Statement of Federal Trade Commission
Concerning *FTC v. Speedway Motorsports, Inc.*

The Federal Trade Commission has voted 4-1[1] to approve a stipulated motion and corresponding order to modify the Stipulated Final Order for Permanent Injunction and Monetary Relief ("Order") entered by the District Court against defendants Speedway Motorsports, Inc. ("Speedway") and Oil-Chem Research Corp. The FTC takes order enforcement seriously, but enforcing the Order as written would not best serve the public interest. Given the unique posture of this case, and balancing all the considerations detailed below, the majority believes that modifying the Order is the only sensible approach. Commissioner Chopra's dissent states no good case to reject the proposed modification of the Order that is before us now, nor does it suggest any alternative course of action that would better serve consumers than the one we adopt.

Fifteen years ago, the FTC and Speedway agreed to settle charges that Speedway and co-defendant Oil-Chem Research Corp. had misled consumers through false advertising about its fuel additive. Under the Order, Speedway was to refund $1 million directly to consumers. The Order specified that if any consumers did not cash their refund checks, Speedway would divvy up the remaining money and send it out to those who did cash their checks, and so on until the entire $1 million had been returned to victims of Speedway's deceit.

Speedway carried out the first round of refunds, but it failed to conduct the follow-up rounds. As a result, although it initially mailed out checks to over 81,000 consumers, each for $12.31 and totaling $1 million, over 6,500 recipients did not cash their checks and Speedway was left with $80,590.72, which it retains to this day. It failed to implement further rounds. The FTC did not uncover the failure to refund the remaining $80,590.72. A decade and a half later, when Speedway self-reported the undistributed funds, the Commission had no realistic prospect of independently detecting this error (as discussed below, this situation cannot reoccur). At this point, each consumer who could receive a check in a subsequent round of distribution would receive approximately $1.[2] We have voted to approve the modification of the Order to allow the balance to be paid to the United States Treasury rather than directly to consumers.

In these circumstances, the majority believes that modifying the Order and allowing Speedway to return ill-gotten gains to the Treasury is the only sensible approach. As a practical matter, the only feasible alternative would require the Commission to be prepared to seek a contempt order compelling Speedway to comply with the exact terms of the Order. It is unlikely such a contempt action would be successful, and in any event, that costly and time-consuming approach is not a good use of the Commission's scarce resources. For one thing, Speedway in fact made an initial good-faith effort to comply with the Order and returned 92% of the ordered restitution pool to consumers. We have no indication that the failure to follow up with a second

[1] Chairman Simons and Commissioners Ohlhausen, Phillips, and Slaughter have voted to modify the Order and join in this statement of the Commission.

[2] In the FTC's extensive experience handling redress programs, as the dollar value of refund checks go down, check-cashing rates also decrease.

round of refunds was intentional. While disgorging the funds to the Treasury saves Speedway administrative costs, requiring additional redress would be disproportionately punitive and contrary to the purpose of the equitable monetary relief in the Order to provide restitution.

The Commission's vote to modify the Order in this instance rather than seeking to enforce the original terms of the Order is specific to these facts. Importantly, the Commission's decision takes into consideration the fact that Speedway's error here was not related to a conduct prohibition or requirement and does not appear to have been in bad faith.

Furthermore, there is no reason to believe that a contempt action in a 15-year-old case would result in any greater benefit to consumers or deterrence of order violations than the modification we approve today. Such an action would require the Commission to invest substantial resources that would likely far exceed the total amount of additional redress (not to mention the *de minimis* sum that each individual might receive). Those resources would have to be diverted from other enforcement matters with potentially greater return to consumers. We see no good case for pursuing such relief here. In fact, the dissent itself recognizes the "good reasons for resolving [the case] via settlement rather than litigation, given the agency's scarce resources."

Finally, we are mindful that Speedway self-reported the problem, which otherwise likely would have remained undiscovered by the Commission, because it predated the order compliance program the Commission instituted in 2007. While this is not the primary basis for our decision to modify, it is one factor in this case. We do not wish to discourage entities subject to consent decrees from revealing instances of non-compliance for fear of disproportionate punishment. Such deterrence only detracts from consumer welfare.

Importantly, as Commissioner Chopra concedes, over ten years ago the agency implemented a comprehensive order compliance program to prevent this type of situation from occurring for any order entered after July 2007. For that matter, more recent Commission orders provide the very remitting provision the Commission is now placing in the Speedway Order.[3] Our action today thus places Speedway in the same position that a similar violator would be in if it were placed under order today. The dissent also proposes that the Commission publish guidance on self-reporting violations. That thoughtful suggestion is worth serious further consideration. But it does little to support the denial of a modification here.

Of course, the Commission must vigorously enforce our orders—and we do. That is true with respect to large companies and small ones alike, as the public interest requires.[4] But, as a law enforcement agency, we must also take into account our legal authority, limited resources,

[3] *See FTC v. T-Mobile USA, Inc.*, No. 2:14-cv-00967 (W.D. Wash. Dec. 19, 2014); *FTC v. LifeLock, Inc.*, No. CV-10-00530 (D. Ariz. Dec. 17, 2015).

[4] Over the past decade, the Commission brought at least 50 enforcement actions alleging order violations in consumer protection matters against all manner of defendants, from individuals to sophisticated corporations. *See, e.g.*, *FTC v. LifeLock, Inc.*, No. CV-10-00530 (D. Ariz. Dec. 17, 2015) (stipulated order requiring payment of $100 million to resolve allegations of prior order violations); *U.S. v. Google, Inc.*, No 3:12-cv-04177 (N.D. Cal. Nov. 16, 2012) (stipulated order requiring payment of $22.5 million to resolve allegations of prior order violations).

and common sense. Our action today does not communicate to the marketplace that the FTC is unwilling or unable to undertake vigorous enforcement of our orders. To the contrary, this case reminds the marketplace that we will ensure that a company under order must pay the full amount of ordered restitution, even 15 years later. In addition, it signals that we encourage voluntary self-reporting and we are careful stewards of the Commission's time and resources to maximize benefits for consumers.