

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
Tallahassee Division**

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

Plaintiffs,

vs.

Case No. 4:19-cv-00094-RH/GRJ

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

Defendant.

_____ /

CLASS ACTION SETTLEMENT AGREEMENT

This Class Action Settlement Agreement (“Class Action Settlement Agreement”) is entered into between Plaintiffs William Demler, Michael Gisi, and Wayne Pula (“Class Representatives”), individually and on behalf of the Class; as defined in ECF No. 163, and Defendant Mark S. Inch, in his official capacity as Secretary of the Florida Department of Corrections (“FDOC”).

I. RECITALS

A. WHEREAS this action was filed on February 19, 2019, seeking declaratory and injunctive relief pursuant to 42 U.S.C. § 1983, in order to obtain a declaration that a policy of the FDOC with regard to digital music purchases made by inmates through the Digital Music Player Program allegedly resulted in an

unconstitutional taking under the Fifth Amendment to the U.S. Constitution and a violation of the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution, and an injunction restoring the Class's ability to listen to the music previously purchased under the Digital Music Player Program while in prison; and

B. WHEREAS Plaintiffs William Demler, Michael Gisi, and Wayne Pula ("Class Representatives"), individually and on behalf of the Class, have alleged that the United States District Court for the Northern District of Florida has subject matter jurisdiction over this dispute; *see* 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1343(a)(3) (civil rights), a contention disputed by FDOC; and

C. WHEREAS the Parties, in an effort to avoid the burden, costs, and inherent risks of further litigation, agree that settlement is in their best interests; and

D. WHEREAS the Parties have engaged in discovery in this matter, including exchanging information and documents and preparing and responding to extensive written discovery, and participating in depositions; and

E. WHEREAS this action has been certified by the Court, pursuant to Rule 23(b)(2), Federal Rules of Civil Procedure, as a class action on behalf of all current Florida Department of Corrections prisoners whose digital media files were taken, or will be taken, pursuant to the Department's termination of the MP3 program, and who purchased more than 75 songs through that program; and

F. WHEREAS by agreeing to this Class Action Settlement Agreement, the FDOC does not admit to liability and expressly denies same; and

G. WHEREAS the signatories to this Class Action Settlement Agreement represent that they are authorized to enter into this Class Action Settlement Agreement and promise to carry out the various promises, representations, and responsibilities made in it; and

H. WHEREAS the FDOC has agreed to restore the ability of inmates to listen to a certain, agreed upon number of songs that were previously purchased under the Digital Music Player Program by the Class, through the issuance of the Settlement Credits; and

I. WHEREAS this Class Action Settlement Agreement includes a release and indemnity provision, which will go into effect after the Effective Date; and

J. WHEREAS the Parties agree that the terms and conditions of this Class Action Settlement Agreement constitute a fair, reasonable, and adequate resolution for the Plaintiffs and the Class under Rule 23(e)(2), Federal Rules of Civil Procedure.

NOW, THEREFORE, the Parties agree, subject to the Court's entry of this Class Action Settlement Agreement, as follows:

II. DEFINITIONS

1. Terms and phrases are defined throughout this Class Action Settlement Agreement. In addition to those terms and phrases, the following terms and phrases as used anywhere in this Class Action Settlement Agreement have the meanings set forth below. In construing these definitions, the singular shall include the plural and the plural shall include the singular:

(a) **“Digital Music Player Program”** means the FDOC’s former statewide program that began in 2011, pursuant to Amendment #1 to FDOC Contract #C2562, that provided FDOC prisoners the ability to purchase media players, accessories, and digital music files and the ability to listen to them.

(b) **“Digital Music Confiscation Policy”** means the actions taken by the FDOC detailed in the FDOC Confiscation Notice, ECF No. 140-18.

(c) **“Keefe”** means Keefe Commissary Network, LLC.

(d) **“JPay”** means JPay, Inc.

(e) **“Tablet Program”** means the current FDOC statewide tablet program that began in 2017, pursuant to FDOC Contract #C2885.

(f) **“Tablets”** shall mean the tablet media players made available under the Tablet Program.

(g) Each **“Tablet Media Credit”** equals the amount designated for the lowest priced songs available in the Media Store, as described in FDOC

Contract #C2885, which is the amount of Media Store credit that can be purchased for one dollar. Although Tablet Media Credits can be purchased, they are not currency or damages, and cannot be exchanged for currency.

