reasoning. Each rested on the authority of prior decisions in which the unclaimed funds were distributed *cy pres*, not handed back to the defendant.[18]

In short, precedent, where it does not directly dictate my reasoning here, makes it clear that the result I reach lies within my discretion.

* * *

It may be permissible or advisable in some cases to include some reversionary value in the total settlement value for purposes of assessing the reasonableness of an attorneys' fee award. But the circumstances of this case do not point me in that direction. Here, the ratio of fees to benefits is disproportionate. The impressive-sounding "total settlement value" of $3,026,290 includes $1,831,610 in unclaimed webinar benefits, the value of which will effectively revert to the defendant, not accrue to the class members. The true total settlement value is, at most, $1,194,680 (cash of $1,145,000 plus continuing education webinars worth $49,680). Class counsel's proposed attorney fee of $1,008,763.33 represents, not 33%, but a whopping 84% of that true settlement value.

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[18] *Alleyne* cited *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 426-32 (2d Cir. 2007) and *Williams* relied on *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301 (9th Cir. 1990). Neither offered a significant rationale for disregarding the factual distinction between a reversionary fund and a *cy pres* distribution. For the reasons expressed above, I find the distinction highly relevant.

Other cases that class counsel cites are likewise distinguishable and unpersuasive. *See Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291 (11th Cir. 1999) (permitting inclusion of reversionary funds in total settlement value for a multiplier of 1.05, where individuals' recovery was calculated as a percentage of the total fund, but explicitly authorizing district courts not to do so); *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 426-32 (2d Cir. 2007) (unclaimed funds included, but were earmarked for *cy pres* fund, not reclaimed by the defendant); *McKinnie v. JP Morgan Chase Bank, N.A.*, 678 F. Supp. 2d 806 (E.D. Wis. 2009) (including reversionary funds where all claimants were fully reimbursed for their loss, portion of fund went to *cy pres* fund, identifying information for non-claimants was not easily available, and resulting multiplier was 1.31).

D. The proposed award to counsel compared to the actual aggregate benefit to the class.

I also consider *Rite Aid* factor number one (size of the fund created and the number of persons benefited) from the point of view of the actual aggregate distribution to the class.

The proposed settlement here will actually deliver a maximum of $180,916.67 ($53,625 cash distribution to claimants, plus $49,680 worth of webinars to claimants, plus the residual $77,611.67,[19] less administration costs, distributed to the non-claimants pro rata). When the value of the settlement is viewed in this manner, the ratio of attorneys' fees to class benefits is startlingly high. Class counsel seek a fee award of $1.08 million, a figure that comes to 5.5 times what the entire class will receive in cash and non-cash benefits.

Now attorneys' fees that exceed the class recovery are not *per se* unreasonable. *See In re Baby Products Antitrust Litig.*, 708 F.3d 163, 178 (3d Cir. 2013) "[The appellant] also asks us to hold that fee awards exceeding the amount directly distributed to class members are presumptively unreasonable. For substantially similar reasons, we do not adopt such a rule."). But *Baby Products* suggests that a court should consider the benefit actually delivered to the class when considering an attorneys' fee proposal.

Other courts have explicitly rejected the theory of class counsel here that a fee may be based on a recovery that was theoretically available, but not actually paid. In *Americana Art China Co. v. Foxfire Printing & Packaging, Inc.*, 743 F.3d 243 (7th Cir. 2014), discussed above, counsel proposed a fee of over $2 million, but the actual class recovery based on claims submitted was just under $400,000. The district court had not relied on the discrepancy between the attorney fee and the actual recovery in reducing the attorney fee award, but the U.S. Court of Appeals for the Seventh Circuit explicitly stated that the

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[19] This statement is for purposes of analysis of the fee requested by counsel. Of course, a reduced fee would result in a larger residual fund for distribution to the non-claimants.

district court would not have erred if it had done so. *Id.* at 246. A contingent fee award in a class action, the court said, is meant to simulate what the parties would have negotiated *ex ante*. While a district court should not rely *exclusively* on what was actually recovered, the court may consider actual recovery as part of its analysis. *Id.* at 247.

