IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA TALLAHASSEE DIVISION

WILLIAM DEMLER and MICHAEL GISI, individually and on behalf of all others similarly situated, and WAYNE PULA,

Plaintiffs,

v. CASE NO. 4:19cv94-RH-GRJ

MARK S. INCH, in his official capacity as Secretary of the Florida Department of Corrections,

Defendant.
_____/

ORDER ON THE APPROVAL OF THE CLASS SETTLEMENT

This case was certified as a class action for settlement purposes. The class members are prisoners in the Florida Department of Corrections. The settlement calls for distribution of music credits to class members. The settlement was preliminarily approved, and notice was given to class members. Class members had the opportunity to file objections. Numerous filings—including objections and other requests—were filed during the objection period. Additional objections were filed late.

A fairness hearing occurred on December 4, 2020. A ruling was announced on the record overruling objections, approving the settlement, and explaining the decision at some length. This order confirms and further explains the ruling. *See Johnson v. NPAS Sols., LLC*, 975 F.3d 1244 (11th Cir. 2020). The settlement is adequate, reasonable, and fair.

I

There were 774 filings during the objection period. Of those, roughly 690 were objections. Of the objections, many (approximately 450) consisted of a form prepared by a purported paralegal and circulated within the Department's prison facilities. Other filings included notices of agreement with the settlement, requests to be added to the class, requests for missing credits, and other miscellaneous requests such as to attend the fairness hearing. Each filing has been reviewed.

A

Regarding the filings that were requests to be deemed a class member or receive credits, orders were entered on October 26, 2020 and December 1, 2020, giving notice to the parties and identifying all requests to be added to the class and requests for media credits. *See* ECF Nos. 935 & 982. At the fairness hearing, the parties explained that the media credit distribution process is ongoing and they are in the process of reviewing the class membership list and distribution amounts for accuracy. This process will continue after the final settlement approval. The parties

acknowledged on the record that any future unresolved claims of membership or for media credits can be addressed with the filing of a motion to enforce the settlement.

B

Roughly 690 objections were received from class members. The class included approximately 11,000 prisoners. *See* ECF No. 965-1 at 22-229. Thus, while there were many objections, the vast majority of the class did not object. Each objection has been read and considered. For purposes of this order, efficiency, and judicial economy, objections are addressed by category with samples identified. All the objections are unfounded.

Objection: The number of credits provided in the settlement is too low. Examples of this objection are in the record at ECF Nos. 453 (the common form objection), 172, 182, 480, 827, 883, and 886. The reason for overruling this objection was explained at length on the record at the fairness hearing. Prisoners paid $1.70 for each song purchased under the MP3 program. Under the settlement, each prisoner will receive a credit valued at $1.00 for each song possessed under the MP3 program. The prisoner will be able to use the credits to purchase songs under the tablet program—the same songs, when available, or, if the prisoner chooses, different songs. It is likely that a residual distribution will result in each

prisoner receiving more than one credit for each song owned under the MP3 program.

The settlement would ensure each prisoner would be able to buy at least the same number of songs for a tablet as the prisoner possessed under the MP3 program if songs under the tablet program could be replaced for $1.00 each. Songs under the tablet program can cost as little as $1.00. But some songs cost more, up to $2.50. Class members object to valuing credits at $1.00; they assert they should be given at least $1.70 in credits per song.

Even assuming the worst possible outcome for a prisoner—that all replacement songs cost $2.50 and there is no supplemental distribution—the prisoner will recover 40% of the value on the songs purchased in the MP3 program. The objectors assert, in effect, that they should recover 100%. But this is a settlement. In settlements, plaintiffs often receive less than what they would receive if they prevailed in the litigation 100% across the board. In this case, in light of the substantial obstacles to full recovery, 40% is within the range of reasonable settlements.

Moreover, it is exceedingly unlikely that any prisoner's chosen songs will all cost $2.50 under the new program. The objections suggest most songs will cost from $1.29 to $1.99. With the likely supplemental distribution, class members may receive credits allowing them to reach or even exceed the number of songs

possessed under the MP3 program—that is, to reach or exceed a 100% recovery. The overwhelming likelihood is that class members will receive a recovery well in excess of 40%—probably closer to 100% than to 40%.

