

1
2
3
4
5
6
7 **UNITED STATES DISTRICT COURT**
8 **SOUTHERN DISTRICT OF CALIFORNIA**
9

10 MICHAEL MCPHAIL; ROBERT BARR
11 KIMNACH III; SCOTT and KRYSTIN
12 WAGNER; CANDACE and NEIL
13 HURLEY; On Behalf of Themselves and
14 All Others Similarly Situated

15 Plaintiffs

16 v.

17 FIRST COMMAND FINANCIAL
18 PLANNING, INC., a Texas Corporation,
19 FIRST COMMAND FINANCIAL
20 SERVICES, INC., a Texas Corporation,
21 LAMAR C. SMITH and HOWARD M.
22 CRUMP

23 Defendants.

CASE NO. 05 CV 0179 (IEG)

**ORDER AWARDING ATTORNEYS'
FEES AND LITIGATION EXPENSES TO
CLASS COUNSEL**

24 This matter having come before this Court for hearing, pursuant to the order of the Court
25 dated November 10, 2008, on the application of Plaintiffs for consideration of approval of the
26 settlement and for consideration of the award of attorneys fees, costs and litigation expenses.
27 Due and adequate notice having been given to the Class as required in said order, and the Court
28 having considered all papers filed and proceedings had herein and otherwise being fully
informed of the premises and good cause appearing therefor, it is

HEREBY ORDERED THAT:

1. The Court determines that an award of attorneys' fees and costs to Class Counsel

1 under the common fund doctrine in the collective amount of \$3,500,000, representing 30% of the
2 first \$10 million in settlement value and 25% of the additional \$2 million in settlement value, is
3 fair, reasonable and appropriate. Counsel for the Class performed work which benefitted the
4 Class and expended substantial time and effort in litigating this matter. After deduction of the
5 litigation expenses, the attorneys' fees requested awarded equates to 22.37% of the total
6 Settlement value. Broken down, the requested litigation expenses are \$815,850.17, and the
7 requested attorneys' fees are \$2,684,149.83. Class Counsel expended over 11,500 hours
8 prosecuting this action for a total lodestar of more that \$4,800,000, which confirms the
9 reasonableness of the requested award because Class Counsel's requested fee award is less than
10 the total lodestar. An award of attorney's fees in this amount compares favorably to the
11 accepted benchmark of attorney's fees awards in common fund cases such as this one.

12 2. The substantial recovery obtained and the results achieved, along with the risks of
13 the
14 litigation, the skill required, quality of the work, the contingent nature of the fee, the financial
15 burden carried by Class Counsel, and awards made in similar cases, all justify the requested
16 attorneys' fee and cost award. The work of class counsel on behalf of the Class resulted in the
17 creation of a common fund with a total settlement value of \$12,000,000.00.

18 3. Class counsel prosecuted this case on a contingent basis. The Court finds that
19 there is a substantial difference between the risk assumed by attorneys being paid by the hour
20 and attorneys working on a contingent fee basis. The attorney being paid by the hour can go to
21 the bank with his fee. The attorney working on a contingent basis can only log hours while
22 working without pay towards a result that will hopefully entitle him to a market place contingent
23 fee taking into account the risk of the undertaking. Otherwise, the contingent fee attorney
24 receives nothing. Class Counsel subjected themselves to this contingent fee market risk in this
25 all or nothing contingent fee case wherein the necessity and financial burden of private
26 enforcement makes the requested award of one-third of the settlement value to the Class
27 appropriate.

28 4. At the time this case was brought, the result was far from certain. The Defendants'

1
2 practice at issue here had been in place for decades and Defendants' numerous defenses to the
3 case created difficulties with proof and novel legal issues for class counsel to overcome. The
4 very substantial risks of this litigation could have resulted in the Class receiving nothing if the
5 claims were litigated.

6 5. In prosecuting this action, Class Counsel displayed the exemplary skill and
7 expertise that is necessary to successfully prosecute this wage and hour class action which
8 involved novel and difficult issues. In opposing the capable firm of Cooley Godward LLP on a
9 contingent fee basis, class counsel had to forego other employment on other cases so as to
10 devote the necessary time and resources to this case.

11 6. The Court finds that the named Plaintiffs performed their duties and roles as the
12 class representatives admirably. The Court hereby awards the named Plaintiffs reimbursement
13 of their reasonable costs and expenses relating to the representation of the Class, as allowed by
14 15 U.S.C. § 78u-4(a)(4), as follows: (1) Michael McPhail - \$10,422.30; (2) Robert Kimmach -
15 \$9,380.96; (3) Candace Hurley - \$3,867.72; (4) Neil Hurley - \$923.20; (5) Scott Wagner -
16 \$3,149.96; and (6) Krystin Wagner - \$2,073.00. These declarations establish the cost and
17 expense expended by Plaintiffs directly on the representation of the Class and the prosecution of
18 the action, along with the evidence as to the applicable pay rate for the Plaintiffs. The Court
19 finds these reimbursement awards to be fair, reasonable and appropriate.


20 7. The Court further finds that class counsel advanced costs and incurred expenses in
21 the
22 amount of \$815,850.17 on behalf of the Class. These costs and expenses were reasonably
23 necessary in the prosecution of the matter, and therefore, the Court awards class counsel
24 \$815,850.17 for reimbursement of costs and expenses, which is included in the total award of
25 fees and costs in the amount of \$3,500,000.00.

26 8. For all of the above reasons, the Court hereby awards \$3,500,000.00 to Class
27 Counsel
28 as attorneys' fees, costs and litigation expenses, to be paid in accordance with the terms of the

1 Stipulation and Settlement Agreement and as set forth herein above, awards cost and expense
2 reimbursement to the Plaintiffs as follows: (1) Michael McPhail - \$10,422.30; (2) Robert
3 Kimnach - \$9,380.96; (3) Candace Hurley - \$3,867.72; (4) Neil Hurley - \$923.20; (5) Scott
4 Wagner - \$3,149.96; and (6) Krystin Wagner - \$2,073.00, and approves payment in the amount
5 of \$ 754,001.67 to Gilardi & Co. for their services as claims administrator.
6

7 **IT IS SO ORDERED.**

8 **DATED: March 30, 2009**

9 
10 **IRMA E. GONZALEZ, Chief Judge**
11 **United States District Court**
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28