The Seventh Circuit again addressed the issue in *Pearson v. NBTY, Inc.*, No. 12-1245, 2014 WL 6466128 (7th Cir. Nov. 19, 2014), in which the Court reemphasized the ratio of attorneys' fees to the total recovery. There, the district court had awarded attorneys' fees of $1.93 million. That amount might have been reasonable compared to the $20.2 million that the defendant theoretically made available for settlement. But it was not reasonable when compared to the $865,284 of benefit *actually paid* to the class. *Id.* at *2. Based on that imbalance, as well as other factors, the Seventh Circuit reversed the attorneys' fees award and vacated the entire settlement.

In *Harris, supra*, class counsel had proposed a fee of approximately $4 million, while the class was to receive a $1 million payout. 2011 WL 4831157 at *5. The requested fee award was 137.5% of the amount the attorneys actually billed (that is, the lodestar multiplier was only 1.375). The Court nevertheless rejected the settlement, in part because the attorneys were taking the "lion's share—80 percent—of the total payout." *Id.* at *6. Here, the lodestar multiplier is 4.78, and the attorneys propose to take 84% of the true payout.

In approved TCPA settlements, the attorneys' fees have generally represented a much smaller portion of the amount paid out by defendants. In *Grannan*, 61.25% of the $1 million payout went to class members, while only 25% went toward attorneys' fees (the remaining amount covered costs). 2012 WL 216522 at *1. In *Vandervort*, at least 52% of the payout went either to the claimants or to a *cy pres* fund, with the attorneys' fees constituting (at most) 48% of the payout. 2014 WL 1274049. *See also Bellows*, 2009 WL 35468 (attorneys' fees approximately 60% of the total payout); *Lo*, 2012 WL 1932283, at *1 and n.1 (attorneys' fees represented 25% of the $49,100 paid out); *Ritchie*,

2014 WL 3955268 at *3 (attorneys' fees represented nearly 40% of the $2.3 million paid out).

The fee that counsel suggests here would constitute about 84% of the $1,194,680 total payout to the class. *Ex ante,* no client would have negotiated an 84% contingency fee. Of course, we are viewing the matter *ex post,* with the benefit of knowledge of actual claims submitted. Nevertheless, experience teaches that the assumption underlying this proposed fee award—that 100% of the class would submit claims for webinar benefits—is unrealistic and would have been unrealistic at the time this settlement was negotiated. This proposed fee award is disproportionate to the benefit received by the class.

E. The benefit to each claimant and to the non-claimant class members

There is another side to the proportionality story, however, one that does support a fee representing a more modest multiplier of hourly billings., I also consider that the recovery to each claimant represents a high percentage of the maximum recovery available. In addition, some cash benefits flow, not just to claimants, but to substantially the entire ascertainable class. This discussion is relevant to *Rite Aid* factor one (size of the fund created and the number of persons benefited); to a lesser degree, it bears on factor two (reaction of the class to the settlement) and three (skill and efficiency of counsel).

TCPA imposes statutory damages of $500 for each unsolicited fax. *See* 47 U.S.C. § 227(b)(3).[20] The 303 claimants here are each receiving a high percentage of what they could have recovered if they had litigated their claims individually. Under the cash portion of the settlement, each claimant is getting $125 per undocumented fax (for up to five faxes); and $175 per documented fax (for up to five faxes). (Fitzgerald Brief, 12-13). That amounts to either 25% or 35% of the statutory damages, with little or no effort or expense required.

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[20] This damages figure is subject to trebling if the plaintiff can show that the defendant willfully or knowingly violated the TCPA. 47 U.S.C § 227(b)(3)(B), (C)). No such proofs have been proffered here.

For each of the 216 claimants who claimed the non-cash webinar benefit (worth approximately $230), the recovery is even higher: equivalent to 71% of statutory damages per undocumented fax, and 81% per documented fax. (Fitzgerald Brief, 13). This might explain why (as *Rite Aid* factor two directs the court to consider) no class member objected to the settlement, and only one opted out. (Fitzgerald Brief, 42).

