

1 IN THE UNITED STATES DISTRICT COURT  
2 MIDDLE DISTRICT OF NORTH CAROLINA

3 FEDERAL TRADE COMMISSION, )  
4 )  
5 Plaintiff, )  
6 v. )  
7 )  
8 SPEEDWAY MOTORSPORTS, INC., and )  
9 OIL-CHEM RESEARCH CORP., )  
10 Defendants. )

CIVIL ACTION  
NO. 1:01CV00126

Judge Bullock

11 **STIPULATED FINAL ORDER FOR PERMANENT INJUNCTION**  
12 **AND MONETARY RELIEF**

13 Plaintiff, the Federal Trade Commission (“FTC” or “Commission”), filed a Complaint for  
14 permanent injunction and other relief against Speedway Motorsports, Inc., and Oil-Chem Research  
15 Corp. pursuant to Section 13(b) of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C.  
16 § 53(b). Defendants deny the FTC’s allegations.

17 The Commission and Defendants have agreed to the entry of the following Stipulated Final  
18 Order for Permanent Injunction in settlement of the Commission's complaint against Defendants.  
19 The Court, being advised in the premises, finds:

20 **FINDINGS**

- 21 1. This Court has jurisdiction of the subject matter and of the parties.
- 22 2. The Complaint states a claim upon which relief may be granted against Speedway  
23 Motorsports, Inc. (“Speedway”), and Oil-Chem Research Corp. (“Oil-Chem”) under Sections 5(a)  
24 and 13(b) of the Federal Trade Commission Act, 15 U.S.C. §§ 45(a) and 53(b).
- 25 3. Venue is proper as to all parties in the Middle District of North Carolina.
- 26 4. The activities of Speedway and Oil-Chem are in or affecting commerce, as defined  
27 in the FTC Act, 15 U.S.C. § 44.
- 28 5. Defendants deny the Commission's allegations and nothing herein shall be construed  
as an admission or finding of liability or misrepresentation by Defendants. With respect to the

1 applicable standard for evaluating Defendants' conduct under the FTC Act, Defendants contend  
2 that the applicable standard is the "reasonable basis" standard. Defendants deny that the applicable  
3 standard is the "competent and reliable scientific evidence" standard. Defendants contend that  
4 zMAX produces results through a number of unique properties not found in other products.

5 6. Speedway and Oil-Chem have waived all rights that may arise under the Equal  
6 Access to Justice Act, 28 U.S.C. § 2412, amended by Pub. L. 104-121, 110 Stat. 847, 863-64  
7 (1996).

8 7. This action and the relief awarded herein are in addition to, and not in lieu of, other  
9 remedies as may be provided by law.

10 8. Each party shall bear its own costs and attorneys' fees.

11 9. Entry of this Order is in the public interest.

12 10. Pursuant to Federal Rule of Civil Procedure 65(d), the provisions of this Order are  
13 binding upon Defendants, and their officers, agents, servants, and employees, and all other persons  
14 or entities in active concert or participation with them, who receive actual notice of this Order by  
15 personal service or otherwise.

## 16 DEFINITIONS

17 For the purposes of this Order, the following definitions shall apply:

18 1. "Competent and reliable scientific evidence" shall mean tests, analyses, research,  
19 studies, or other evidence based on the expertise of professionals in the relevant area, that have  
20 been conducted and evaluated in an objective manner by persons qualified to do so, using  
21 procedures generally accepted in the profession to yield accurate and reliable results.

22 2. Unless otherwise specified, "Defendants" shall mean:

23 A. Speedway, its divisions, subsidiaries, successors and assigns, and their  
24 officers, agents, servants, and employees;

25 B. Oil-Chem, its divisions, subsidiaries, successors and assigns, and their  
26 officers, agents, servants, and employees; and  
27

28 C. Each of the foregoing, and any combination of the foregoing.



1 F. extends engine life; or

2 G. reduces emissions,

3 unless at the time the representation is made, Defendants possess and rely upon competent and  
4 reliable evidence, which when appropriate must be competent and reliable scientific evidence, that  
5 substantiates the representation.

6  
7 **II.**

8 IT IS FURTHER ORDERED that Defendants, directly or through any corporation,  
9 partnership, subsidiary, division, or other device, and their officers, agents, servants, and  
10 employees, and all other persons or entities in active concert or participation with them who receive  
11 actual notice of this Order, by personal service or otherwise, in connection with the manufacturing,  
12 labeling, advertising, promotion, offering for sale, sale, or distribution of any product, service or  
13 program, in or affecting commerce, shall not misrepresent, in any manner, expressly or by  
14 implication, the existence, contents, validity, results, conclusions or interpretations of any test,  
15 study, or research.

