plaintiff's recovery as a wage claim, meaning that plaintiff initially intended to try this action as a contract claim for which there was no right to recover legal fees." The trial court applied a 1.25 multiplier to compensate plaintiff's counsel for proceeding on a contingency basis. The trial court calculated the final figure for plaintiff's attorney fees as follows: "$145,000 (reasonable hourly rate) x 23% (portion of recovery that were unpaid wages) x 1.25 (multiplier) = $41,687.50."

III. DISCUSSION

A. Defendant's Appeal

Defendant makes two main arguments concerning the oral contract. First, defendant asserts the trial court erred by finding the oral contract existed because plaintiff's written employment agreement precluded the existence of the oral contract; Tai had no actual or apparent authority to enter into the oral contract; and the parties did not mutually assent. Second, defendant argues the trial court erred by finding the oral contract's terms were for three years, including the time after plaintiff left employment with defendant. Alternatively, it argues plaintiff is not entitled to attorney fees. It contends she failed to comply with the requirements of section 218.5.

We interpret a written document de novo where the parties present no conflicting extrinsic evidence. (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865-866; accord, *Garcia v. Truck Ins. Exchange* (1984) 36 Cal.3d 426, 439.) We interpret a statute de novo. (*People ex rel. Lockyer v. Shamrock Foods Co.*

(2000) 24 Cal.4th 415, 432; *In re Clarissa H.* (2003) 105 Cal.App.4th 120, 125.) And we review a trial court's resolution of disputed facts for substantial evidence. (*Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 632; *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874.)

1. Existence of Oral Contract

a. plaintiff's written employment agreement

Defendant contends plaintiff's employment agreement precludes the oral contract at issue here. It cites language from the September 28, 2010 employment offer to plaintiff: "Please note that any oral statements on the part of supervisors, managers, or other employees of [defendant] concerning conditions of employment are superseded by the terms of this letter . . . ." Defendant asserts this language precludes the oral contract. This argument fails. Implicit in the present tense use of "are" is that the written employment agreement supersedes any oral statements in existence *at the time* plaintiff entered into employment. (See Civ. Code, § 1625 [written contract supersedes all prior or contemporaneous negotiations or stipulations]; Code Civ. Proc., § 1856, subd. (a) ["Terms set forth in a writing intended by the parties as a final expression of their agreement with respect to the terms included therein may not be contradicted by evidence of a prior agreement or of a contemporaneous oral agreement."].) However, the employment offer's language does not mention anything about *future* oral statements or agreements.

Defendant further argues that plaintiff's written employment agreement was not modified pursuant to Civil Code section 1698, subdivisions (a) to (c). However, defendant does not make an argument concerning whether the oral contract was an independent collateral contract. As noted in Civil Code section 1698, subdivision (d), "Nothing in this section precludes in an appropriate case the application of rules of law concerning . . . oral independent collateral contracts." (See *Lacy Mfg. Co. v. Gold Crown Mining Co.* (1942) 52 Cal.App.2d 568, 577-578 [independent collateral contract existed which did not alter or vary written contract].) Here, as noted, the oral contract provided that plaintiff would receive 5 percent commission for every room sale. This was not within the scope of plaintiff's written employment agreement and thus did not alter or contradict any part of it.

Defendant cites *Malmstrom v. Kaiser Aluminum & Chemical Corp.* (1986) 187 Cal.App.3d 299, 317 (*Malmstrom*) to argue a later oral promise does not modify a written agreement. In *Malmstrom*, the plaintiff had a written employment agreement with the defendant in 1977. (*Id.* at p. 309.) The written agreement provided in pertinent part: "'Employer employs and shall continue to employ Employee at such compensation and for such a length of time as shall be mutually agreeable to Employer and Employee.'" (*Ibid.*) The plaintiff later asserted that in 1981, he was orally assured that he would be employed at least until he was 65 years old, conditioned on satisfactory job performance. (*Ibid.*) The plaintiff argued, inter alia, the oral agreement was an independent collateral contract. (*Id.* at p. 317.) The Court of Appeal disagreed holding that the alleged oral agreement would contradict the terms of the 1977

written agreement, namely that the plaintiff was an at-will employee. (*Id*. at 318.)