(h) **“Settlement Credits”** shall mean the three million and nine hundred thousand (3,900,000) Tablet Media Credits that the FDOC has agreed to make available to the Class on July 1, 2020, in the manner set forth in this Class Action Settlement Agreement. Settlement Credits are being provided for the sole purpose of satisfying Plaintiffs’ and the Class’s injunctive claims by reinstating the ability of inmates to listen to a certain, agreed upon number of songs that were previously purchased under the Digital Music Player Program by the Class. Settlement Credits are not a settlement fund, currency or damages, and cannot be exchanged for currency. The Settlement Credits are subject to the same terms and conditions as credit to the Media Store, as described in FDOC Contract #C2885 and any subsequent amendments thereto, are not subject to any additional limitations, and nothing in this Class Action Settlement Agreement shall be interpreted in a way that alters that.

(i) **“Released Claims”** means all claims raised in this action and all other claims (including all claims for violation of federal or state constitutional, statutory, regulatory, or common law), whether known or

unknown, arising out of the Digital Music Confiscation Policy, that were or could have been raised, against the Defendant in this action.

(j) **“Indemnification Notice”** means a notice and copy of this Class Action Settlement Agreement served on a class member, supported by sworn affidavit by the person who served notice. The notice must include a detailed description of a Released Claim that the FDOC contends has not been dismissed within fourteen (14) days after the Effective Date or has been filed after the Effective Date. The notice shall state: “You have filed a new claim or failed to dismiss an action based on a claim that was released by the Class Action Settlement Agreement, attached hereto. Please immediately move for dismissal of the Released Claim, or cooperate with the FDOC or the State of Florida in dismissing said claim. If you comply with this Notice, no adverse actions will be taken against You.” In order for the Indemnification Notice to be valid, no adverse actions may be taken by FDOC or the State of Florida against the Noticed Party related to actions taken to Satisfy Claims, including, but not limited to, seeking fees, costs, and/or other sanctions against the Noticed Party.

(k) **“Noticed Party”** means the person who has been served with a valid Indemnification Notice.

(l) **“Noticed Claims”** mean claims referenced in an Indemnification Notice.

(m) **“Satisfied Claims”** means Noticed Claims that a Noticed Party has moved to be dismissed, stipulated to be dismissed, or otherwise has abandoned within 45 days of the date that Indemnification Notice has been served upon the Noticed Party. The fact that additional actions may be needed by a court, agency, the FDOC, the State of Florida, or any third parties in order to bring about a dismissal of the claims referenced in the Indemnification Notice shall have no bearing on whether a claim becomes a Satisfied Claim.

(n) **“Indemnified Claims”** means Noticed Claims that have not been moved to be dismissed, stipulated to be dismissed, or otherwise abandoned within 45 days of the date that an Indemnification Notice is served on a Noticed Party. No claim may be considered an Indemnified Claim if it is a Satisfied Claim.

(o) **“Class”** means all current [as of April 16, 2020] Florida Department of Corrections prisoners whose digital media files were taken, or will be taken, pursuant to the Department’s termination of the MP3 program (Digital Music Player Program), and who purchased more than 75 songs through that program.

**III. TERMS AND EFFECT OF
CLASS ACTION SETTLEMENT AGREEMENT**

2. **Full Resolution.** This Class Action Settlement Agreement is designed to fully release and indemnify the FDOC and the State of Florida from the Released Claims, to resolve any and all claims raised by the Class Representatives and the Class, or that could have been brought by the Class Representatives and the Class, in any way arising out of the Digital Music Player Program and/or any and all inmate purchase of digital music through the Digital Music Player Program, and to resolve Class Counsel's attorneys' fees and costs.

3. **Preliminary Approval.** The Parties shall file a Motion for Preliminary Approval of Class Action Settlement no later than May 14, 2020. The Parties shall file with said Motion for Preliminary Approval, a proposed Order Granting Preliminary Approval in significantly the same form as attached hereto as Exhibit A.

4. **Release.** After the Effective Date, Plaintiffs and the Class agree that the FDOC and the State of Florida are released from all Released Claims to the fullest extent permitted by Federal Rule of Civil Procedure 23(b)(2).

5. **Indemnification.** After the Effective Date, the FDOC and the State of Florida shall be indemnified by a Noticed Party for any and all Indemnified Claims that were identified in the Indemnification Notice to the fullest extent permitted by Federal Rule of Civil Procedure 23(b)(2).