16  
17 **III.**

18 IT IS FURTHER ORDERED that Defendants, directly or through any corporation,  
19 partnership, subsidiary, division, or other device, and their officers, agents, servants, employees,  
20 and attorneys, and all other persons or entities in active concert or participation with them who  
21 receive actual notice of this Order, by personal service or otherwise, in connection with the  
22 manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any  
23 product, service or program, in or affecting commerce, shall not misrepresent, in any manner,  
24 expressly or by implication, that endorsements or testimonials reflect:



1 within fifteen (15) business days after the period for purchasers to respond to the  
2 Notice of Refund Offer has expired.

3 D. No information other than that form mutually agreed upon by the Parties, shall be  
4 included in or added to the Notice of Refund Offer, nor shall any other material be  
5 transmitted therewith. The envelope containing the Notice of Refund Offer shall be  
6 in the form set forth in Attachment B to this order.

7 E. For each mailing returned by the U.S. Postal Service as undeliverable for which  
8 Defendants thereafter obtain a corrected address, Defendants shall, within fifteen  
9 (15) business days after receiving the corrected address, send a Notice of Refund  
10 Offer to the corrected address.

11 F. Defendants shall send a refund check or credit card refund to (i) each direct  
12 purchaser who returns the completed application form appended to the Notice of  
13 Refund Offer to Defendants and (ii) to each purchaser contemplated under subpart  
14 "C" who returns the completed application form appended to the Notice of Refund  
15 Offer to Defendants. Defendants shall send refund checks by first-class mail,  
16 postage prepaid, or apply credit card refunds, within fifteen (15) business days after  
17 the period for purchasers to respond to the Notice of Refund Offer has expired. If a  
18 credit card refund cannot be processed, Defendants shall send a refund check in the  
19 manner specified above. The envelope containing the refund check shall be in the  
20 form set forth in Attachment C to this order.

21 G. Refunds will be distributed to purchasers in one or more rounds, on a *pro rata* basis.  
22 For the first round, the *pro rata* share will be calculated by dividing \$1,000,000.00  
23 by the total number of consumers requesting a refund pursuant to this Part.

24 H. A second round of *pro rata* check or credit card refunds will be sent to pay out any  
25 money remaining if purchasers in the first round fail to cash their checks.  
26 Consumers eligible for the second round would include all consumers who cashed  
27 their checks or successfully had a credit applied to their credit card in the first round.  
28 The *pro rata* share would be determined by dividing the remaining available refund

1 monies by the total number of consumers who cashed checks or received credit card  
2 refunds in the first round (subtracting the total amount of their first round refund  
3 checks). In no case, however, would any second round consumer receive more than  
4 100 percent of the monies, including shipping and handling charges, paid by such  
5 consumer to Defendants. A consumer shall have the right to participate in the  
6 refund distribution only upon signing a waiver of rights and release of all claims  
7 against Defendants. Defendants shall conduct additional rounds of *pro rata* refunds  
8 if necessary to apply the full \$1,000,000.00 amount to consumer refunds. Such  
9 additional rounds may be accomplished by applying additional credits to the credit  
10 cards of eligible consumers.

11 I. Defendants shall notify any purchaser who applies for a refund but fails to apply  
12 properly, of any error in the purchaser's refund application, and shall provide a  
13 reasonable opportunity for the purchaser to rectify any such error.

14 J. Within two hundred forty (240) days from the date of service of this order,  
15 Defendants shall furnish to Commission staff the following:

- 16 1. In computer readable form and in computer print-out form, a list of the  
17 names and addresses of all consumers who were sent refund checks or  
18 received credit card refunds pursuant to Part IV of this order, and for each  
19 name included on the list, the amount, check or transaction number and  
20 mailing or transaction date of every refund sent or applied;
- 21 2. A list of all Notices of Refund Offer returned to Defendants as undeliverable  
22 or rejected, all credit card refunds that could not be applied to consumer's  
23 credit cards; and
- 24 3. All other documents and records evidencing efforts made and actions taken  
25 by Defendants to identify, locate, contact and provide refunds to consumers  
26 requesting a refund.

27 For purposes of this Part, "purchaser" shall mean any person who has purchased zMax and who has  
28 not previously received a full refund of the purchase price.

