

have a substantial presence and track record in the United States. This is due to the importance of timely and effective service and support, as well as a strong "buy American" sentiment. Second, there are no significant foreign companies that produce mobile RF AMR systems.

The United States market for mobile RF AMR systems is highly concentrated. Itron and Schlumberger Electricity are the two largest suppliers of mobile RF AMR systems to electric utilities in the United States, and combined would account for over 99 percent of the market. There are three other firms in the market that together have a market share of less than one-half of one percent. Additionally, because Itron and Schlumberger Electricity are the only two mobile RF AMR suppliers with access to the proprietary ERT technology, the industry standard, they are especially close competitors, and the direct competition between Itron and Schlumberger Electricity has benefitted consumers significantly in the form of lower prices, improved service and greater innovation. Absent Commission action, Itron's acquisition of Schlumberger Electricity raises serious antitrust concerns.

Finally, sufficient new entry into the United States mobile RF AMR market is unlikely to occur in a timely manner as there are significant impediments to entry and expansion. A new entrant would need to devote significant time and expense to researching and developing a product. Second, a new entrant must undertake the lengthy and costly process of establishing a track record of performance and reliability for its product, which is critical to utility customers because they rely on the quality and accuracy of AMR systems in order to properly bill their customers. Further, a new entrant would not have access to the intellectual property necessary to sell a mobile RF AMR system that is compatible with the substantial installed base of systems produced by Itron and Schlumberger Electricity, which would significantly limit the available sales opportunities.

#### IV. The Consent Agreement

The Consent Agreement effectively remedies the Proposed Acquisition's anticompetitive effects in the U.S. market for the research, development, manufacture, and sale of mobile RF AMR systems by requiring Itron to grant a royalty-free license to its mobile RF AMR technology. Pursuant to the Consent Agreement, a package of assets referred to in the Consent Agreement as the RF AMR Assets, will be licensed to Hunt. The RF AMR Assets provide Hunt

with all the technology and rights necessary to manufacture and sell a mobile RF AMR system, including endpoints and receivers, that is entirely interoperable with Itron's mobile RF AMR system. Should Itron fail to accomplish the divestiture within the time and in the manner required by the Consent Agreement, the Commission may appoint a trustee to divest the RF AMR Assets subject to Commission approval. The trustee will have the exclusive power and authority to accomplish the divestiture within twelve (12) months of being appointed, subject to any necessary extensions by the Commission.

The Commission is satisfied that Hunt is a well-qualified acquirer of the divested assets. Hunt is a private corporation headquartered in Pequot Lakes, Minnesota, that researches, develops, manufactures, and sells powerline carrier ("PLC") systems to electric utilities. PLC systems are a type of AMR technology used primarily for rural service areas. PLC systems are therefore complementary to mobile RF AMR systems, which are utilized primarily in areas of low population concentration. Therefore, Hunt does not pose separate competitive issues as the acquirer of the license to the RF AMR assets. Due to its involvement in the electric utility industry, Hunt has the resources, related expertise and capabilities to ensure that it will become an effective competitor in the market for mobile RF AMR systems for electric utilities.

Until Hunt has made the necessary manufacturing arrangements, Hunt will procure Electric RF Endpoints from Itron at terms that will allow Hunt to aggressively compete with Itron immediately upon the closing of the transaction. Under a separate supply agreement, Hunt may also procure mobile RF AMR receivers from Itron under terms that would enable Hunt to compete effectively with Itron. To provide mobile RF AMR receivers, however, Hunt may choose to partner with Neptune, as did Schlumberger Electricity. To ensure that Hunt retains the ability to partner with Neptune for mobile RF AMR receiving devices and to allow Neptune to continue to make sales for its own account, the proposed consent agreement requires Itron to assign all of Schlumberger Electricity's mobile RF AMR receiving device rights to Neptune.

The Consent Agreement contains several further provisions designed to help ensure that the divestiture of the mobile RF AMR Assets is successful. First, to assist Hunt in the manufacture and sale of the Hunt mobile RF AMR

system, Itron will provide technical assistance to Hunt, including 200 hours of technical assistance at no cost to Hunt. Second, Itron must provide Hunt with any updates to ERT technology for a period of three years. Finally, the Decision and Order allows the Commission to appoint an Interim Monitor, if necessary, to ensure that Itron complies with all of its obligations and performs all of its responsibilities as required by the Consent Agreement.