There are other benefits to this settlement that have value as well. Prisoners are able to get access to their music much sooner through this settlement than they would if this case were to go to trial and an appeal. The purpose of the case was to allow prisoners to listen to music while incarcerated. Under this settlement, they are able to do that much sooner. Receiving media credits also gives prisoners the opportunity to purge old songs and replace them with new songs.

Finally, and importantly, this case was not an obvious win for the plaintiffs. By the time the parties announced a settlement, I had thoroughly reviewed and considered cross-motions for summary judgment. The plaintiffs faced substantial legal hurdles. *See, e.g.*, *Sullivan v. Ford*, 609 F.2d 197, 198 (5th Cir. 1980).

Objection: Class members should receive monetary damages including compensatory and punitive damages, not media credits. Examples of this objection are in the record at ECF Nos. 230, 240, 244, 250, 390, 590 at 6, 708, 777, 896, and 906. This objection was also explained and thoroughly addressed on the record. Money damages were not available in this case. Money damages were not recoverable in federal court because of the Eleventh Amendment and sovereign immunity. Moreover, even a state-court damages claim was exceedingly unlikely

to succeed. In state court, the Department probably would have had sovereign immunity from a damages claim. And Florida law provides for liens against prisoners that might well have rendered illusory any damages award. A settlement providing media credits without the recovery of damages was reasonable.

Objection: Pre-settlement credits should not be counted. Examples of this objection are in the record at ECF Nos. 213 at 1-2, 249 at 1, 468, and 870. Before the parties entered into this settlement agreement, the Department and its vendor agreed to provide a specified number of media credits to prisoners. The ultimate number of pre-settlement credits was 100. Some prisoners asserted these credits should not count towards the settlement credits. This objection is unfounded. The 100 credits—that prisoners did not pay for and were given to help replace songs lost—reduced any loss, would preclude any recovery based on the songs that could be replaced with the 100 credits, and thus were reasonably taken into account as part of the settlement.

Objection: The MP3 players and accessories were not compensated. Examples of this objection are in the record at ECF Nos. 453 (the common form objection), 195, 337, 400, 625, and 811. When the tablet program replaced the MP3 program, prisoners who had previously participated in the MP3 program were given the choice between a free mini-tablet or a discounted larger tablet. *See, e.g.*, Bickley Dep., ECF No. 126-2 at 28. The tablets have greater functionality and

allow for more activities and uses. A tablet was an upgrade from an MP3 player. Likely acknowledging this, the plaintiffs have not pursued claims based on the physical players. *See, e.g.*, Pls.' Resp. to Def.'s Mot. for Summ. J., ECF No. 153 at 6-7 n.22. Even if the plaintiffs had pursued this claim, it would have been extremely weak considering a tablet was given to inmates to replace their MP3 players. This objection is unfounded.

Objection: Some prisoners did not receive a free tablet. Examples of this objection are in the record at ECF Nos. 183, 274, 283, 292, 376, 578, and 756. Whether by mistake, inadvertence, or unexplained circumstance, some prisoners assert they were entitled to but did not receive the free tablet. Any alleged failure to properly implement the free-tablet benefit was not part of the claim in this case. The remedy for any error lies elsewhere. The objection is unfounded.

Objection: All prisoners—even if they are no longer incarcerated—should get media credits regardless of how many songs they purchased through the MP3 program. Examples of this objection are in the record at ECF Nos. 236, 256, 273, 296, 308, 317, 867, and 972. Prisoners who purchased fewer than 100 songs are not part of the class and thus are not bound by the settlement. Prisoners who have been released have access to their original MP3 players or the digital media previously stored on it. If individuals who are not part of the class believe they

have claims, they are free to pursue them in an appropriate forum. These objections are unfounded.

