

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY

---

IN RE SPEEDWAY MOTORSPORTS, )  
INC. DERIVATIVE LITIGATION )

---

Consolidated  
Civil Action No. 18245-NC

MEMORANDUM OPINION

Submitted: October 8, 2003

Decided: October 14, 2003

Norman M. Monhait, of ROSENTHAL MONHAIT GROSS & GODDESS, P.A.,  
Wilmington, Delaware; OF COUNSEL: Rachel **Sirota**, of SIROTA & SIROTA  
LLP, New York, New York, Attorneys for Plaintiff.

Philip Trainer, Jr., of ASHBY & GEDDES, Wilmington, Delaware; OF  
COUNSEL: Scott Schreiber, Drew Harker and Elissa J. Preheim of ARNOLD &  
PORTER, Washington, D.C., Attorneys for H.A. Wheeler, William R. Brooks,  
Edwin R. Clark, William P. **Benton**, Mark M. Garnbill and Jack L. Kemp.

A. Gilchrist Sparks and Yvette C. Fitzgerald, of MORRIS, NICHOLS, ARSHT &  
TUNNELL, Wilmington, Delaware; OF COUNSEL: Fred Lowrance and Melanie  
**Dubis**, of PARKER POE ADAMS & BERNSTEIN L.L.P., Raleigh, North  
Carolina, Attorneys for O. Bruton Smith.

CHANDLER, Chancellor

This derivative litigation arises from the sale in January 2000 of certain property owned by Speedway Motorsports, Inc. (“SMI”) to O. Bruton Smith, its Chairman, Chief Executive Officer, and majority shareholder. Discovery is complete, and defendants have moved for summary judgment. For the reasons set forth below, I grant the motion.

## I. BACKGROUND

SMI is a Delaware corporation in the business of owning and operating motor speedways throughout the United States. In November 1998, the company purchased the Las Vegas Motor Speedway (“Speedway”). As a condition of sale, SMI was required to purchase an adjacent industrial park and 280-acre tract of vacant land (the “Properties”). In December 1998, SMI announced its intention to dispose of the Properties within twelve months.

SMI had the Properties appraised by the real estate firm of Shelli L. Lowe & Associates in January 1999. Lowe valued the Properties at \$53.2 million. SMI booked that amount on its financial statements. Deloitte & Touche audited SMI’s financial statements, including the entries for the Properties. SMI then began its attempt to dispose of the Properties. A second real estate firm contacted more than sixty potential purchasers on behalf of SMI, but the best, written offer that the company received for the Properties was \$40 million. By late 1999, the company recognized two significant problems with selling the Properties. First, the

industrial park received its water through the Speedway and because of local regulations, SMI was required to establish separate water and fire service before the industrial park's sale. Second, the 280-acre tract of vacant land was land locked. These two problems were "a tremendous impediment to sale."

In November 1999, SMI announced it **would** not meet its third quarter earnings estimates due partially to the inability to dispose of the Properties. SMI's stock price suffered upon this announcement, and investors increased pressure on SMI to sell the Properties. Because of these events, the **company**<sup>1</sup> asked Smith to purchase the Properties at book value. The **Board**<sup>2</sup> met on December 13, 1999 and unanimously adopted a resolution setting out the terms of the proposed sale to Smith, subject to a fairness opinion by First Union Securities, Inc. First Union determined that the proposed purchase price of \$53.2 was fair to SMI. The Board met again on January 13, 2000, reviewed the fairness opinion, and unanimously

---

<sup>1</sup> William Brooks Deposition Transcript at 128 ("Brooks Dep. Tr.").

<sup>2</sup> At the time of the transaction, Speedway's Board had seven directors, each of whom is a named defendant. The Chairman of the Board is O. Bruton Smith. Smith also serves as the company's CEO and owns approximately 70% of the company's outstanding shares. Three directors, H.A. Wheeler, William Brooks, and Edwin Clark, hold senior management positions at Speedway. The other three directors, William **Benton**, Mark Gambill, and Jack Kemp, hold no management positions at Speedway and receive only stock options as compensation for their service as directors. Kemp resigned **from** the Board in 2002.

approved the sale.<sup>3</sup> Smith also agreed to pay to SMI any profit that he might realize on any eventual sale of the Properties.<sup>4</sup>

## II. ANALYSIS

Summary judgment is appropriate if the moving party demonstrates that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law.<sup>5</sup> Here, the undisputed facts show that the Board's decision to sell the Properties is protected by the business judgment rule and defendants are entitled to summary judgment.

Contrary to plaintiffs assertions, the entire fairness standard does not apply to the sale of the Properties to Smith. In order for that standard to apply, Smith, by virtue of his domination of SMI, must have caused the company to act in such a way that he "receive[d] something from [SMI] to the exclusion of, and detriment to, the minority stockholders" of the company! Smith's agreement to pay the company any profit that he might make on the sale of the property forecloses the conclusion that he received anything from SMI to the detriment of minority stockholders.' Also, the record indicates that Smith never actually sought the

---

<sup>3</sup> Smith actually paid \$54.3 million for the Properties because of post-closing adjustments of the book value.

<sup>4</sup> Brooks Dep. Tr. at 13 1-32; Transcript of Deposition of O. Bruton Smith at 159-60.

