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UNITED STATES DISTRICT COURT  
DISTRICT OF IDAHO

TED ROBERTS,  
  
Plaintiff,  
  
-vs-  
  
FEARLESS FARRIS SERVICE STATIONS,  
INC., an Idaho Corporation; THE FEARLESS  
FARRIS SERVICE STATION, INC.  
DEFERRED COMPENSATION PLAN,  
FARRIS S. LIND, KENT F. LIND, H. KENT  
JOHNSON, CHARLEY JONES, and SHAWN  
DAVIS, individually and as Present or Former  
Administrators and Fiduciaries of the Fearless  
Farris Service Stations, Inc.  
  
Defendants.

NO. CIV 05-472-S-WFN  
  
FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

A two day bench trial was held beginning on January 28, 2008. Robert Huntley and Jeffrey Mandell represented the Plaintiff; Candy Dale represented Fearless Farris Service, Charley Jones and Shawn Davis; and Glenda Talbutt and Michael Brady represented Farris Lind, Kent Lind and Kent Johnson. The following constitutes the Court's Findings of Fact and Conclusions of Law which are based on the testimony and exhibits received into evidence and the briefing of the parties.

**FINDINGS OF FACT**

Plaintiff alleges Defendants violated several provisions of ERISA in their creation, maintenance, and termination of the Fearless Farris Service Station, Inc. Deferred Compensation Plan [Plan]. Plaintiff was employed by Westpoint Transport [Westpoint], a wholly owned subsidiary of Fearless Farris Service Stations, Inc. [Fearless Farris]. At all

1 relevant times prior to and including November 18, 2002, Defendant Fearless Farris was  
2 owned by Farris S. Lind, Kent F. Lind, and H. Kent Lind [Sellers]. At all relevant times after  
3 November 18, 2002, Fearless Farris was owned by Defendants Charley Jones and Shawn  
4 Davis [Buyers].

5 In February, 1981, Plaintiff became employed at Westpoint as a truck driver. As a  
6 full-time employee, Plaintiff was selected to participate in the Plan. After 22 consecutive  
7 years of employment, the Buyers terminated Plaintiff on August 18, 2003. He was 48 years  
8 old.

9 In approximately 1982, the Executive Committee of Fearless Farris created the Plan.  
10 Fearless Farris served as Plan sponsor and Plan administrator. H. Kent Johnson was a  
11 member of the Executive Committee, and later an owner, until the sale in November, 2002.  
12 Participating employers in the Plan included Fearless Farris Wholesale, Inc. [Wholesale],  
13 Westpoint, and Fearless Farris Stinker Stations, Inc. The parties agree that the Plan is subject  
14 to ERISA.

15 The Plan consisted of letters and memoranda distributed to Plan participants over the  
16 years. Prior to 2002, Fearless Farris did not consult legal or financial counsel when Fearless  
17 Farris instituted, amended, or maintained the Plan. The Executive Committee, which included  
18 all officers of Fearless Farris, made all decisions regarding the Plan until the sale on  
19 November 18, 2002.

20 The Plan underwent several changes over the years. Initially, the Plan "would pay  
21 [Participants] \$500.00/month for 15 years after [Participant's] retirement at age 65." In 1984,  
22 the Executive Committee revised the Plan to increase the amount of compensation to \$600  
23 per month for 15 years when the employee reached age 65. The Executive Committee also  
24 included benefits to the employee's beneficiary in event of death. In late 1990, the Executive  
25 Committee amended the Plan again, this time adding life insurance and altered compensation  
26 to \$9,000 per year for 15 years or \$1,500 per month for the employee's beneficiary if the

1 employee pre-deceased retirement. The 1991 revision increased the annual compensation to  
2 \$9,600. The memorandum also clarified that to "qualify for the plan, the employee must be  
3 fully employed in any of the following categories: maintenance, freight drivers, supervisors  
4 or staff" and that full-time employment must have been for at least three years. It listed  
5 Plaintiff as a participant in the Plan.

6 The Executive Committee made their final revision in 1995. This iteration of the Plan  
7 governs the terms of the Plan applicable to Plaintiff. The Plan provided in part:

8 The Company is continuing to invest money for you to assist you in your  
9 retirement. As you recall, this costs you nothing, except your dedication and  
loyalty to our Company.

10 Fearless Farris Deferred Compensation Plan will pay to the qualified employee  
11 or his surviving beneficiary, upon reaching the retirement age of 65 and having  
12 completed a minimum of 20 years of service to the Company a monthly sum of  
13 25% of the average of his/her last 5 years of service for a period of 15 years. In  
the case of the employee pre-deceasing the retirement age of 65 years, but still  
meeting the 20 year service requirement, the Company will pay to the surviving  
beneficiary 50% of the employee's last 5 year average income, paid monthly for  
15 years.

14 The 1995 version of the Plan included an example page which anticipates a 10% divestment  
15 for each year that the employee retires prior to age 65. The example page did not include  
16 what would happen in the event of termination prior to age 65.