The purpose of this analysis is to facilitate public comment on the Consent Agreement, and is not intended to constitute an official interpretation of the proposed Decision and Order or the Order to Maintain Assets, or to modify their terms in any way.

By direction of the Commission.

**C. Landis Plummer,**

*Acting Secretary.*

[FR Doc. 04-13082 Filed 6-9-04; 8:45 am]

**BILLING CODE 6750-01-P**

## FEDERAL TRADE COMMISSION

[File No. 042-3033]

### KFC Corporation; Analysis to Aid Public Comment

**AGENCY:** Federal Trade Commission.

**ACTION:** Proposed consent agreement.

**SUMMARY:** The consent agreement in this matter settles alleged violations of Federal law prohibiting unfair or deceptive acts or practices or unfair methods of competition. The attached Analysis to Aid Public Comment describes both the allegations in the draft complaint that accompanies the consent agreement and the terms of the consent order—embodied in the consent agreement—that would settle these allegations.

**DATES:** Comments must be received on or before July 2, 2004.

**ADDRESSES:** Comments should refer to "KFC Corporation, File No. 042 3033," to facilitate the organization of comments. A comment filed in paper form should include this reference both in the text and on the envelope, and should be mailed or delivered to the following address: Federal Trade Commission/Office of the Secretary, Room H-159, 600 Pennsylvania Avenue, NW., Washington, DC 20580. Comments containing confidential material must be filed in paper form, as explained in the **SUPPLEMENTARY INFORMATION** section. The FTC is requesting that any comment filed in paper form be sent by courier or overnight service, if possible, because U.S. postal mail in the Washington area

and at the Commission is subject to delay due to heightened security precautions. Comments filed in electronic form (except comments containing any confidential material) should be sent to the following e-mail box: [consentagreement@ftc.gov](mailto:consentagreement@ftc.gov).

**FOR FURTHER INFORMATION CONTACT:** Shira Modell or Michelle Rusk, FTC, Bureau of Consumer Protection, 600 Pennsylvania Avenue, NW., Washington, DC 20580, (202) 326-3116 or 326-3148.

**SUPPLEMENTARY INFORMATION:** Pursuant to section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46(f), and section 2.34 of the Commission's Rules of Practice, 16 CFR 2.34, notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement, and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC Home Page (for June 3, 2004), on the World Wide Web, at <http://www.ftc.gov/os/2004/06/index.htm>. A paper copy can be obtained from the FTC Public Reference Room, Room 130-H, 600 Pennsylvania Avenue, NW., Washington, DC 20580, either in person or by calling (202) 326-2222.

Public comments are invited, and may be filed with the Commission in either paper or electronic form. Written comments must be submitted on or before July 2, 2004. Comments should refer to "KFC Corporation, File No. 042 3033," to facilitate the organization of comments. A comment filed in paper form should include this reference both in the text and on the envelope, and should be mailed or delivered to the following address: Federal Trade Commission/Office of the Secretary, Room H-159, 600 Pennsylvania Avenue, NW., Washington, DC 20580. If the comment contains any material for which confidential treatment is requested, it must be filed in paper (rather than electronic) form, and the first page of the document must be clearly labeled "Confidential."<sup>1</sup> The

FTC is requesting that any comment filed in paper form be sent by courier or overnight service, if possible, because U.S. postal mail in the Washington area and at the Commission is subject to delay due to heightened security precautions. Comments filed in electronic form should be sent to the following e-mail box: [consentagreement@ftc.gov](mailto:consentagreement@ftc.gov).

The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. All timely and responsive public comments, whether filed in paper or electronic form, will be considered by the Commission, and will be available to the public on the FTC Web site, to the extent practicable, at [www.ftc.gov](http://www.ftc.gov). As a matter of discretion, the FTC makes every effort to remove home contact information for individuals from the public comments it receives before placing those comments on the FTC Web site. More information, including routine uses permitted by the Privacy Act, may be found in the FTC's privacy policy, at <http://www.ftc.gov/ftc/privacy.htm>.