The recovery here is not out of line with class members' average recoveries in other TCPA class actions. *See, e.g., Michel*, 2014 WL 497031 at *18 (plaintiffs recovered $240 each, just less than half of the $500 to which they were entitled under the statute); *Vandervort*, 2014 WL 1274049 at *2 (class members received between $175 and $275 for undocumented faxes, and $500 per fax received for documented faxes); *Lo*, 2012 WL 1932283 at *1-2 (claimants were paid $1,331.23, representing 88.75% of the $1,500 that each class member could have recovered for a willful violation); *Ritchie*, 2014 WL 3955268 at *3 (claimants would receive, on average, 95.83% of what they could have recovered under the statute).

That claimants will receive a substantial percentage of statutory damages is encouraging. That relatively high recovery per claimant, however, may not be wholly attributable to counsel's skill (contemplated by *Rite Aid* factor three). Of the 8,181 class members (7,769 of whom were successfully notified), 303 (or about 3.7%) submitted claims. (Fitzgerald Brief, 11, 12-13.). So a relatively small number of claimants stand to receive the per-fax cash benefit described above.

The settling parties were surely aware that the response rate was likely to be low. Common fund cases generally, and TCPA cases in particular, tend to yield low response rates. *See, e.g., Michel*, 2014 WL 497031, at *4 (2.7%); *Rose*, 2014 WL 4273358 at *5 (about 3.2%); *Americana Art*, 743 F.3d at 245 (7.3%); *Vandervort* 2014 WL 1274049 at 1205 (0.48%); *Lo*, 2012 WL 1932283, at *2 (10.84%); *Ritchie v. Van Ru Credit Corp.*, No. 2:12-CV-01714, Plaintiff's Unopposed Motion for Final Approval of Class Action Settlement, No. 91 at 6

(10.62%). Thus the settling parties could reasonably have expected that the cash payout would not exhaust the $1,145,000 cash fund.

The backstop provision of this settlement, however, provides that any residual unclaimed cash in the $1,145,000 fund would nevertheless benefit the class. That residue is initially to be distributed pro rata to the large majority of the class who did *not* submit claims (or rather, to those for whom the administrator can locate a current address). So a low response rate does not inure to the benefit of the defendant or class counsel; leftover funds will go to class members. *See* Part III.G, *infra*.

Granted, the webinar benefit was theoretically available to every class member, and its $230 value would not be diluted by the number of claimants. The settlement provided, however, that the webinar benefit would be granted only to class members who specifically claimed it. And in fact only 216 class members did claim it, for a total value of just $49,680. The webinar benefit, as opposed to the cash fund, will not benefit non-claimants.

Nevertheless, I conclude that the relatively high payout and the broad distribution of benefits favor some premium over counsel's hourly billings.

In contrast, the injunctive relief that the settlement provides is at best nominal, and does not argue for a fee larger than the attorneys' billing. Gann has agreed to refrain from sending any faxes that violate the TCPA. Such an injunction does not significantly alter the position of either the defendants or the class. Everyone is prohibited from sending faxes that violate the TCPA. The promise that class counsel have extracted from Gann is largely superfluous, except insofar as it is potentially enforceable by contempt. This is not, for example, an additional promise to refrain from contacting class members. Nor has Gann agreed to adopt new procedures for avoiding violations of the TCPA. Gann has simply agreed that it will not violate the law. The injunction thus does little to support an enhanced fee.

F. Remaining *Rite Aid* factors: Reaction of class, Skill of attorneys, Complexity of litigation, Risk of nonpayment.

I deal more briefly with the remaining *Rite Aid* factors. I here discuss them more briefly, as they substantially overlap the *Girsh* factors already discussed at Part I, *supra*.

The second *Rite Aid* factor looks to the reaction of the class. As noted above, only 3.7% of the class made claims. No one objected to the terms of the settlement in general, or to the attorneys' fees in particular. This factor favors a fee in excess of hourly billing.

