



Office of Commissioner
Rohit Chopra

UNITED STATES OF AMERICA
Federal Trade Commission

STATEMENT OF COMMISSIONER ROHIT CHOPRA

*In the Matter of Speedway Motorsports
Commission File Number X010021*

August 10, 2018

Questions Presented

violation, how much leniency is

Summary

often a good alternative to litigation, they are not always in the public
part to settle, the settlement must be smart.

order should be able to profit from misconduct. The Federal Trade
did agreeing to settlements that result in a Defendant profiting from
thorough analysis of these profits should include consideration not only
gotten proceeds, but also the avoided costs of order compliance,
defendant agreed to bear those costs.

ult in this matter on the basis of self-reporting, the Commission was
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marketing, promoting, and sponsoring these events, the corporation operates a number of businesses, including a subsidiary that markets auto lubricants.

In 2001, the FTC charged Speedway with violating the law by tricking consumers about the benefits of its zMax automobile lubricant. Specifically, the FTC alleged that the company tricked consumers into thinking zMax would increase their vehicle's performance. The Commission's complaint detailed a number of false or unsubstantiated claims made by Speedway, including that their product would improve gas mileage, reduce engine wear and corrosion, extend engine life, and reduce emissions.¹ In essence, the company made claims that would lead a consumer to think they would *save* money.

To top it off, the FTC's investigation found that the company manipulated corrosion protection test results. After independent tests showed that the company's product *doubled* the rate of corrosion rather than reducing it, Speedway allegedly used a fabricated report containing altered results in their advertising, which report included a cover sheet and letterhead ripped off from the real report.² Their infomercial touting the fabricated report ran more than 13,000 times.³

Two years later, in 2003, the FTC and Speedway entered into a consent order filed in federal court that provided \$1 million in restitution for purchasers of zMax, as well as various other remedies to put a stop to Speedway's deception.

Importantly, as part of the order agreed to by both Speedway and the Commission, Speedway was required to pay *all* expenses⁴ associated with distributing refunds to consumers. They were also required to ensure that the full \$1 million would be paid out. To be clear, the order sought to ensure that consumers would get refunds, and that Speedway would be responsible for the costs of doing so, even if they were substantial.

While Speedway

Under the settlement approved by the Majority, the Commission is agreeing to allow Speedway to simply turn over the remaining undistributed consumer refunds to the U.S. Government, completely ignoring the costs avoided by Speedway in failing to abide by the order it agreed to. These costs are far greater than the undistributed refunds.

Meanwhile, consumers who purchased \$39.95 lubricant after being misled about how it would affect their engines did not receive what was due to them under the order.⁷

Analysis and Discussion

Speedway is not a mom-and-pop business. In its 2017 fiscal year, the corporation generated over \$148 million in profit.⁸ When faced with charges by the FTC over fifteen years ago, it was clearly well counseled when it resolved the matter. In fact, in the original consent order between the company and the FTC, Speedway retained at least six lawyers from four different law firms.⁹

At the same time, this case is not high profile, so I appreciate the desire to resolve it expeditiously. There are g

If Commission leadership relied on a more analytically rigorous dollar target for settlement, I have no doubt that our talented staff would have been able to succeed in meeting this target.¹¹ Of course, I would be open to considering alternative analytical approaches even if it led to a dollar target that is higher or lower than what would result from my own preferred methodology. The key is that FTC leadership must empower our staff with a rigorous framework for approaching settlement negotiations that yields a just result. This is what the public expects of us.

By accepting a settlement that is well below the sum of Speedway's avoided costs and ill-gotten gains, I fear that the Commission is establishing a precedent that it will permit large, publicly traded companies to violate orders and turn a profit in the process. We should not be bringing down the hammer on small scammers while providing white glove treatment for sophisticated corporations.

One justification put forth for the leniency in this matter is that the company self-reported its noncompliance. Self-reporting and self-policing are important values for law enforcement and regulatory agencies to promote. They are important to the public interest. It is not the duty of the Commission to punish self-reporting. It is the duty of the Commission to punish non-compliance. The Commission should not be lenient on non-compliance. It should be 4 n5.

Appropriate corrective action and remediation. The Commission should give weight to self-reporting only when the entity has made all appropriate remediation to affected consumers and businesses.

While Speedway eventually alerted the Commission to its order violation, it was certainly not timely, nor is it clear that the discovery and disclosure were not part of a requirement set forth by a third party to resolve the matter. In addition, the consumer refund process required by the original agreement will not be completed as ordered.

The leniency offered by the Majority for self-reporting seems excessive. I worry that this is a loss for consumers and for law enforcement credibility.

Conclusion

Federal law enforcement agencies must do more to avoid bad deals that rely on flawed analytical approaches.¹⁴ If we fail to enforce our orders even when small sums of money are at stake, will we have the credibility we need to reach just outcomes in cases involving widespread failures and harm?

I appreciate that self-reporting is important, but I do not believe it should be given significant weight in this matter.¹⁵ The Commission should clearly articulate the factors it will consider when determining whether leniency is appropriate. However, leniency should not be our default.

The Commission should be concerned by the message this sends to other companies under order, and I hope that future resolutions reflect rigorous analysis. Companies big and small think hard to protect shareholder interests when negotiating with law enforcement. Law enforcement must likewise think hard when protecting the public interest. No company, regardless of its size or clout, likn/5.J P738J av