#### **Analysis of Proposed Consent Order To Aid Public Comment**

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a consent order from KFC Corporation ("KFCC").

The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make final the agreement's proposed order.

This matter involves the advertising and promotion of KFC Original Recipe fried chicken. According to the FTC complaint, KFC represented that eating KFC fried chicken, specifically 2 Original Recipe fried chicken breasts, is better for a consumer's health than eating a Burger King Whopper. The complaint alleges that this claim is false. Although 2 KFC Original Recipe fried chicken breasts have slightly less total fat (38 g. v. 43 g.) and saturated fat (12 g. v. 13 g.) than Burger King's Whopper, they have more trans fat (3.5 g. vs. 1 g.), more cholesterol (290 mg. v. 85 mg.), more sodium (2300 mg. vs. 980 mg.), and more calories (760 v. 710).

public interest. See Commission Rule 4.9(c), 16 CFR 4.9(c).

The FTC's complaint also alleges that KFCC represented that eating KFC fried chicken is compatible with "low carbohydrate" weight loss programs. The FTC alleges that this claim is false because "low carbohydrate" weight loss programs such as the Atkins Diet and the South Beach Diet, for example, advise against eating breaded, fried foods.

The proposed consent order contains provisions designed to prevent KFCC from engaging in similar acts and practices in the future.

Part I of the order prohibits KFCC from representing that eating KFC fried chicken is better for a consumer's health than eating a Burger King Whopper, or that eating KFC fried chicken is compatible with "low carbohydrate" weight loss programs, unless the representation is true and, at the time it is made, KFCC possesses and relies upon competent and reliable evidence—which in certain specified cases must be competent and reliable scientific evidence—that substantiates the representation.

Part II prohibits KFCC from making certain representations about the absolute or comparative amount of fat, cholesterol, sodium, calories or any other nutrient in any food it sells that contains chicken, about the compatibility of such food with any weight loss program, or about the health benefits of such food, unless the representation is true and, at the time it is made, KFCC possesses and relies upon competent and reliable evidence—which in certain specified cases must be competent and reliable scientific evidence—that substantiates the representation.

Part II also provides that representations conveying nutrient content or health claims that have been defined (for labeling purposes) by regulations promulgated by the Food and Drug Administration ("FDA") will be evaluated using the same nutrient thresholds that FDA has established for those claims. Furthermore, Part II provides that a mere numerical statement of the amount of a particular nutrient in such food will not, by itself, be considered to be a weight loss compatibility or health benefit claim covered by Part II.

Part III permits any representation for any product that is permitted in labeling for such product pursuant to regulations promulgated by FDA pursuant to the Nutrition Labeling and Education Act of 1990.

Parts IV through VII of the order require KFCC to keep copies of relevant advertisements and materials substantiating claims made in the

<sup>1</sup> Commission Rule 4.2(d), 16 CFR 4.2(d). The comment must be accompanied by an explicit request for confidential treatment, including the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. The request will be granted or denied by the Commission's General Counsel, consistent with applicable law and the

advertisements; to provide copies of the order to certain of its current and future personnel for three years; to notify the Commission of changes in corporate structure; and to file compliance reports with the Commission. Part VIII provides that the order will terminate after twenty (20) years under certain circumstances.

The purpose of this analysis is to facilitate public comment on the proposed order, and it is not intended to constitute an official interpretation of the agreement and proposed order or to modify in any way their terms.

By direction of the Commission.

**C. Landis Plummer,**  
Acting Secretary.

#### **Statement of Commissioner Pamela Jones Harbour**

The Commission has entered into a consent agreement with KFC Corp. ("KFCC") to settle allegations that the company deceptively advertised its fried chicken as being compatible with low-carbohydrate weight loss programs, among other claims. I concur with the Commission's admirable results in obtaining strong injunctive relief, and I applaud staff for bringing a national advertising case. I believe, however, that an even stronger remedy is warranted. KFCC is fully aware of our nation's struggle with obesity, yet has cynically attempted to exploit a massive health problem through deceptive advertising. Companies should not be allowed to benefit monetarily from this kind of deception, especially where the health and safety of consumers are compromised. Therefore, I encourage the Commission to find ways to seek monetary relief in future cases like this one.