1 **RECORD KEEPING**

2 **V.**

3 IT IS FURTHER ORDERED that Defendants, for a period of five (5) years after the last  
4 date of dissemination of any representation covered by this Order, shall maintain and upon request  
5 make available to the Commission for inspection and copying:

- 6 A. All advertisements and promotional materials containing the representation;  
7 B. All materials that were relied upon in disseminating the representation; and  
8 C. All tests, reports, studies, surveys, demonstrations, or other evidence in their  
9 possession, custody, or control, that contradict, qualify, or call into question the  
10 representation, or the basis relied upon for the representation, including complaints  
11 and other communications with consumers or with governmental entities or  
12 consumer protection organizations. Nothing in this subparagraph C requires  
13 Defendants to waive their rights to assert the attorney client privilege or work  
14 product doctrine, provided however, that if Defendants withhold materials otherwise  
15 called for under this Subparagraph (C) then Defendants shall create a privilege log  
16 identifying any materials withheld and specifying the bases for assertions of the  
17 attorney client privilege or work product doctrine. The FTC reserves the right to  
18 challenge Defendants' assertions of privilege.

19  
20 **MONITORING**

21 **VI.**

22 IT IS FURTHER ORDERED that Defendants, for a period of five (5) years after the date of  
23 service of this Order, shall deliver a copy of this Order to all current and future officers and  
24 directors, and to all managers, employees, agents, and representatives having responsibilities with  
25 respect to the subject matter of this Order, and shall secure from each such person a signed and  
26 dated statement acknowledging receipt of the Order. Defendants shall deliver this Order to current  
27 personnel within thirty (30) calendar days after the date of service of this Order, and to future  
28 personnel within thirty (30) calendar days after the person assumes such position or responsibilities.



1 Defendants shall maintain and upon request make available to the Commission for inspection and  
2 copying each such signed and dated statement for a period of five (5) years after such statement is  
3 signed.

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5 **VII.**

6 IT IS FURTHER ORDERED that Defendants shall, for a period of five (5) years, notify the  
7 Commission at least thirty (30) calendar days prior to any change in either corporation that may  
8 affect compliance obligations arising under this Order, including but not limited to a dissolution,  
9 assignment, sale, merger, or other action that would result in the emergence of a successor  
10 corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts  
11 or practices subject to this Order; the proposed filing of a bankruptcy petition; or a change in the  
12 corporate name or address. *Provided, however,* that, with respect to any proposed change in either  
13 corporation about which Defendants learn less than thirty (30) calendar days prior to the date such  
14 action is to take place, they shall notify the Commission as soon as is practicable after obtaining  
15 such knowledge.

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17 **VIII.**

18 IT IS FURTHER ORDERED that Defendants shall, within sixty (60) calendar days after  
19 the service of this Order, file with the Commission a report, in addition to an initial report, in  
20 writing, setting forth in detail the manner and form in which they have complied with this Order.  
21 Defendants have submitted an initial compliance report dated December 23, 2002 describing the  
22 means by which they will comply with Parts I-III of this Order. The staff has sent a letter dated  
23 December 26, 2002 responding to Defendants' initial compliance report.

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**IX.**

IT IS FURTHER ORDERED that the Commission is authorized to monitor the compliance of Defendants with this Order by all lawful means, including but not limited to the following means:

- A. The Commission is authorized, without further leave of court, to obtain discovery from any person in the manner provided by Chapter V of the Federal Rules of Civil Procedure, Fed. R. Civ. P. 26-37, including but not limited to the use of compulsory process pursuant to Fed. R. Civ. P. 45, for the purpose of monitoring and investigating the compliance of defendants with this Order.
- B. Nothing in this Order shall limit the Commission's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1, to investigate whether defendants have violated any provision of this Order or Sections 5 or 12 of the FTC Act, 15 U.S.C. §§ 45, 55.

**ACKNOWLEDGMENT OF RECEIPT OF ORDER**  
**AND RIGHT TO REOPEN**

**X.**

IT IS FURTHER STIPULATED AND ORDERED that, within fifteen days after service of this Order, Defendants shall submit to the Commission a truthful sworn statement, in the form shown on Attachment D, that shall acknowledge receipt of this Order.

1 **RETENTION OF JURISDICTION**

2 **XI.**

3 IT IS FURTHER ORDERED that this Court shall retain jurisdiction of this matter for  
4 purposes of construction, modification, and enforcement of this Order.

5  
6 FEDERAL TRADE COMMISSION

SPEEDWAY MOTORSPORTS, INC.

OIL-CHEM RESEARCH CORP.