Defendant also cites an opinion from the United States Court of Appeals for the Ninth Circuit, *Fanucchi & Limi Farms v. United Agri Products* (9th Cir. 2005) 414 F.3d 1075 (*Fanucchi*). In *Fanucchi*, the plaintiff and the defendant entered into a loan agreement formed under California law. (*Id.* at p. 1078.) The loan agreement provided, "'[T]he written loan agreement may not be contradicted by evidence of any prior, contemporaneous, or subsequent oral agreements or understandings of the parties.'" (*Ibid*.) The plaintiff argued a subsequent oral agreement modified the loan. (*Id.* at p. 1080.) The trial court disagreed, and the Ninth Circuit affirmed. (*Id.* at pp. 1080-1081.) The Ninth Circuit found that under Civil Code section 1698, subdivision (c), the written loan agreement could not be modified by a subsequent oral agreement. (*Fanucchi, supra*, at p. 1081.)

Defendant also relies on *Reiter v. Anderson* (1927) 87 Cal.App. 642 (*Reiter*). In *Reiter*, the defendant ordered and received sewing machines from a company but did not pay for them. (*Id.* at p. 643.) The written agreement provided in pertinent part: "'No other contract, either verbal or written, other than that which is written or printed herein will be recognized by the [company], and we hereby agree to all of the conditions as set forth in the above.'" (*Id.* at p. 644.) The defendant asserted that a later oral contract, in which the company purportedly agreed to accept returns of the sewing machines, superseded the written agreement. (*Id.* at p. 651.) The Court of Appeal disagreed. (*Id.* at p. 652.) The court noted the written contract contained express language that precluded any other contract from binding the company. (*Ibid*.)

Fanucchi, *Malmstrom*, and *Reiter* are not applicable in the case before us. The written contracts in *Fanucchi* and *Reiter* specifically precluded all other contracts other than the written one. Additionally, the oral contracts in *Malmstrom* and *Reiter* were not independent and collateral because they attempted to change material terms of the written agreement. Here, plaintiff's written employment agreement concerned her salary and her job duties as director of procurement. The subsequent oral contract involved a new job duty, sales, with a different form of compensation. Tai's testimony supports this conclusion as well. The oral contract was thus independent and collateral to her written employment agreement. As such, plaintiff's oral contract is within the exception enumerated in Civil Code section 1698, subdivision (d).

Even if the subsequent oral contract was not independent and collateral to the written employment agreement, the oral contract would be a modification under Civil Code section 1698, subdivision (c). As we explained, the written employment agreement did not preclude subsequent oral contracts. The subsequent oral contract is supported by new consideration, namely new compensation. Thus, under either theory, the oral contract is not precluded by the written employment agreement.

b. Tai's authority to enter oral contract

As noted, the trial court found Tai had actual authority to enter into the oral contract with plaintiff on behalf of defendant. Civil Code section 2316 provides, "Actual authority is such as a principal intentionally confers upon the agent, or intentionally, or by want of ordinary care, allows the agent to believe himself to

possess." (See also Corp. Code, § 208, subd. (b) ["Any contract or conveyance made in the name of a corporation which . . . is done within the scope of the authority, actual or apparent, conferred by the board or within the agency power of the officer executing it, except as the board's authority is limited by law other than this division, binds the corporation . . . ."].) The Court of Appeal has held: "Unless the evidence is undisputed, the scope of an agency relationship is a question of fact . . . ." (*Oswald Machine & Equipment, Inc. v. Yip* (1992) 10 Cal.App.4th 1238, 1247; *Magnecomp Corp. v. Athene Co.* (1989) 209 Cal.App.3d 526, 536.)