The third *Rite Aid* factor involves the skill and efficiency of the attorneys. The claim is not a particularly difficult one to establish. The class has, however, benefited from class counsel's experience in this kind of litigation. Counsel's hourly billings do not appear excessive. The settlement was reached without undue wrangling or dilatory proceedings. Class counsel (as well as defense counsel) have been efficient and professional. This factor, too, favors a fee in excess of hourly billing.

The fourth and fifth *Rite Aid* factors, the complexity and duration of the litigation and the risk of nonpayment, are interrelated. Viewed in one way, a TCPA case is fairly simple: the defendant's records of fax transmissions provide both the core proof of liability and the means of notifying the class. Damages, which are set by statute, do not involve the court in complicated factual questions or difficult issues of causation. One proof problem, though perhaps not an insurmountable one, might be the recipients' failure to retain the faxes.[21] Others are referred to above at Part I (*Girsh* factors four and five). The settlement was structured to circumvent these.

This case did, however, face significant issues of class action procedure, now resolved, that seemed to threaten its viability. Originally filed in state court, the case quickly ran afoul of a ruling barring TCPA class actions from

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21 By hypothesis, the faxes were unwanted. Ironically, however, the recipients who retained the faxes (and thus were able to document their claims and receive the higher payout) might have been the very recipients who valued them at the time.

the courts of New Jersey. In response, the plaintiffs moved to voluntarily dismiss the state case without prejudice so that they could refile it in federal court. Defendants opposed and appealed the voluntary dismissal, which was ultimately upheld. (Fitzgerald Brief, 4).

Plaintiff then refiled the case here in federal court. At first it was unclear whether New Jersey's bar on TCPA class actions would apply in federal court as well. (Fitzgerald Brief, 46). Several months after this federal action was filed, however, that issue was resolved in plaintiffs' favor by the United States Supreme Court in *Mims v. Arrow Financial Services, LLC*, 132 S. Ct. 740 (Jan. 18, 2012). Counsel may have benefited fortuitously from the timing of the *Mims* ruling. That does not detract from the reality that, at the time of filing, this class action was not a sure thing. That litigation risk will figure in my calculus.

Setting aside the risk of non-payment, I consider the delay in payment. The original action was filed in May 2011. Class counsel have invested a considerable (though not gargantuan) amount of time. They have also absorbed significant (though not ruinous) out-of-pocket expenses to the tune of $15,599.19. (Fitzgerald Brief, 57). I take it they have not yet been paid anything. The time value of that delayed payment may justify an upward adjustment of the attorney's fee. *See Bellows v. NCO Financial Systems, Inc.*, No. 07-cv-1413, 2009 WL 35468 at *5 (S.D. Cal. Jan. 5, 2009) (*citing Missouri v. Jenkins*, 491 U.S. 274, 283-284 (1989) ("[a]n adjustment for delay in payment is an appropriate factor in determining what constitutes a reasonable attorneys' fee under federal fee-shifting statutes").

All in all, I agree that the uncertainty of recovery, viewed from the standpoint of the time of filing, weighs in favor of an award of attorneys' fees somewhat higher than counsel's actual hourly billings.

G. Award of reasonable attorneys' fees

Weighing all of the considerations stated above, I have determined that an appropriate award of attorneys' fees is $421,577.00. That corresponds to twice the amount of hourly billing, *i.e.*, a lodestar multiplier of 2. Awarding

counsel 200% of their actual billing is warranted given the result obtained, the difficulties that counsel faced, and the other factors stated above. For the reasons expressed above, however, the proposed award, which corresponds to a multiplier of 4.78, would not be reasonable. A multiplier of 2 is more proportionate to the true value of the settlement, and is in keeping with the multipliers ranging from .8 to 2.71 found in reported TCPA settlements.