6. **Merger.** This Class Action Settlement Agreement contains all the terms and conditions agreed upon by the Parties concerning the resolution of this proceeding. No oral agreement entered into at any time, nor any prior written agreement, shall be deemed to bind the Parties or to vary the terms and conditions of this Class Action Settlement Agreement, except as expressly provided in it. This Class Action Settlement Agreement may be modified only in writing signed by all Parties.

7. **Liability.** Nothing contained in this Class Action Settlement Agreement or any order entered by the Court adopting this Class Action Settlement Agreement is or shall be construed as an admission by the FDOC of the truth of any allegations or the validity of any claim asserted in the Complaint or of the FDOC's liability and in fact FDOC denies same.

8. **Assignment.** This Class Action Settlement Agreement shall apply to all persons who are members of the Class. This Class Action Settlement Agreement creates no rights in favor of any other person and creates no obligations or duties on the part of the FDOC beyond the terms of this Class Action Settlement Agreement.

9. **Dismissal.** After the Effective Date, this case shall be fully dismissed with prejudice, and all claims by any Party, including those for any attorneys' fees and costs, shall be extinguished.

10. **Final Approval.** The Parties will request that the preliminary approval order set a date for a final fairness hearing. At the final fairness hearing, the Parties will request that the Court enter a Final Approval Order (the “Final Approval Order”). The fact that the Court may require non-substantive changes in the Final Approval Order will not invalidate this Agreement or the settlement.

11. **Effective Date.** The “Effective Date” of this Class Action Settlement Agreement shall be the calendar date five (5) business days after the later of (a) the date on which the Court enters a Final Approval Order, dismissing with prejudice the claims of all Class members; or (b) if any Class member has objected to the settlement, the date on which the date for filing an appeal has expired or, if an appeal has been filed, the date on which the settlement and judgment has been affirmed in all material respects by the appellate court of last resort to which such appeals have been taken and such affirmances are no longer subject to further appeal or review.

12. **Costs, Expenses, and Attorneys’ Fees.** In settlement of all claims for attorneys’ fees, taxable costs, and non-taxable litigation expenses incurred through the date of entry of the proposed Class Action Settlement Agreement, the FDOC agrees to tender to Class Counsel the gross sum of ONE HUNDRED AND FIFTY THOUSAND DOLLARS (\$150,000), via check made payable to the Social Justice Law Collective Trust Account (Fed. Tax ID No. 46-0961071) (the “Settlement Amount”), within thirty (30) days of the Effective Date. The Parties agree that this

Settlement Amount includes the resolution and payment in full of all of Plaintiffs' claims for reasonable attorneys' fees and costs, and the FDOC will not oppose or otherwise object to this amount being paid to Class Counsel. Class Counsel's attorneys' fees and costs is based upon an agreed upon amount for fees and costs as part of the amicable resolution of the pending litigation for which liability is in dispute. There is no settlement fund, as damages are not being sought or provided, and therefore, Class Counsel's fees are not a percentage-of-fund calculation, but rather, represent a negotiated, discounted lodestar calculation designed to resolve Class Counsel's claim for attorneys' fees and costs pursuant to 42 U.S.C. § 1988, along with any other claims for attorneys' fees and costs Class Counsel may have.

13. **CAFA Notice.** Within ten (10) days of filing this Class Action Settlement Agreement with the Court, Defendants' counsel will cause the notice of the settlement required by the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1715(b), to be issued to the Attorney General for the United States, and any appropriate state authorities.

14. **Court Approval.** The Parties agree that they will jointly take all necessary and appropriate steps to obtain preliminary approval from the Court of this Class Action Settlement Agreement, final approval and entry by the Court of this Class Action Settlement Agreement, and dismissal of the action with prejudice.

15. **Settlement Contingent on Court Approval.** The Parties agree that this Class Action Settlement Agreement is subject to and conditioned upon the Court's approval of this Class Action Settlement Agreement. In the event that the Court declines to approve this Class Action Settlement Agreement, the Parties agree that this Class Action Settlement Agreement shall be null and void and without prejudice to the Parties' rights.

16. **Waiver of Appeal.** Upon the Court's approval of this Class Action Settlement Agreement in substantially the same form as the proposed Final Approval Order attached hereto, the Parties waive their rights to appeal any existing order, decision, or ruling in this action.

