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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MICHAEL MCPHAIL; ROBERT BARR
KIMNACH III; SCOTT and KRYSTIN
WAGNER; CANDACE and NEIL HURLEY;
On Behalf of Themselves and All Others
Similarly Situated,

Plaintiffs,

v.

FIRST COMMAND FINANCIAL
PLANNING, INC., a Texas Corporation;
FIRST COMMAND FINANCIAL
SERVICES, INC., a Texas Corporation;
LAMAR C. SMITH; and HOWARD M.
CRUMP,

Defendants.

Case No. 05 CV 179 IEG (JMA)

FINAL ORDER AND JUDGMENT

Judge: Hon. Irma E. Gonzalez

1 WHEREAS, a class action is pending before this Court entitled: *McPhail v. First*
2 *Command Financial Planning, Inc.*, Case No.: 3: 05-CV-0179 IEG (JMA) (the “Action”);

3 WHEREAS, the Court previously certified the Class (as defined herein) in this Action by
4 order dated September 19, 2007;

5 WHEREAS, pursuant to Federal Rule of Civil Procedure 23(e), this matter came before
6 the Court for hearing pursuant to the Order for Notice and Hearing dated November 10, 2008 (the
7 “Preliminary Order”), on the application of the Parties for approval of a proposed settlement of
8 the Action (the “Settlement”), which is set forth in the Stipulation and Agreement of Settlement
9 dated October 16, 2008 and was entered into by Class Representatives, on behalf of themselves
10 and the Class, and Defendants (the “Stipulation”);

11 WHEREAS, due and adequate notice has been given to the Class as required in the
12 Preliminary Order; and

13 WHEREAS, the Court has considered all papers filed and proceedings had herein and
14 otherwise is fully informed in the premises and good cause appearing;

15 IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

16 1. This Order and Final Judgment (the “Judgment”) incorporates by reference the
17 definitions in the Stipulation, and all terms used herein shall have the same meanings as set forth
18 in the Stipulation unless otherwise defined herein.

19 2. This Court has jurisdiction over the subject matter of the Action, and over all
20 parties to the Action (the “Parties”), including all members of the Class.

21 3. The Notice of Proposed Settlement and Motion for Attorneys’ Fees & Fairness
22 Hearing (the “Settlement Notice”) has been given to the Class, pursuant to and in the manner
23 directed by the Preliminary Order. Class Counsel has filed proof of the mailing of the Settlement
24 Notice and proof of publication of the Summary Notice with the Court. A full opportunity to be
25 heard has been offered to all Parties, the Class, and persons and entities in interest. The form and
26 manner of the Settlement Notice and the Summary Notice are hereby determined to have: (a)
27 constituted the best practicable notice, (b) constituted notice that was reasonably calculated, under
28 the circumstances, to apprise Class Members of the pendency of the Action, of the effect of the

1 Stipulation, including releases, of their right to object to the proposed Settlement, of their right to
2 exclude themselves from the Class, and of their right to appear at the Fairness Hearing, (c)
3 constituted reasonable, due, adequate, and sufficient notice to all persons or entities entitled to
4 receive notice, and (d) met all applicable requirements of the Federal Rules of Civil Procedure,
5 the United States Constitution (including the Due Process Clause), 15 U.S.C. § 78u-4(a)(7), the
6 Rules of the Court, and any other applicable law. It is further determined that all members of the
7 Class are bound by the Judgment herein.

8 4. The Settlement, and all transactions preparatory or incident thereto, is found to be
9 fair, reasonable, adequate, and in the best interests of the Class, and is hereby approved. The
10 Parties are hereby authorized and directed to comply with and to consummate the Settlement in
11 accordance with the Stipulation, and the Clerk of this Court is directed to enter and docket this
12 Judgment in the Action.

13 5. The Action and all claims included therein, as well as all of the Settled Claims
14 (defined in the Stipulation and in Paragraph 6(c) below) are dismissed with prejudice as to Class
15 Representatives and all other members of the Class, and as against each and all of the Released
16 Parties (defined in the Stipulation and in Paragraph 6(b) below). The Parties are to bear their own
17 costs, except as otherwise provided in the Stipulation.