Our nation's obesity rate has "reached epidemic proportions, afflicting 6 out of every 10 Americans."<sup>1</sup> Being overweight or obese is "the second leading cause of preventable death, after smoking, resulting in an estimated 300,000 deaths per year. The costs, direct and indirect, associated with [being] overweight and obese are estimated to exceed \$100 billion a year."<sup>2</sup> Obesity has been described as both an "epidemic" and a "crisis."<sup>3</sup> Many consumers are interested in controlling their weight, and they rely

heavily on the nutritional information in food advertisements to help them make choices about which foods to eat.

In the fall of 2003, KFCC apparently was suffering from decreased fried chicken sales, perhaps as a result of consumers' interest in a healthier diet.<sup>4</sup> In October 2003, KFCC embarked on an ad campaign in which it deceptively advertised that eating KFC fried chicken is compatible with a "low carbohydrate" weight loss program, even though "low carbohydrate weight loss programs such as the Atkins Diet and the South Beach Diet advise against eating breaded, fried foods."<sup>5</sup> In another ad, KFCC advertised that eating two of its "Original Recipe" fried chicken breasts was better for a consumer's health than eating a Burger King Whopper—even though the chicken is nearly equivalent to the Whopper in fat grams and is actually higher in trans fat, cholesterol, sodium and calories.<sup>6</sup> Both ads also promote an entire bucket of chicken, even though the voiceovers in the ads referenced one or two-piece servings.<sup>7</sup>

KFCC knew (or certainly should have known) that its ads were false and deceptive, and that the ads would encourage consumers to believe that KFC fried chicken was much healthier for them than it actually is. Only a few days after the ads aired, an *Advertising Age* editorial strongly criticized KFCC for running them, describing the ads as "desperate and sleazy tactics."<sup>8</sup> In an interview on National Public Radio, the executive editor of *Advertising Age* stated that it was "very unusual" for the publication to run such a staff editorial, but justified it by saying that "[i]nstead of being truth well told, which is what advertising should be, it seems like not only an exaggerated claim, but basically

an effort to deceive."<sup>9</sup> Consumer advocacy groups complained about the ads as well, and the ads were the subject of much discussion until they stopped airing in late November 2003.<sup>10</sup>

I have voted to accept the proposed settlement because it contains very strong injunctive relief that will go a long way toward preventing KFCC from engaging in similar deceptive advertising in the future. In addition to addressing the specific claims made in the KFCC ads, the proposed consent agreement also contains more general language prohibiting KFCC from making representations about the absolute or comparative amount of fat, cholesterol, sodium, calories, or any other nutrient in any food it sells that contains chicken; about the compatibility of such food with any weight loss program; or about the health benefits of such food, unless the representation is true and, at the time it is made, KFCC possesses and relies upon competent and reliable evidence—which in certain specified cases must be competent and reliable scientific evidence—that substantiates the representation.<sup>11</sup>

Accepting injunctive relief alone is reasonably consistent with the Commission's prior settlements in similar cases. However, where a company appears to have exploited a national health crisis, an even stronger response from the Commission is warranted. While I recognize that it may be difficult to calculate monetary relief in these kinds of cases, I would like to see the Commission develop methodological approaches that would support seeking such remedies in future cases of similar types of deceptive advertising, as the Commission has done in the past. For example, in 1995, the FTC settled charges with The Dannon Company that it had made false or misleading claims for its Pure Indulgence line of frozen yogurt. As part of the consent agreement, Dannon agreed to pay \$150,000 in disgorgement.<sup>12</sup> Similarly, in 1983, the FTC settled charges with Estee Corporation that it had misled

<sup>4</sup> See 20/20: *Fast Not Fat: Fast Food Chains Will Go to Any Lengths to Keep People Eating Their Food* (ABC News television broadcast, Oct. 31, 2003); Editorial, *KFC blunders in "health" ads*, *Advertising Age* (Nov. 3, 2003), at 22; Bob Garfield, *Garfield's AdReview: KFC serves big, fat bucket of nonsense in "healthy" spots*, *Advertising Age* (Nov. 3, 2003), at 61.