17. **Captions.** The captions of this Class Action Settlement Agreement are for convenience of reference only and in no way define, limit, or describe the scope or intent of this Class Action Settlement Agreement.

18. **Governing Law.** The contractual terms of this Agreement shall be interpreted and enforced in accordance with the substantive law of Florida, without regard to its conflict of laws and/or choice of law provisions.

19. **Recitals.** The parties agree that recitals set forth above are true and that they constitute a part of this settlement.

V. SETTLEMENT CREDIT DISTRIBUTION

20. The FDOC represents and warrants that on the date this Class Action Settlement Agreement is entered into, 100 Tablet Media Credits have been distributed to each member of the Class.

21. Plaintiffs have agreed to accept, and FDOC has agreed to provide, the Settlement Credits to the Class, along with the other provisions detailed herein, as full and complete settlement of the Released Claims, to be distributed to members of the Class as set forth below.

22. Within fourteen (14) days of the execution of this Class Action Settlement Agreement, the FDOC shall review the Excel Sheet, attached hereto as Exhibit B, and furnish Class Counsel with a list of names of the prisoners contained therein that were no longer incarcerated on the date of certification.

23. Class counsel shall, within twenty (20) days after receiving the Excel sheet, furnish the FDOC with a modified Excel sheet containing only the names of the Class Members and the number of Tablet Media Credits each is entitled to from the Settlement Credits (the "Settlement Credit Distribution List"). Each Class member who purchased more than 100 songs under the Digital Music Player Program shall be entitled to one (1) Tablet Media Credit for each additional song over 100 that they purchased under the Digital Music Player Program, drawn from and not to exceed the Settlement Credits. If there are any excess Tablet Media

Credits after distribution to Class members as set forth above, the remainder of the Settlement Credits shall be apportioned among all Class members on a *pro rata* basis based on the number of songs purchased under the Digital Music Player Program. The Parties have jointly agreed that this is the most fair and equitable method for distributing the Settlement Credits among the Class members.

24. The FDOC will ensure that the Settlement Credits are provided to each Class member in the amounts listed on the Settlement Credit Distribution List on July 1, 2020.

VI. NOTICE

25. Pursuant to Rule 23(e), Federal Rules of Civil Procedure, the FDOC, within fourteen (14) days of the Court's preliminary approval of the Notice of Proposed Settlement (hereinafter "Notice") attached to this Class Action Settlement Agreement as Exhibit C, shall provide the Notice to the Class by posting a copy of the attached Notice (both the English and Spanish version) in a prominent area in every dormitory and law library of every FDOC institution. The Notice shall remain posted for sixty (60) days. A copy of the Notice shall be provided individually to any inmate who is not housed in a common dormitory setting. Notice shall also be provided on the FDOC website, in a publication or publications of FDOC's choosing that is/are made available to FDOC inmates, and if technologically feasible and JPay

is able to do so, on the Tablets in standard and accessible formats for Class members with disabilities. The cost of providing such notice shall be borne by the FDOC.

26. Class members shall have sixty (60) days from the date of Preliminary Approval to file with the Clerk of the Court any written objections to this proposed Class Action Settlement Agreement, with a copy to class counsel. The FDOC shall provide free paper, envelopes, and postage to any indigent inmate who wishes to file objections to this Class Action Settlement Agreement. Such communications with the Court shall be considered privileged legal mail by the FDOC, its agents, and employees.

VII. EXECUTION BY PARTIES

WHEREFORE the Parties agree to the terms and conditions of the Class Action Settlement Agreement as set forth above.

William Demler
Class Representative
Plaintiff

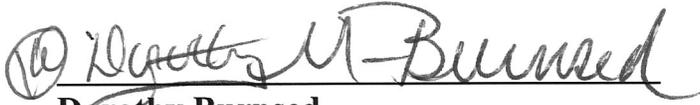
Date: _____

Michael Gisi
Class Representative
Plaintiff

Date: _____

Wayne Pula
Class Representative
Plaintiff

Date: _____

A handwritten signature in black ink, appearing to read "Dorothy M. Burnsed". The signature is written in a cursive style and is positioned above a horizontal line.

Dorothy Burnsed,
Interim General Counsel, on behalf of
Mark S. Inch, Secretary of the
Florida Department of Corrections
Defendant

Date: 5/14/2020