18 6. As used in this Judgment, the terms “Released Parties,” “Related Parties,” “Settled
19 Claims,” “Settled Defendants’ Claims,” and “Unknown Claims” shall have the meanings set forth
20 below:

21 (a) “Related Parties” means each Defendant’s past or present directors,
22 officers, employees, registered representatives, agents, partners, principals, members, insurers,
23 co-insurers, re-insurers, controlling shareholders, attorneys, advisors, accountants, auditors,
24 personal or legal representatives, predecessors, successors, parents, subsidiaries, divisions, joint
25 ventures, assigns, spouses, heirs, related or affiliated entities, any entity in which a Defendant has
26 a controlling interest, any member of any Individual Defendant’s immediate family, or any trust
27 of which any Individual Defendant is the settlor or which is for the benefit of any member of an
28 Individual Defendant’s immediate family.

1 (b) "Released Parties" means Defendants and the Related Parties.

2 (c) "Settled Claims" means and includes any and all claims, debts, demands,
3 controversies, obligations, losses, rights or causes of action or liabilities of any kind or nature
4 whatsoever (including, but not limited to, any claims for damages (whether compensatory,
5 special, incidental, consequential, punitive, exemplary or otherwise), injunctive relief, declaratory
6 relief, rescission or rescissionary damages, interest, attorneys' fees, expert or consulting fees,
7 costs, expenses, or any other form of legal or equitable relief whatsoever), whether based on
8 federal, state, local, statutory or common law or any other law, rule or regulation, whether fixed
9 or contingent, accrued or un-accrued, liquidated or unliquidated, at law or in equity, matured or
10 unmatured, whether class or individual in nature, including both known claims and Unknown
11 Claims (defined herein) that: (i) have been asserted in this Action by Class Representatives on
12 behalf of the Class and its Class Members against any of the Released Parties, or (ii) have been or
13 could have been asserted in any forum by Class Representatives, Class Members, or any of them
14 against any of the Released Parties, which arise out of, relate to, or are based upon the allegations,
15 transactions, facts, matters, occurrences, representations, or omissions involved, set forth, or
16 referred to in the Complaint as limited and/or clarified by the Court's July 30, 2007 Order
17 granting class certification, including any claim, cause of action and/or demand that was or could
18 have been asserted therein. Class Representatives and Class Counsel did not allege, in the
19 Action, any claim, cause of action, or demand against Defendants related to or arising out of the
20 sale of insurance products by or on behalf of Defendants. As a result of the foregoing, no tolling
21 of the statute of limitations concerning any claim, cause of action, or demand related to or arising
22 out of the sale of insurance products by or on behalf of Defendants shall be deemed to have
23 occurred as a result of the filing of the Action. Settled Claims shall also include any claims,
24 debts, demands, controversies, obligations, losses, rights, or causes of action that Class
25 Representatives, Class Members, or any of them may have against the Released Parties or any of
26 them which involve or relate in any way to the defense of the Action or the Settlement of the
27 Action. Notwithstanding the foregoing, or any other provision contained in this Stipulation,
28 Settled Claims shall not include any claims to enforce the Settlement, including without

1 limitation, any claims to enforce the terms of this Stipulation, of orders, or of judgments issued by
2 the Court in connection with the Settlement.

3 (d) "Settled Defendants' Claims" means and includes any and all claims,
4 debts, demands, controversies, obligations, losses, costs, rights or causes of action or liabilities of
5 any kind or nature whatsoever (including, but not limited to, any claims for damages (whether
6 compensatory, special, incidental, consequential, punitive, exemplary or otherwise), injunctive
7 relief, declaratory relief, rescission or rescissionary damages, interest, attorneys' fees, expert or
8 consulting fees, costs, expenses, or any other form of legal or equitable relief whatsoever),
9 whether based on federal, state, local, statutory or common law or any other law, rule or
10 regulation, whether fixed or contingent, accrued or unaccrued, liquidated or unliquidated, at law
11 or in equity, matured or unmatured, including both known claims and Unknown Claims, that have
12 been or could have been asserted in the Action or any forum by the Released Parties against any
13 of the Class Representatives, Class Counsel, Class Members or their attorneys, which arise out of
14 or relate in any way to the institution, prosecution, or settlement of the Action. Notwithstanding
15 the foregoing, or any other provision contained in this Stipulation, Settled Defendants' Claims
16 shall not include any claims to enforce the Settlement, including, without limitation, any of the
17 terms of this Stipulation or orders or judgments issued by the Court in connection with the
18 Settlement.