<sup>5</sup> In the Matter of *KFC Corporation*, File No. 042–3033, Complaint at ¶¶ 5, 8–9 (June 2, 2004).

<sup>6</sup> *Id.* at ¶ 7 ("While compared to Burger King's Whopper, two KFC Original Recipe fried chicken breasts have slightly less total fat (38 g. v. 43 g.) and saturated fat (12 g. v. 13 g.), they have more trans fat (3.5 g. vs. 1 g.), more cholesterol (290 mg. v. 85 mg.), more sodium (2300 mg. vs. 980 mg.), and more calories (760 v. 710).").

<sup>7</sup> See, e.g., *World News Tonight with Peter Jennings: Good for You? KFC Adverts* (ABC television broadcast, Nov. 19, 2003); *NBC Nightly News with Tom Brokaw: Federal Trade Commission Wanting Proof That KFC's Chicken Can Be Called a Health Food in TV Commercials* (NBC television broadcast, Nov. 18, 2003); *KFC Corporation*, Complaint at ¶ 5 (setting forth voiceovers).

<sup>8</sup> Garfield, *supra* note 4.

<sup>9</sup> *Day To Day: Jonah Bloom Discusses Advertising Age Magazine's Editorial Criticism of KFC's New Ad Campaign* (National Public Radio broadcast, Nov. 6, 2003).

<sup>10</sup> See, e.g., Bruce Schreiner, *KFC Ends Healthy Fried Chicken Ad Blitz*, *Assoc. Press Online* (Nov. 19, 2003); 20/20, *supra* note 4.

<sup>11</sup> In the Matter of *KFC Corporation*, File No. 042–3033, Analysis of Proposed Consent Order to Aid Public Comment (June 2, 2004).

<sup>12</sup> FTC Press Release, *Dannon Agrees To Settle FTC Charges That Low-Fat Ad Claims for Frozen Yogurt were False and Misleading* (Nov. 25, 1995); In the Matter of *The Dannon Company, Inc.*, Dkt. No. C–3643, 121 F.T.C. 136, 139 (March 18, 1996) (consent order).

<sup>1</sup> *Weight-Loss Advertising: An Analysis of Current Trends, A Report of the Staff of the Federal Trade Commission* (Sept. 2002), at vii ("Executive Summary"), available at <http://www.ftc.gov/bcp/reports/weightloss.pdf>.

<sup>2</sup> *Id.*

<sup>3</sup> See *The Time/ABC News Summit on Obesity* (Preliminary Agenda for June 2–4, 2004), available at <http://www.time.com/time/2004/obesity>; America's Obesity Crisis, *Time* (June 7, 2004).

consumers by falsely claiming that the sweeteners in its foods had been accepted by the American Diabetes Association and the Food and Drug Administration. Estee Corporation agreed to pay \$25,000 in *cy pres* relief to the American Diabetes Association or the Juvenile Diabetes Foundation.<sup>13</sup>

While injunctive relief is important in deceptive advertising cases such as this one, monetary relief may further serve to correct unlawful conduct, reverse its ill effects, and deter future violations of the law. Well-formulated *cy pres* relief, in particular, may provide real benefits to consumers. It is not only reasonably related to the violation, but also reasonably likely to reach the individuals most injured by a particular deceptive advertisement. Should the appropriate case present itself in the future, I strongly encourage the Commission to consider the applicability and effectiveness of *cy pres* and other potential monetary remedies.

#### Statement of Commissioner Mozelle W. Thompson

I have voted to accept the consent agreement with KFC Corp. in this matter and I concur with Commissioner Harbour's statement.

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Office of the Secretary

#### Funding Opportunity Title: Announcement of Availability of Funds for Cooperative Agreements for Family Planning Research

*Announcement Type:* This is the initial announcement of this competitive funding opportunity.

*CFDA Number:* 93.974.

**Authority:** Section 1004 of the Public Health Service (PHS) Act.

**DATES:** To receive consideration, applications must be received by the Office of Public Health and Science (OPHS) Grants Management Office no later than August 9, 2004.