Substantial evidence supports the trial court's finding that Tai had actual authority to enter into the oral contract on defendant's behalf. Tai testified to the following: He was the vice president of operations over 14 hotels, including the Biltmore; acted as the personal representative of Chairman Kwek to the hotels and hired several people in the performance of his duties; reported only to the chairman and the chief executive officer of the company; was responsible for negotiating procurement contracts for the hotels; and was involved in the hotels' operations, renovations, and budgets.

c. mutual assent

Defendant also contends there was no mutual assent to enter into the oral contract between Tai and plaintiff. Namely, defendant asserts defendant and plaintiff had differing views as to their mutual obligations. This argument is unavailing. Mutual assent or consent is defined under Civil Code section 1565: "The consent of the parties to a contract must be: [¶] 1. Free; [¶] 2. Mutual; and, [¶] 3. Communicated by each to the

other." Mutual assent is a factual question. (*Vita Planning & Landscape Architecture, Inc. v. HKS Architects, Inc.* (2015) 240 Cal.App.4th 763, 772; *Alexander v. Codemasters Group Limited* (2002) 104 Cal.App.4th 129, 141, disapproved on another ground in *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 524.)

The evidence of mutual assent is quite clear. Tai asked plaintiff to undertake additional sales responsibilities in exchange for additional compensation. He asked plaintiff about the general commission for obtaining room sales. She informed him it was 5 percent on crew room sales. A memorandum of understanding between the Biltmore and China Southern Airlines was later signed. Tai informed plaintiff that she would receive a 5 percent commission for obtaining the crew room agreement. Plaintiff was subsequently able to secure a crew room agreement between the Biltmore and China Southern Airlines' crews. The evidence supports a finding that Tai and plaintiff mutually assented to the terms of the oral contract.

d. oral contract's three-year duration

Defendant also contests the trial court's finding that the crew room agreement extended the oral contract for three years. It argues that the agreement to pay a commission should have ended upon plaintiff leaving defendant's employ. But there is substantial evidence to support the trial court's finding on this issue. Tai testified that based on his understanding of the crew room agreements, the standard duration was three years. He also confirmed that the duration of the agreement he made with plaintiff was to be for the duration of the China Southern Airlines business relationship with the Biltmore. The terms of the oral

contract set a "5% commission on all room sales." Plaintiff testified that Tai promised her a commission on China Southern Airlines crew sales as long as the hotel benefited from the revenue. There was no requirement in the oral contract that plaintiff had to be a current employee to receive the commission. Thus, the trial court did not err by finding plaintiff was owed commission for three years.

2. Attorney Fees

Defendant argues the trial court should not have awarded attorney fees. We note defendant filed its sole notice of appeal from the judgment prior to the trial court's postjudgment order determining the fee award amount. The normal procedure for challenging the judgment and a postjudgment order is to file separate appeals from both. (*Pfeifer v. John Crane, Inc.* (2013) 220 Cal.App.4th 1270, 1316; *Torres v. City of San Diego* (2007) 154 Cal.App.4th 214, 222.) However, the judgment here awarded plaintiff attorney fees under section 218.5. Thus, the issue of entitlement to attorney fees is properly before this court on appeal. (*Pfeifer v. John Crane, Inc., supra*, 220 Cal.App.4th at pp. 1316-1317; *Grant v. List & Lathrop* (1992) 2 Cal.App.4th 993, 998.)

Defendant cites the language in section 218.5 which purportedly limits recovery of attorney fees to parties only "upon the initiation of the action." Defendant asserts plaintiff did not have a viable attorney fees request when she filed her initial complaint. It cites the trial court's order granting its motion to strike plaintiff's request for attorney fees from the initial

complaint.[2] Defendant contends that because plaintiff did not assert an action for nonpayment of wages until the second amended complaint, she is not entitled to attorney fees under section 218.5

The relevant statutory language under section 218.5, subdivision (a) provides, "In any action brought for the nonpayment of wages . . . the court shall award reasonable attorney's fees and costs to the prevailing party if any party to the action requests attorney's fees and costs upon the initiation of the action." We find plaintiff's action was brought for the nonpayment of wages. Upon initiating the action with her original complaint, plaintiff sought damages for defendant's breach of their oral contract. The trial court determined plaintiff's damages for contract breach were in part wages as defined under the Labor Code. As we will discuss below, all of plaintiff's damages were wages under the Labor Code. Thus, plaintiff's action for contract breach was for recovery of unpaid wages. Plaintiff does not have to plead a Labor Code claim in the original complaint in order to qualify for attorney fees under section 218.5 and the case of *Plancich v. United Postal Service, Inc.* (2011) 198 Cal.App.4th 308 (*Plancich*), cited by defendant, does not hold otherwise.[3]

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[2] That order reads, "Plaintiff's request for attorney's fees is unsupported by reference to any contractual provision or statutory authority, and *Brandt* fees are not available under the facts alleged herein."