Objection: Some songs are missing in the tablet program, the tablets have technical issues, and the MP3 program should have been kept. Examples of this objection are in the record at ECF Nos. 174, 192, 235, 250, 264, 285, 883, and 916. The issues related to song selections and technical issues are fleeting and not addressed in this lawsuit. The Department has considerable discretion in managing the prison facilities; the argument is weak that it could not properly choose to have a single program and to jettison the MP3 program in favor of the upgraded tablet program. This objection is unfounded.

Objection: A general concern about enforcement and the potential end of the tablet program. Examples of this objection are in the record at ECF Nos. 182, 191, 241, 915, and 967. Under the settlement agreement and order approving it, the court retains jurisdiction to enforce the agreement. There is no reason to believe the Department will not comply with the agreement, and any failure can be remedied. Speculation about what could happen when the contract with the Department's new vendor ends provides scant reason to question the settlement agreement. These objections are unfounded.

Objection: The Department should be required to admit liability. An example of this objection is at ECF No. 311. As part of the Department's

considerable discretion in the operation of its facilities, it can reasonably choose to provide greater benefits than it is legally obligated to provide. To require a settlement of this kind to include an admission of liability would be to prohibit the Department from going further than its legal obligation. This would make no sense. This objection is unfounded.

Objection: Requests to opt-out. Six objectors asserted a right to opt out. *See* ECF Nos. 259, 264, 919, 936, 956, and 968. There is generally no right to opt out of a Rule 23(b)(2) class. *See Holmes v. Cont'l Can Co.*, 706 F.2d 1144, 1153 (11th Cir. 1983) ("The general rule in this circuit remains that absent members of (b)(2) classes have no automatic right to opt out of the lawsuit and to prosecute an entirely separate action."); *see also Kincade v. Gen. Tire & Rubber Co.*, 635 F.2d 501, 507 (5th Cir. 1981). There are narrow exceptions where class members should be allowed to opt out of a Rule 23(b)(2) class. *See Holmes*, 706 F.2d at 1155 (holding it was an abuse of discretion for a district court to not require an opt out procedure for a Rule 23(b)(2) class where the settlement included awards of backpay—the functional equivalent of damages ordinarily recoverable in a (b)(3) class—from a finite and small fund).

Allowing a class member to opt out would create the potential for a separate lawsuit seeking an injunction requiring the Department to maintain the MP3 program or fundamentally alter the replacement tablet program. The possibility of

competing, inconsistent injunctions is a reason (b)(2) classes can be maintained and class members are not allowed to opt out. Allowing these six objectors to opt out would sacrifice the interest of thousands of class members to the purported interests of these six. The objections asserting a right to opt out are unfounded.

Objection: The Departments should not implement the "loaner tablet" program. Examples of this objection are in the record at ECF Nos. 887, 949, 961, and 967. The background is this. At some point after implementing the tablet program, the Department and its contracted provider, JPay, Inc., announced they would implement a "loaner tablet" program. Under this program, prisoners must turn in their tablets, and they receive an upgraded, loaner tablet for use while in custody. Loaners apparently can be replaced over time with further-upgraded models, though the record is not clear on this. When a prisoner is released, the prisoner receives the purchased tablet back. A prisoner with a life sentence gets to use the loaner tablet—or upgraded replacements—indefinitely. The digital music files are not lost. Some class members filed objections asserting the Department should not be allowed to implement this program. To the extent this is an objection, it is unfounded. The loaner program is not at issue in this litigation.

The named plaintiff Wayne Pula, who is not a class representative, has moved for a preliminary injunction ending the loaner-tablet program. But no claim

has been asserted related to the loaner-tablet program, and Mr. Pula has not shown grounds for a preliminary injunction. This order denies the motion.

Isolated objections: There were several objections not common enough to warrant their own grouping but have been considered and are unfounded. These include objections that disabled veterans should get media credits first (ECF No. 210), objections on unrelated issues such as care packages and loss of inmate clothing (ECF Nos. 225 & 845), allegations that the Department engaged in a criminal conspiracy with its vendors (ECF No. 585), and requests that the court order the Department to change its property rules codified in the Florida Administrative Code to allow additional property generally and for inmates in close confinement (ECF Nos. 249 & 652). These objections are unfounded or unrelated to the settlement of this case.