17 The Plan included full-time employees in positions across the companies except  
18 for the service stations. Participants in the Plan included administrative staff, payroll  
19 clerks, truck drivers, and maintenance personnel. Their annual salaries ranged from  
20 approximately \$22,000 to \$85,000. Most of these employees lacked negotiating power within  
21 the company. Plaintiff's and Mr. Jones' testimony supports this conclusion. Despite  
22 Plaintiff's repeated meetings with Mr. Johnson and Mr. Jones in his role as an unofficial  
23 spokesman for the truck drivers, his concerns and requests regarding the Plan were not  
24 implemented.

25 During the last days of Seller's ownership of Fearless Farris, required Form 5500 filings  
26 for 1990 - 2002 were made to the Internal Revenue Service by Wholesale concerning the

1 Plan. These Form 5500 filings identified the Plan sponsor and administrator as Wholesale.  
2 Schedule P to these filings identified the Plan trustee/custodian as Wholesale. Mr. Johnson  
3 signed the returns as an officer on behalf of Wholesale.

4       Though the Plan was unfunded, the Sellers established a funding mechanism upon  
5 creation of the Plan. Beginning in 1982, Fearless Farris purchased and maintained a life  
6 insurance policy upon each employee participating in the Plan. During the Sellers' ownership  
7 of Fearless Farris, Fearless Farris was the owner and beneficiary of these life insurance  
8 policies. Fearless Farris paid all policy premiums. Mr. Johnson testified that it was the  
9 Executive Committee's intent to use proceeds of the insurance policies to pay for benefits  
10 under the Plan. Prior to the sale, Sellers pledged the insurance policies as collateral for a loan.  
11 The sale transferred the life insurance for all non-owner Plan participants to Buyers. After  
12 the sale, Buyers unencumbered the policies, then surrendered the insurance policies for their  
13 combined cash surrender value, in excess of \$600,000, placing the funds in the corporate  
14 accounts of Fearless Farris.

15       The Sellers established their commitment to honoring the terms of the Plan. The Court  
16 found Mr. Johnson's testimony that the Executive Committee intended to continue the Plan  
17 and would have paid benefits pursuant to the 1995 Plan to be very credible. To illustrate this  
18 commitment, Mr. Johnson testified that Fearless Farris was providing benefits to Bob  
19 Belliveau, a Plan participant pursuant to the 1995 Plan. Additionally, Mr. Johnson testified  
20 that the Executive Committee opted to sell to Mr. Jones and Mr. Davis due to the latter's  
21 familiarity with the business and the Committee's perception that the Buyers would do right  
22 by the employees. After the sale, he attempted to intervene when he felt Mr. Jones had  
23 interfered with an employee's right to benefits.

24       Charshaw, Inc., Davis-Jones, Inc., and Joshnik LLC purchased the stock and assets of  
25 Fearless Farris Service Stations, Inc, and Fearless Farris Wholesale, Inc., and its subsidiary  
26 entities effective November 18, 2002. Charley Jones and Shawn Davis became the sole

1 shareholders and owners of Fearless Farris and its subsidiaries. Charley Jones serves as  
2 President and Treasurer for all corporate entities mentioned above; Shawn Davis serves as  
3 Vice-President and Secretary for all corporate entities mentioned above.

4 As of November 18, 2002, all involvement, control, authority, and/or responsibility for  
5 the Plan remained with Fearless Farris and its affiliates. Except for a few non-business assets  
6 not relevant to this inquiry, the Stock Asset and Purchase Agreement [Agreement] transferred  
7 all assets and liabilities of Fearless Farris. Though the Agreement did not directly address the  
8 Plan, Mr. Jones testified that he was aware of the Plan and its contours based on his due  
9 diligence performed prior to the sale. Also, Mr. Johnson testified that prior to the date of the  
10 sale of Fearless Farris, Sellers specifically told Buyers of their desire that the Plan participants  
11 be taken care of by Buyers and that all obligations of Fearless Farris to the Plan participants  
12 be met.

13 In July, 2003, Mr. Jones and Mr. Davis held meetings and distributed a  
14 memorandum informing some Plan participants that the Plan was terminated for those  
15 employees not within 5 years of retirement and that all participants should not expect to  
16 receive any benefits promised under the Plan. Though called a "termination" some  
17 participants benefitted from an altered plan, while others near retirement received benefits  
18 under the Plan. The corporate structures owning the assets previously owned by Fearless  
19 Farris and its affiliates have changed hands since alteration of the Plan, but Westpoint is still  
20 viable and is owned by Stinker Stores which is under the joint control of Mr. Davis and Mr.  
21 Jones. Westpoint is responsible for making payments of benefits under the Plan. Plaintiff  
22 signed an acknowledgment of his receipt of the purported termination of the Plan. His  
23 testimony is credible that by signing the acknowledgment he did not agree that the company  
24 had a right to divest him of his benefits.