[3] In *Plancich*, the issue was whether costs could be awarded to an employer who prevailed in a claim for overtime pay pursuant to section 510 in light of the fact that section 1194 gives a prevailing *employee* the right to recover costs in such an action

The order granting defendant's motion to strike is also immaterial. Plaintiff requested as relief attorney fees in her initial complaint. The viability of plaintiff's attorney fees request is not a requirement under section 218.5. Accordingly, as the trial court found, plaintiff may recover attorney fees under section 218.5.

B. Plaintiff's Appeal

Plaintiff asserts the trial court erred in its calculation of plaintiff's attorney fees. We review a trial court's order awarding attorney fees for an abuse of discretion. (*Nemecek & Cole v. Horn* (2012) 208 Cal.App.4th 641, 651; *Cruz v. Ayromloo* (2007) 155 Cal.App.4th 1270, 1274.) This court reviews a determination of the legal basis for an attorney fees award de novo. (*Toro Enterprises, Inc. v. Pavement Recycling Systems, Inc.* (2012) 205 Cal.App.4th 954, 957; *Sessions Payroll Management, Inc. v. Noble Construction Co.* (2000) 84 Cal.App.4th 671, 677.)

Plaintiff argues the trial court erred in calculating her reasonable attorney fees as a percentage of the recovery considered "wages" under the Labor Code. Section 200, which defines wages, provides: "As used in this article: (a) 'Wages' includes all amounts for labor performed by employees of every

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but says nothing about awarding costs to a prevailing *employer*. The Court of Appeal held that even if the plaintiff was correct on this point, UPS would still be awarded costs because by requesting costs in its answer to the complaint it "requested costs be awarded at the initiation of the action." (*Plancich, supra*, 198 Cal.App.4th at p. 314.) This case did not hold that a costs or attorney's fees request had to be made concurrently with the filing of a claim of action under the Labor Code.

description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation. [¶] (b) 'Labor' includes labor, work, or service whether rendered or performed under contract, subcontract, partnership, station plan, or other agreement if the labor to be paid for is performed personally by the person demanding payment."

The trial court had two bases for how it calculated the attorney fees: the percentage of recovery attributable to "wages" under the Labor Code; and plaintiff initially bringing this action under a contract theory. As noted, it determined approximately 23 percent of plaintiff's recovery consisted of wages under the Labor Code. The wages were calculated as money due during the time period when she was employed by defendant. The court then categorized the commission accruing after plaintiff had left defendant's employment as contractual damages.

We disagree with the trial court's ruling that plaintiff's wages under the Labor Code accrued only during the time period when she was employed by defendant. Our Supreme Court held: "In the . . . context of commissions on sales, it has long been the rule that termination (whether voluntary or involuntary) does not necessarily impede an employee's right to receive a commission where no other action is required on the part of the employee to complete the sale leading to the commission payment. [Citation.] This concept has been colorfully described as ""He who shakes the tree is the one to gather the fruit."" [Citations.]" (*Schachter v. Citigroup, Inc.* (2009) 47 Cal.4th 610, 622; see *Koehl v. Verio, Inc.* (2006) 142 Cal.App.4th 1313, 1330 [commission as wages depends on contractual terms].) Here, the oral contract between plaintiff and defendant set a 5 percent

commission on all room sales. Plaintiff earned the commission when China Southern Airlines entered into the crew room agreement with the Biltmore. The parties do not dispute defendant employed plaintiff when the crew room agreement was signed. Under the oral contract, there was nothing else for plaintiff to do "to complete the sale leading to the commission payment." Thus, plaintiff's entire commission from the crew room agreement constituted "wages" under the Labor Code.