7  
8  
9 *Jonathan Cowen*  
10 JONATHAN COWEN *by Elaine*  
LAUREEN KAPIN *Kaiser*  
11 CRAIG LISHER  
MELVIN ORLANS  
EDWIN RODRIGUEZ  
12 Counsel for Plaintiff  
Federal Trade Commission  
13 Washington, DC 20580  
202-326-2533

*William R. Brooks, VP*  
WILLIAM R. BROOKS, Vice-President  
on behalf of Defendants  
Speedway Motorsports, Inc.  
Oil-Chem Research Corp.

14  
15 *Fred T. Lowrance*  
Fred T. Lowrance  
Melanie Dubis  
16 PARKER POE  
ADAMS & BERNSTEIN LLP  
17 401 South Tryon Street  
Suite 3000  
18 Charlotte, NC 28202  
(704) 372-9012  
19 (704) 334-4706 (fax)

20  
21 Kenneth A. Gallo  
Leiv H. Blad Jr.  
22 Aimée D. Latimer  
Allyson Baker  
23 CLIFFORD CHANCE  
ROGERS & WELLS LLP  
24 2001 K Street NW  
Washington, D.C. 20009  
25 (202) 912-5000  
26 (202) 912-6000 (fax)

27 Counsel for Defendants  
28

1  
2 **IT IS SO ORDERED**, this \_\_\_\_\_ day of \_\_\_\_\_, 2002 in Greensboro,  
3 North Carolina.

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5 \_\_\_\_\_  
6 UNITED STATES DISTRICT JUDGE  
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**ATTACHMENT A - LETTER**

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**ATTACHMENT B - REFUND NOTICE LETTER ENVELOPE**

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Forwarding and Return Postage Guaranteed: [address of consumer refund administrator]

Window Envelope

[The following statement is to appear in a box, on the left hand side of the envelope in red, in extra large, bold type face]

**ATTENTION: IMPORTANT REFUND INFORMATION INSIDE**

**ATTACHMENT C - REFUND CHECK ENVELOPE**

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Forwarding and Return Postage Guaranteed: [address of consumer refund administrator]

Window Envelope

(indicates a check is enclosed)





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I hereby declare under penalty of perjury under the laws of the United States of America  
that the foregoing is true and correct. Executed on (date) \_\_\_\_\_, at (city, state) \_\_\_\_\_  
\_\_\_\_\_.

\_\_\_\_\_  
William R. Brooks

STATE OF NORTH CAROLINA  
COUNTY OF \_\_\_\_\_

BEFORE ME this day personally appeared William R. Brooks, who being first duly sworn,  
deposes and says that he has read and understands the foregoing statement and that he has executed  
the same for the purposes contained therein.

SUBSCRIBED AND SWORN TO before me this \_\_\_\_\_ day of \_\_\_\_\_, 2002,  
by William R. Brooks. He is personally known to me or has presented (state identification) \_\_\_\_\_  
\_\_\_\_\_ as identification.

\_\_\_\_\_  
Print Name  
NOTARY PUBLIC  
STATE OF CALIFORNIA  
Commission Number  
Affix Seal

**C L I F F O R D  
C H A N C E**

**CLIFFORD CHANCE US LLP**

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**Leiv H. Blad Jr.**

Partner

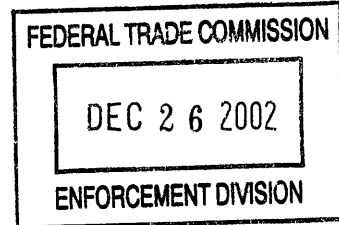
DIRECT TEL +1 202 912 5122

DIRECT FAX +1 202 912 6000

leiv.blad@cliffordchance.com

December 23, 2002

Elaine D. Kolish  
Director  
Federal Trade Commission  
Enforcement Division IBCP  
Washington, DC 20580



Re: *Federal Trade Commission v. Speedway Motorsports, Inc. and Oil-Chem Research Corp.*, Civil Action No. 1:01CV00126  
Compliance Report

Dear Ms. Kolish:

In anticipation of the Stipulated Final Order (the "Order"), Oil-Chem Research Corp. ("Oil-Chem") and Speedway Motorsports, Inc. ("SMI") submit this initial Compliance Report describing the means by which they will comply with the conduct provisions of the Order. Oil-Chem and SMI also will submit an additional Compliance Report sixty (60) days after the date of service of the Order.

Set forth below are the claims Oil-Chem intends to make in the advertising and promotion of zMAX. As substantiation for each claim, Oil-Chem refers to confidential, Bates-stamped documents produced under seal during the litigation of this action. Oil-Chem and SMI request that the Commission continue to preserve the confidentiality of these documents pursuant to the Protective Order executed by the parties during the litigation.