**SUMMARY:** The Office of Population Affairs (OPA) announces the availability of fiscal year (FY) 2004 funds for a

cooperative agreement program for family planning research. The purpose of this program is to obtain data or research-based information which can be used to help improve the delivery of family planning services.

Title X of the Public Health Service Act, 42 U.S.C. 300, *et seq.*, authorizes programs related to family planning. Section 1004 of the Act, as amended, authorizes the Secretary of Health and Human Services to award grants to entities for research in the biomedical, contraceptive development, behavioral, and program implementation fields related to family planning and population. Implementing regulations can be found at 42 CFR part 52.

The OPA is committed to achieving the health promotion and disease prevention objectives of "Healthy People 2010," a PHS-led national activity for setting priority areas. This announcement is related to the priority area of family planning. Potential applicants may obtain a copy of "Healthy People 2010" at <http://www.health.gov/healthypeople>.

#### Overview Summary

The Office of Population Affairs (OPA) announces the availability of \$350,000 to \$450,000 for fiscal year (FY) 2004 funds for one to three cooperative agreement projects for family planning research. Awards will be \$150,000 to \$250,000 per year and will be funded in annual increments (budget periods) and may be approved for a project period of up to five years. Funding for all budget periods beyond the first year of the cooperative agreement is contingent upon the availability of funds, satisfactory progress of the project, and adequate stewardship of Federal funds.

#### I. Funding Opportunity Description

This announcement seeks applications from public and non-profit private entities to conduct data analyses and related research and evaluation on issues of interest to the family planning field. Many persons have observed that gaps exist in the array of data and analyses needed by administrators, planners, and researchers in the field of family planning. The need for such data is likely to increase. Therefore, funds available under this announcement are for projects to increase the availability of data and research-based information which will be useful to family planning administrators and providers, researchers, and officials of local, State, and the Federal government, including OPA, in order to improve the delivery of family planning services to persons needing and desiring such services.

#### II. Award Information

The OPA intends to make available approximately \$350,000 to \$450,000 to support an estimated one to three research projects. Awards will range from \$150,000 to \$250,000 per year. Projects will be funded in annual increments (budget periods) and may be approved for a project period of up to five years. Funding for all budget periods beyond the first year of the cooperative agreement is contingent upon the availability of funds, satisfactory progress of the project, and adequate stewardship of Federal funds.

A cooperative agreement is an award instrument establishing an "assistance" relationship between OPA and a recipient, in which substantial programmatic involvement with the recipient is anticipated during performance of the activity. The recipient will have lead responsibilities in all aspects of the study, including any modification of study design, conduct of the study, data analysis and interpretation, and preparation of publications. However, OPA will collaborate with the recipient, as appropriate, and provide consultation, assistance, and support in planning, implementing, and evaluating all aspects of the proposed plan. OPA will provide assistance in the preparation and review of reports to be disseminated.

#### III. Eligibility Information

##### 1. Eligible Applicants

Any public or private nonprofit entity located in a State (which includes one of the 50 United States, the District of Columbia, Commonwealth of Puerto Rico, U.S. Virgin Islands, Commonwealth of the Northern Mariana Islands, American Samoa, Guam, Republic of Palau, Federated States of Micronesia, and the Republic of the Marshall Islands) is eligible to apply for a cooperative agreement under this announcement. Faith-based organizations are eligible to apply for these cooperative agreements for family planning research.

##### 2. Cost-Sharing or Matching

No cost sharing or matching of non-Federal funds is required.

#### IV. Application and Submission Information

##### Form of Application and Submission Information

##### 1. Address to Request Application Package

Applications kits may be requested from, and applications should be

<sup>13</sup> In the Matter of Estee Corporation, Dkt. No. C-3126, 102 F.T.C. 1804, 1812 (Nov. 16, 1983) (consent order). *Cy pres* relief, also known as indirect restitution or fluid recovery, is used in situations where injured persons cannot be directly compensated. Instead, under *cy pres*, restitutionary funds are awarded in some alternate way that indirectly benefits the injured persons.