<sup>5</sup> Ct. Ch. R. 56(c); *Cooke v. Oolie*, 2000 WL 710199, at \*7 (Del. Ch.).

<sup>6</sup> *Sinclair Oil Corp. v. Levien*, 280 A.2d 717,720 (Del. 1971).

<sup>7</sup> Plaintiff argues that Smith did not agree to repay the company any profits until after this litigation ensued despite the sworn testimony of two witnesses to the contrary. Simply denying the existence of this agreement is insufficient to create a factual dispute under Ct. Ch. R. 56(e).

Properties, but that he agreed to purchase it as an accommodation to SMI.<sup>8</sup> Furthermore, as the majority shareholder, Smith had no incentive to pursue a transaction that benefited him personally at the expense of minority shareholders—Smith stood to lose substantially if the transaction decreased the value of SMI's stock.<sup>9</sup>

The business judgment rule will protect the decision to sell the Properties to Smith if made by disinterested and independent directors, acting with due care and in good faith, and which has a rational business purpose.” The facts demonstrate that the SMI Board was disinterested and independent. As noted above, Smith received nothing from the sale to the exclusion or detriment of the minority shareholders and none of the other directors had any financial interest in the

---

See also *Cooke*, 2000 WL 710199, at \*7 (“Uncontested facts properly set forth in the record must be assumed true.”); *Womach v. Thomas*, 486 A.2d 15, 17 (Del. Ch. 1984) (“facts set forth under oath by the movant which remain uncontroverted by the opponent will be assumed to be true”). In addition, the timing of the agreement is immaterial for purposes of determining whether it eliminates any benefit to Smith at the exclusion of the minority shareholders.

<sup>8</sup> *Sinclair*, 280 A.2d at 720, requires that the director “cause” the transaction in order for the entire fairness standard to apply. See also *Parnes v. Bally Entertainment Corp.*, 2001 WL 224774, at \* 12 (Del. Ch.) (noting director did not seek transaction at issue).

<sup>9</sup> See *Cooke*, 2000 WL 710199, at \* 12-13 (finding plaintiffs failed to establish a conflict of interest because directors’ status as majority shareholders and creditors of the company removed incentives “to pursue a transaction that benefited them as creditors if that transaction did not produce total net gain to defendants after considering both their equity and debt positions.”); *Parnes*, 2001 WL 224774, at \* 11 n.30 (“As the owner of over 8% of Bally’s outstanding stock at the time of the Merger, (Chairman and CEO) Goldberg stood to gain more than anyone else from an increased offer for Bally stock.”).

<sup>10</sup> *Cooke*, 2000 WL 710100, at \*11.

transaction either.” Furthermore, as all the directors were SMI shareholders, their motives for pursuing the sale were aligned with the plaintiffs interests.\* The record also reflects that the directors adequately apprised themselves of the information material to the decision to approve the sale to Smith. The Board was aware of the inability to dispose of the Properties at book value and the negative pressure that this had on SMI’s stock price. The Board was aware of the terms of the sale, and aware that the buyer of the Properties was Smith. The Board approved the sale at a price determined by a professional real estate firm, audited by an accounting firm, and ascertained as fair by an investment bank. The record shows that SMI’s directors were motivated by nothing less than a genuine desire to dispose of an asset that was harming the performance of SMI’s stock (undoubtedly a rational business purpose) and were fully informed in their decision-making. The undisputed facts support the conclusion that the Board was not grossly negligent, “the legal standard against which a director’s actions are measured.”<sup>13</sup>

---

<sup>11</sup> One of the directors, Gambill, was previously employed by a subsidiary of First Union, but nothing in the record indicates that he had a disabling financial interest because of First Union’s involvement in the transaction.

<sup>12</sup> See *supra* n.9.

<sup>13</sup> *Kahn v. Roberts*, 1995 WL 745056, at \*4 (Del. Ch.). The plaintiff attempts to create a factual dispute by arguing-that the property was not in fact unmarketable and that its actual value exceeded the purchase price paid by Smith. Neither of these arguments create a genuine issue of material fact because the plaintiff is “replacing the corporate directors’ judgments with their own,” *Cooke*, 2000 WL 710199, at \* 11, precisely what the business judgment rule seeks to prevent.

For the foregoing reasons, I grant defendants' motion for summary judgment. I have entered an Order consistent with this decision.

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

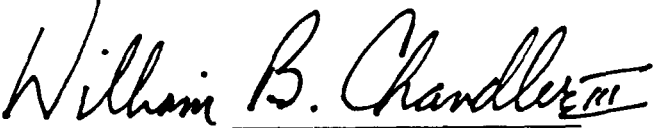
\_\_\_\_\_  
IN RE SPEEDWAY MOTORSPORTS, )  
I-NC. DERIVATIVE LITIGATION )  
\_\_\_\_\_

Consolidated  
Civil Action No. 18245-NC

**ORDER**

For the reasons set forth in this Court's Memorandum Opinion entered in this case on this date, it is

ORDERED that summary judgment is entered in favor of defendants and against plaintiff, and these consolidated actions are dismissed.

  
\_\_\_\_\_  
Chancellor

Dated: October 14, 2003