- a. zMAX soaks into metal.

Substantiation: DX 35, 36

- b. zMAX reduces friction.

Substantiation: DX 15, 16, 18, 19, 20, 21, 22, 23, 24, 39, 40, 46, 49, 50, 51, 52, 53

- c. zMAX increases horsepower.

Substantiation: DX 15, 16, 18, 19, 20, 21, 22, 23, 24, 46, 49, 50,

Elaine Kolish  
December 23, 2002

Page 2

51, 52, 53

d. zMAX dissipates engine heat.

Substantiation: DX 15, 16, 18, 19, 20, 21, 22, 23, 24, 35, 36, 46, 49,

50, 51, 52, 53

e. zMAX helps to improve or restore gas mileage and reduce emissions in older cars, by virtue of reducing engine deposits.

Substantiation: DX 15, 16, 18, 19, 26, 37, 38, 41, 42, 43, 45, 47,  
48, 49, 50, 51, 52, 53

f. zMAX helps to maintain gas mileage and emissions in newer cars, by virtue of reducing engine deposits.

Substantiation: DX 15, 16, 37, 38, 41, 42, 43, 45, 47, 48, 49, 50,

51, 52, 53

g. zMAX helps to reduce wear on engine valve-stems and guides and piston rings and skirts, by virtue of reducing engine deposits.

Substantiation: DX 15, 16, 28, 32, 33, 34, 39, 40, 41, 42, 49, 50,

51, 52, 53

h. zMAX helps to extend engine life, by virtue of reducing engine deposits.

Substantiation: DX 15, 16, 28, 32, 33, 34, 41, 42, 49, 50, 51, 52,

53

Oil-Chem and SMI will provide copies of the Order to all employees and agents responsible for the advertising and promotion of zMAX. Oil-Chem and SMI continue to intend to comply with the Federal Trade Commission Act and with Parts I, II, and III of the Order. Oil-Chem and SMI have informed such employees and agents of the companies' high standards for truth and accuracy in all advertising and their commitment to enforcing these standards at all times. More specifically, Oil-Chem and SMI have instructed their employees and agents with responsibility for the advertising and marketing of zMAX that they must comply with Parts I, II, and III of the Order. To ensure such compliance, Oil-

Elaine Kolish  
December 23, 2002

Page 3

Chem and SMI will submit all print and broadcast advertising to outside counsel before such advertising is published for the purpose of obtaining a legal opinion that such advertising complies with Parts I, II, and III of the Order.

Oil-Chem and SMI request guidance from the FTC regarding its response to the claims set forth above. I understand that you will provide me with such a response in a return letter.

Sincerely,



Leiv H. Blad Jr.

cc: O. Bruton Smith  
William R. Brooks  
Ed Rachanski Sr.  
Fred Lowrance



UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
WASHINGTON, D.C. 20580

Division of Enforcement  
Bureau of Consumer Protection

December 26, 2002

Oil-Chem Research Corp.  
6800 W. 73<sup>rd</sup> St.  
Bedford Park, Illinois 60638

Speedway Motor Sports, Inc.  
U.S. Highway 29 North  
Concord, North Carolina 28026

Re: FTC v. Speedway Motorsports, Inc., and Oil-Chem Research Corp.,  
1:01CV00126 (M.D. NC)

Gentlemen:

The Division of Enforcement has reviewed your submission dated December 23, 2002, which you have submitted to show the manner in which the defendants will comply with Parts I - III of the Stipulated Final Order for Permanent Injunction and Monetary Relief ("order") if it is entered in the above-referenced matter.

The information that you have submitted consists of a description of your compliance procedures and your description of certain claims that you intend to make in future advertising. The staff has concluded, on the assumption that such information is accurate and complete, that no compliance action would be merited if the order is entered. We will not be precluded, however, from recommending to the Commission an appropriate action if the submitted information is inaccurate or incomplete or if any defendant violates the terms of the order. Because you have not submitted any advertisements for the staff to review at this time, we reserve the right to request that you submit substantiation under the order for any additional express or implied claims made in future advertising and, if appropriate, to recommend that the Commission initiate an enforcement action based on such claims. The opinions expressed in this letter are those of the staff and not necessarily those of the Commission or of any Commissioner.

Sincerely,

A handwritten signature in cursive script that reads "Elaine D. Kolish".

Elaine D. Kolish  
Associate Director