19 (e) "Unknown Claims" means any and all claims that any Class Representative
20 or Class Member does not know or suspect to exist and any and all claims that First Command or
21 any Individual Defendant does not know or suspect to exist in his, her, or its favor at the time of
22 the release of the Released Parties which, if known by him, her or it, might have affected his, her
23 or its settlement with and release of, as applicable, the Released Parties, Class Representatives,
24 and Class Members, or might have affected his, her or its decision to object or not to object to this
25 Settlement. The Class Representatives, Class Members, First Command, and the Individual
26 Defendants and each of them may hereafter discover facts in addition to or different from those
27 which he, she or it now knows or believes to be true with respect to the subject matter of the
28 Settled Claims and/or the Settled Defendants' Claims. Nevertheless, with respect to any and all

1 Settled Claims and Settled Defendants' Claims, the Parties stipulate and agree that, upon the
2 Effective Date, the Parties shall expressly waive and each of the Class Members shall be deemed
3 to have, and by operation of the Judgment shall have, waived all provisions, rights and benefits of
4 California Civil Code § 1542 and all provisions, rights and benefits conferred by any law of any
5 state or territory of the United States, or principle of common law, which is similar, comparable
6 or equivalent to California Civil Code § 1542. California Civil Code § 1542 provides:

7 **A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE**
8 **CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER**
9 **FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF**
10 **KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS**
11 **OR HER SETTLEMENT WITH THE DEBTOR.**

12 The Parties expressly acknowledge, and the Class Members shall be deemed to have, and by
13 operation of the Judgment shall have, acknowledged that the waiver and release of Unknown
14 Claims constituting Settled Claims and/or Settled Defendants' Claims was separately bargained
15 for and a material element of the Settlement.

16 7. Upon the Effective Date, Class Representatives and all Class Members on behalf
17 of themselves, their personal representatives, heirs, executors, administrators, trustees, successors,
18 and assigns: (a) shall have fully, finally and forever released, relinquished and discharged each
19 and every one of the Settled Claims against the Released Parties, whether or not any such Class
20 Member or Class Representative executes or delivers a Proof of Claim form ("Proof of Claim");
21 and (b) shall be deemed to have covenanted not to sue on, and shall forever be barred from suing
22 on, instituting, prosecuting, continuing, maintaining or asserting in any forum, either directly or
23 indirectly, on their own behalf or on behalf of any class or other person, any Settled Claim against
24 any of the Released Parties.

25 8. Upon the Effective Date, each of the Defendants, on behalf of themselves and
26 their Related Parties: (a) shall have fully, finally and forever released, relinquished and
27 discharged each and every one of the Settled Defendants' Claims; and (b) shall be deemed to
28 have covenanted not to sue on, and shall forever be barred from suing on, instituting, prosecuting,
continuing, maintaining or asserting in any forum, either directly or indirectly, on their own

1 behalf or on behalf of any class or other person, any Settled Defendants' Claim against Class
2 Representatives, Class Members and their respective counsel, or any of them.

3 9. Notwithstanding ¶¶ 7-8 herein, nothing in this Judgment shall bar any action or
4 claim by any of the Parties or the Released Parties to enforce or effectuate the terms of the
5 Stipulation or this Judgment.

6 10. This Judgment and the Stipulation, including any provisions contained in the
7 Stipulation, any negotiations, statements, or proceedings in connection therewith, or any action
8 undertaken pursuant thereto:

9 (a) shall not be offered or received against any Released Party as evidence of
10 or construed as or deemed to be evidence of any presumption, concession, or admission by the
11 Released Party with respect to the truth of any fact alleged by any of the plaintiffs or the validity
12 of any claim that has been or could have been asserted in the Action or in any litigation, or the
13 deficiency of any defense that has been or could have been asserted in the Action or in any
14 litigation, or of any liability, negligence, fault, or wrongdoing of any Released Party;

15 (b) shall not be offered or received against any Released Party as evidence of a
16 presumption, concession, or admission of any fault, misrepresentation, or omission with respect
17 to any statement or written document approved or made by any Released Party;