I also consider the award of $421,577.00 from the point of view of a contingent fee. That sum represents just 14% (rather than the proposed 33%) of the $3,026,290 settlement value calculated by class counsel. Even standing alone, that is within the realm of reasonableness; as noted above, a 33% contingent rate is high when compared to the rates of 15% to 28% approved by courts in other TCPA cases. But the real point is that the $3,026,290 settlement value is inflated. The true settlement value is closer to a maximum of $1,194,680. Class counsel's proposed fee of $1,008,763.33 would represent a very unreasonable 84% of that true value. My award of $421,577, measured against the settlement's true value, corresponds to a contingent fee of approximately 35%, which is more than fair. The contingent percentage method and the lodestar method are accepted means of evaluating attorneys' fees. *See Rite Aid*, 396 F.3d at 300, 305 (explaining that the percentage recovery method is preferred in common fund cases, but recommending that courts nonetheless use the lodestar method as a "cross-check"). As explained, a fee of $421,577 is reasonable under either.

Reduction of the proposed attorneys' fees will leave additional money in the cash fund. In accordance with the Settlement Agreement, that additional residue shall remain in the fund for the benefit of the class. The settlement provides that the residue of the cash fund is initially to be distributed *pro rata* among the non-claimant class members, up to a maximum of $125 per person. That residue will now be larger than the $77,611.67 (less expenses) anticipated

by class counsel, but the disposition will nevertheless proceed in the manner contemplated by the Settlement Agreement.[22]

The revised calculation of the cash residue (rounded to the nearest dollar) is as follows:

$1,145,000 cash fund
- $ 53,625 distributed to 303 claims made
- $ 5,000 incentive award to named representative
- $ 421,577 attorneys' fees
- $ 15,600 attorneys' expenses[23]
= **$ 649,198** residue

After deduction of administrative expenses, that $649,198 residue will be distributed to all class members who did not file a claim, if the administrator can obtain a valid address for them. That will amount to as many as 7,466 persons. A *pro rata* distribution to all of them would amount to approximately $87 per person. Because that is well below the maximum of $125 (Settlement Agreement ¶ 8(a)(iii)), there is no need to consider the second tranche of distributions provided for in ¶ 10(e).[24]

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[22] Gann appears to agree that the amount by which the attorneys' fees are reduced should not revert to itself, but should be redistributed to class members: "The amount of the [$1,145,000] cash fund to be distributed to each class member will largely depend on the amount of attorneys' fees and Plaintiff's incentive award to be awarded by the Court. The greater the fees and the greater the incentive award, the smaller the amount to be distributed to each class member." Gann Brief, 1.

[23] Class counsel's original proposal included their expenses in the contingent fee. Giving the benefit of the doubt, I have awarded them separately.

[24] The administrator's calculation will unfold along the following lines. As noted above, payments from the $1,145,000 cash fund are made first to cover administrative costs, the incentive award, attorneys' fees and expenses, and the 303 claims. (Settlement Agreement, ¶¶ 1(a), 10(a) - (b)). From the residue of the Fund, up to $125 per person will be distributed to those individuals who did not file a claim, but who (as determined by the claims administrator) owned a number to which an offending fax was sent. *Id.* at ¶¶ 10(c), 8(a)(iii). If there were any money left over after that distribution, it would be distributed to all three of the above categories of class members (*i.e.*, the 303 claimants who produced a copy of a fax or a declaration, and

CONCLUSION

The terms of the Settlement Agreement and the incentive award will be approved as proposed, except that the attorneys' fee award is reduced to $421,577. A separate order will issue.

Dated: December 17, 2014
Newark, New Jersey

Kevin McNulty
United States District Judge

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the class members who owned one of the fax numbers as determined by the claims administrator). *Id.* at ¶ 10(e).

It appears that a maximum of about 7,466 class members are eligible to receive a pro rata share of up to $125 from the residual amount (*i.e.*, the 7,769 class members who were successfully notified, less the 303 class members who filed a claim). Settlement Agreement, ¶ 8(a)(iii). Assuming no expenses, and assuming addresses for all could be found, they would receive a maximum award of approximately $87 per individual. That $87 award does not exceed the $125 maximum award under ¶ 8(a)(iii). Hence there will be no further distribution to all class members (including claimants) under ¶ 10(e) of the settlement agreement.