The second basis used by the trial court to determine the fees was the timing of when plaintiff alleged her Labor Code claim. As set forth above, plaintiff brought this action initially on a contract theory and did not allege a Labor Code cause of action until her second amended complaint. The trial court used the percentage of recovery it deemed wages as the basis for determining plaintiff's reasonable attorney fees. The trial court erred in its determination of commission as wages and commission as damages to determine what portion of the billed attorney fees went towards the Labor Code claim. As we have found, the entirety of plaintiff's commission fell under the definition of wages under the Labor Code. Additionally, calculating reasonable attorney fees based on the percentage of recovery is not appropriate under the lodestar method.

To calculate attorney fees under this method, our Supreme Court has explained: "[A] court assessing attorney fees begins with a touchstone or lodestar figure, based on the 'careful compilation of the time spent and reasonable hourly compensation of each attorney . . . involved in the presentation of the case.' (*Serrano* [*v. Priest* (1977)] 20 Cal.3d [25,] 48.) We expressly approved the use of prevailing hourly rates as a basis for the lodestar, noting that anchoring the calculation of attorney

fees to the lodestar method "'is the only way of approaching the problem that can claim objectivity, a claim which is obviously vital to the prestige of the bar and the courts.'" (*Id.* at p. 48, fn. 23.) In referring to '*reasonable*' compensation, we indicated that trial courts must carefully review attorney documentation of hours expended; 'padding' in the form of inefficient or duplicative efforts is not subject to compensation. (See *id.* at p. 48.) [¶] Under *Serrano* [*v. Priest*], the lodestar is the basic fee for comparable legal services in the community; it may be adjusted by the court based on factors including, as relevant herein, (1) the novelty and difficulty of the questions involved, (2) the skill displayed in presenting them, (3) the extent to which the nature of the litigation precluded other employment by the attorneys, (4) the contingent nature of the fee award. (*Serrano* [*v. Priest*], *supra*, 20 Cal.3d at p. 49.) The purpose of such adjustment is to fix a fee at the fair market value for the particular action. In effect, the court determines, retrospectively, whether the litigation involved a contingent risk or required extraordinary legal skill justifying augmentation of the unadorned lodestar in order to approximate the fair market rate for such services. The "'experienced trial judge is the best judge of the value of professional services rendered in his court, and while his judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong.'" (*Ibid.*)" (*Ketchum v. Moses*, *supra*, 24 Cal.4th at pp. 1131-1132; accord, *Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 579.) The lodestar adjustment method applies to a statutory fee award unless the statutory authorization provides for another method. (*Ketchum v. Moses*, *supra*, 24 Cal.4th at p. 1135; *Meister*

v. Regents of University of California (1998) 67 Cal.App.4th 437, 448-449.)

The trial court did not correctly apply this method when calculating plaintiff's reasonable attorney fees. While it made a determination regarding the reasonableness of the requested hourly rate, the record does not show that it considered the actual time spent by plaintiff's attorney on the Labor Code claim. Rather, it reduced the lodestar value to 23 percent because of its view that only the amount "earned while plaintiff was employed could be characterized as a 'commission,' that is as a wage claim." We will reverse for the trial court to make proper findings in applying the lodestar method.

Plaintiff additionally argues the contract and Labor Code cause of actions were so intertwined that a trial court could not apportion between them. Our Supreme Court held: "Attorney's fees need not be apportioned when incurred for representation on an issue common to both a cause of action in which fees are proper and one in which they are not allowed." (*Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 129-130 [fee award under Civil Code section 1717]; see *Atkins v. Enterprise Rent-A-Car Co.* (2000) 79 Cal.App.4th 1127, 1133 ["When the liability issues are so interrelated that it would have been impossible to separate them into claims for which attorney fees are properly awarded and claims for which they are not, then allocation is not required."].) We leave it to the trial court to decide in the first instance what apportionment, if any, should occur.

DISPOSITION

The judgment is affirmed. The order pertaining to attorney fees is reversed. Upon remittitur issuance, the trial court is to apply the lodestar method as stated in *Ketchum v. Moses*, *supra*, 24 Cal.4th at pages 1131-1132. Plaintiff Jackie Chen may recover her appeal costs from defendant M&C Hotel Interests, Inc.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LANDIN, J.*

We concur:

KRIEGLER, Acting P.J.

BAKER, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief pursuant to article VI, section 6 of the California Constitution.