18 (c) shall not be offered or received against any Released Party as evidence of a
19 presumption, concession, or admission with respect to any liability, negligence, fault, or
20 wrongdoing in any civil, criminal, or administrative action or proceeding, other than such
21 proceedings as may be necessary to effectuate the provisions of the Stipulation; provided,
22 however, that the Released Parties may refer to the Stipulation to effectuate the releases and other
23 liability protection granted them hereunder and may file the Stipulation and/or this Judgment in
24 any action that may be brought against them in order to support a defense or counterclaim based
25 on principles of res judicata, collateral estoppel, full faith and credit, release, good faith
26 settlement, judgment bar, or reduction, or any other theory of claim preclusion or issue preclusion
27 or similar defense or counterclaim;

28

1 (d) shall not be construed against any Released Party as an admission or
2 concession that the consideration to be given hereunder represents the amount that could be or
3 would have been recovered after trial; and

4 (e) shall not be construed as or received in evidence as an admission,
5 concession, or presumption against the Class Representatives or any of the Class Members that
6 any of their claims are without merit, or that any defenses asserted by Defendants have any merit,
7 or that damages recoverable under the Action would not have exceeded the Settlement Amount.

8 11. The Plan of Allocation is approved as fair and reasonable, and Class Counsel and
9 the Claims Administrator are directed to administer the Settlement in accordance with the terms
10 and provisions of the Stipulation.

11 12. The Court finds that all Parties and their counsel have complied with each
12 requirement of the Private Securities Litigation Reform Act ("PSLRA") and Rules 11 and 37 of
13 the Federal Rules of Civil Procedure as to all proceedings herein, and that Class Representatives
14 had a good faith basis to bring, maintain, and prosecute this Action in accordance with the
15 PSLRA and Federal Rule of Civil Procedure 11.

16 13. Only those Class Members who submit valid and timely Proofs of Claim shall be
17 entitled to receive a distribution from the Net Settlement Fund. The Proof of Claim to be
18 executed by each Class Member shall further release all Settled Claims against the Released
19 Parties. All Class Members shall be bound by all of the terms of the Stipulation and this
20 Judgment, including the releases set forth herein, whether or not they submit a valid and timely
21 Proof of Claim, and shall be barred from bringing any action against any of the Released Parties
22 concerning the Settled Claims.

23 14. No Class Member shall have any claim against Class Counsel, the Claims
24 Administrator, or other agent designated by Class Counsel based on the distributions made
25 substantially in accordance with the Settlement and Plan of Allocation as approved by the Court
26 and further orders of the Court.

27 15. No Class Member shall have any claim against the Defendants, Defendants'
28 counsel, or any of the Released Parties with respect to: (a) any act, omission, or determination of

1 Class Counsel, the Escrow Agent, or the Claims Administrator, or any of their respective
2 designees or agents, in connection with the administration of the Settlement or otherwise; (b) the
3 management, investment or distribution of the Gross Settlement Fund and/or the Net Settlement
4 Fund; (c) the Plan of Allocation; (d) the determination, administration, calculation, or payment of
5 claims asserted against the Gross Settlement Fund and/or the Net Settlement Fund; (e) the
6 administration of the Escrow Account; (f) any losses suffered by, or fluctuations in the value of,
7 the Gross Settlement Fund and/or the Net Settlement Fund; or (g) the payment or withholding of
8 any Taxes, expenses and/or costs incurred in connection with the taxation of the Gross Settlement
9 Fund and/or the Net Settlement Fund or the filing of any tax returns.

10 16. Any person who opts out of the Settlement by submitting, pursuant to the
11 Settlement Notice, a timely request for exclusion shall be entitled to timely file an individual
12 lawsuit, but shall be barred from filing a subsequent class action lawsuit concerning the Settled
13 Claims against any of the Released Parties (“Anti-Stacking Order”).

14 17. Any order approving or modifying the Plan of Allocation set forth in the
15 Settlement Notice, or the application by Class Counsel for an award of attorneys’ fees and
16 reimbursement of expenses, or any request of Class Representatives for reimbursement of
17 reasonable costs and expenses, shall not disturb or affect the finality of this Judgment, the
18 Stipulation, or the Settlement contained therein.