II

In addition to overruling the objections, I find this settlement is fair, adequate, reasonable, and not the product of collusion. I explained my finding at length on the record of the fairness hearing. I summarize my findings here.

The Eleventh Circuit has identified several factors in determining whether a settlement is fair, adequate, and reasonable including: (1) the existence of fraud or collusion behind the settlement; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the proceedings and the amount of discovery

completed; (4) the probability of plaintiffs' success on the merits; (5) the range of possible recovery; and (6) the opinions of the class counsel, class representatives, and the substance and amount of opposition to the settlement. *See, e.g.*, *Leverso v. SouthTrust Bank of Ala., Nat'l Ass'n*, 18 F.3d 1527, 1530-31 (11th Cir. 1994); *see also Holmes v. Cont'l Can Co.*, 706 F.2d 1144, 1147-49 (11th Cir. 1983); *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 213 (5th Cir. 1981).

This settlement was the result of extended negotiations with an experienced mediator. It is not the result of fraud or collusion. The settlement was reached after the full discovery period had ended. Discovery in this case was extensive. There was also extensive motion practice including a motion to dismiss, motion for class certification, and cross-motions for summary judgment. Each side aggressively presented and defended its positions.

The plaintiffs were ably represented by class counsel. But they faced significant obstacles to ultimately succeed on the merits. These obstacles were discussed on the record of the fairness hearing. One issue would have been the Department's discretion in how it administers its program. *See, e.g.*, *Sullivan v. Ford*, 609 F.2d 197, 198 (5th Cir. 1980) ("A state has a compelling interest in maintaining security and order in its prisons and, to the extent that if furthers this interest in reasonable and nonarbitrary ways, property claims by inmates must give way."). Another issue would have been the natural obsolescence of older

technology. The Department cannot promise to keep a benefit forever and then renege, but it was not clear on the facts the Department did that. It was very possible a trial would have netted a lesser recovery or no recovery at all for the plaintiffs.

The possible recovery in this case was an injunction requiring the Department to restore all old music from the MP3 program onto the JPay tablets. It is highly unlikely the same music would have been transferred between the programs due to licensing restrictions and mechanics. Prisoners—if they won—would have gotten the same or substitute songs but would not have recovered the original purchase price. They would have had to wait a long time for any potential recovery after trial and perhaps appeal. Class counsel—experienced prison-litigation attorneys—believe this settlement is an extremely favorable settlement for class members. While there were numerous objections, there were thousands of prisoners who did not object.

On balance, this settlement is fair, adequate, and reasonable.

III

A final note on attorneys' fees. I approve the $150,000 fee amount requested in the motion for preliminary approval. The proposed fee was disclosed in the notice to the class. The fees are low for work of this quality and the time (roughly 2500 hours) devoted to the case. *See In re Home Depot Inc.*, 931 F.3d 1065, 1089-

91 (11th Cir. 2019); *see also Bivins v. Wrap It Up, Inc.*, 548 F.3d 1348, 1350 (11th Cir. 2008) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)) (explaining the lodestar method); *see also Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 717-20 (5th Cir. 1974) (laying out the *Johnson* factors that may be considered to adjust the lodestar). The fee award is not coming from the media credits or impacting the settlement media credit fund. Class members had the opportunity to object to attorneys' fees but only one mentioned the subject, and then only in passing. The class member who objected to fees asked to personally receive the fee award. *See* ECF No. 888. The objection is unfounded.

IV

For these reasons,

IT IS ORDERED:

1. The motion to approve the settlement, ECF No. 965, is granted.
2. All objections to the proposed settlement are overruled.
3. Mr. Pula's preliminary-injunction motion, ECF No. 949, is denied.
4. Class member Grover W. Peavy's motion to opt out, ECF No. 936, is denied.

SO ORDERED on December 10, 2020.

s/Robert L. Hinkle
United States District Judge