19 18. Class Counsel are hereby awarded attorneys’ fees, costs, and expenses in the
20 amount of 30% of the first \$10 million of the Gross Settlement Fund and 25% of the remaining
21 \$2 million of the fund plus accrued interest, the sum of which the Court finds to be fair and
22 reasonable. The foregoing award of fees, costs, and expenses shall be paid to Class Counsel from
23 the Gross Settlement Fund, and such payment shall be made at the time and in the manner
24 provided in the Stipulation, with interest from the date the Gross Settlement Fund was funded to
25 the date of payment, at the same net rate that interest is earned by the Gross Settlement Fund.
26 The appointment and distribution among Class Counsel of any award of attorneys’ fees shall be
27 within Class Counsel’s sole discretion.
28

1 19. In making this award of attorneys' fees and reimbursement of expenses to be paid
2 from the Gross Settlement Fund, the Court has considered and found that:

3 (a) The Settlement has created a fund of \$12 million in cash that is already on
4 deposit, plus interest thereon, and that numerous Class Members who submit acceptable Proofs of
5 Claim will benefit from the Settlement;

6 (b) Over 207,412 copies of the Settlement Notice were disseminated to Class
7 Members stating that Class Counsel were moving for attorneys' fees, costs, and expenses equal to
8 30% of the first \$10 million and 25% of the next \$2 million of the Settlement Fund, plus interest
9 thereon, and five (5) objections were filed against the terms of the proposed Settlement or the
10 ceiling on the fees and expenses contained in the Settlement Notice;

11 (c) Class Counsel have conducted the litigation and achieved the Settlement
12 with skill, perseverance, and diligent advocacy;

13 (d) The Action involves complex factual and legal issues and was actively
14 prosecuted for nearly four years and, in the absence of a settlement, would involve further lengthy
15 proceedings with uncertain resolution of the complex factual and legal issues;

16 (e) Had Class Counsel not achieved the Settlement there would remain a
17 significant risk that the Class Representatives and the Class may have recovered less than the
18 Settlement Amount or nothing at all from the Defendants;

19 (f) Class Counsel have advanced \$815,850.17 in costs and expenses to fund
20 the litigation of this Action; and

21 (g) The amount of attorneys' fees awarded and expenses reimbursed from the
22 Gross Settlement Fund are fair and reasonable and consistent with awards in similar cases.

23 20. Class Representatives are hereby awarded as follows: (1) Michael McPhail -
24 \$10,422.30; (2) Robert Kimnach - \$9,380.96; (3) Candace Hurley - \$3,867.72; (4) Neil Hurley -
25 \$923.20; (5) Scott Wagner - \$3,149.96; and (6) Krystin Wagner - \$2,073.00, as reimbursement
26 for their reasonable costs and expenses directly related to their representation of the Class as
27 allowed by 15 U.S.C. §78u-4(a)(4), plus interest earned on such amount at the same rate earned
28 by the Gross Settlement Fund.

1 21. Without affecting the finality of this Judgment in any way, the Court reserves
2 exclusive and continuing jurisdiction over the Action, the Class Representatives, the Class, and
3 the Released Parties for the purposes of: (a) supervising the implementation, enforcement,
4 construction, and interpretation of the Stipulation, the Plan of Allocation, and this Judgment; (b)
5 hearing and determining any application by Class Counsel for an award of attorneys' fees, costs,
6 and expenses and/or reimbursement to the Class Representatives, if such determinations are not
7 made at the final hearing; and (c) supervising the distribution of the Gross Settlement Fund and/or
8 the Net Settlement Fund.

9 22. In the event, for any reason whatsoever, that the Settlement is terminated or does
10 not become Final in accordance with the terms of the Stipulation, or in the event that the Gross
11 Settlement Fund, or any portion thereof, is returned to First Command, then this Judgment shall
12 be rendered null and void, shall be vacated to the extent provided by and in accordance with the
13 Stipulation, and, in such event, all orders entered and releases delivered in connection herewith
14 shall be null and void to the extent provided by and in accordance with the Stipulation.

15 23. In the event that, prior to the Effective Date, one or more of the Parties institutes
16 any legal action against any other Party to enforce any provision of the Stipulation or this
17 Judgment or to declare rights or obligations thereunder, the successful Party or Parties shall be
18 entitled to recover from the unsuccessful Party or Parties reasonable attorneys' fees and costs
19 incurred in connection with any such action.

20 24. There is no reason for delay in the entry of this Judgment and immediate entry by
21 the Clerk of the Court is expressly directed pursuant to Rule 54(b) of the Federal Rules of Civil
22 Procedure.

23 **IT IS SO ORDERED.**

24
25 Dated: March 30, 2009


Hon. Irma E. Gonzalez

United States District Court Judge