25 Mr. Jones, in consultation with Mr. Davis, exercised control over the Plan making all  
26 decisions relative to its existence and terms. In his testimony, Mr. Jones indicated that he

1 made all the decisions, but did not seem to do so in his corporate officer capacity. He signed  
2 the termination notice without reference to his relationship to the corporation.

3 The Plan, according to the 1995 modification, delineates the contours of Plaintiff's  
4 benefits. The parties agree that Plaintiff's average compensation over the last five calendar  
5 years was \$47,443.07. According to the 1995 modification, Plaintiff's benefits will be 25%  
6 of his average compensation. Upon reaching the age of 65, Plaintiff is due \$988.40 per month  
7 for fifteen years. If Plaintiff pre-deceases retirement age of 65, his surviving beneficiary will  
8 be owed 50% of his average wage for 15 years, or \$1976.79 per month.

### 9 CONCLUSIONS OF LAW

#### 10 **1. The Plan Was Not a "Top-Hat " Plan.**

11 A "top hat" plan is defined as a "plan which is unfunded and is maintained by an  
12 employer primarily for the purpose of providing deferred compensation for a select group of  
13 management or highly compensated employees." 29 U.S.C. §§ 1051(2), 1081(a)(3),  
14 1101(a)(1). Additionally, the employees involved must "have sufficient influence within the  
15 company to negotiate compensation agreements that will protect their own interests where  
16 ERISA provisions do not apply." *Guiragoss v. Khoury*, 44 F. Supp. 2d 649 (E.D. Va. 2006)  
17 (also see Ct. Rec. 80). The employer has the burden of demonstrating that the plan is a "top  
18 hat" plan. *See, e.g., Alexander v. Brigham & Women's Physicians Org., Inc.*, 467 F. Supp. 2d  
19 136, 142 (D. Mass. 2006).

20 The Defendants failed to prove that the Plan was completely unfunded; however,  
21 this factor is not decisive. Though it is undisputed that no funds were set aside in trust for the  
22 Plan, Mr. Johnson credibly testified that the Executive Committee intended to fund the Plan  
23 with the insurance policies. According to Mr. Johnson, the death benefits were higher than  
24 the pension benefits due to the larger payout in the event of a premature death. Conforming  
25 the Plan to the insurance policy payout reflects the intent to tie the proceeds of the insurance  
26 policies to the Plan.

1 Participants were not "a select group of management or highly compensated  
2 employees." The evidence shows that the participants were long term employees who  
3 earned various amounts, but most, if any, were not highly compensated. Neither were they all  
4 or mostly management. Defendants attempt to argue that the participants were "key" due  
5 to their role in the company and thus meet this prong. However, employees who are  
6 not highly compensated or management do not meet the standard set in the statute.

7 Participants did not have the ability to negotiate an agreement that protected their  
8 own interests. Most participants lost all benefits when the Plan was terminated, they did not  
9 receive any compensation or any other advantage in exchange for the loss of this substantial  
10 benefit. Plaintiff attempted to negotiate, but was unable to secure a better deal. In fact, he  
11 lost benefits.

12 **2. ERISA Entitles Plaintiff to All Vested Benefits.**

13 Interpreting the Plan to comply with 29 U.S.C. §1053, Plaintiff's rights in the Plan  
14 vested and he is entitled to his full benefit upon attainment of age 65. Though the requirement  
15 of 20 year vesting violates ERISA, this is immaterial because Plaintiff met this Plan  
16 requirement. Once an employee satisfies 7 years of service, their right to their normal  
17 retirement benefit is nonforfeitable. 29 U.S.C. §1053(a)(2)(A)(iii). Since Plaintiff seeks  
18 payment of his benefits beginning upon attainment of age 65, he is not subject to divestment  
19 for early retirement.

20 **3. Defendants Fearless Farris Service Stations, Farris S. Lind, Kent F. Lind,**  
21 **H. Kent Johnson, Charley Jones and Shawn Davis Are All Fiduciaries.**

22 ERISA "provides a functional definition of a fiduciary which depends, in part, upon  
23 whether a person 'exercises any discretionary authority or discretionary control respecting  
24 management of such plan or exercises any authority or control respecting management or  
25 disposition of its assets . . . ." *Kayes v. Pacific Lumber Co.*, 51 F.3d 1449, 1459 (9th Cir.  
26 1995). Even where a corporate officer or director is acting on behalf of a corporation, they





1 for fifteen years upon reaching age 65. If Plaintiff predeceases the retirement age of 65,  
2 Defendants Fearless Farris, Fearless Farris Inc. Deferred Compensation Plan, Charley Jones  
3 and Shawn Davis shall provide the surviving beneficiary \$1,976.79 per month.

4 2. Defendants Fearless Farris, Charley Jones, and Shawn Davis shall pay Plaintiff's  
5 reasonable attorney's fees and costs pursuant to 29 U.S.C. §1132(g).

6 The Clerk of the Court is directed to:

- 7 • File this Order,
- 8 • Provide copies to counsel, and
- 9 • Enter a judgment consistent with this Order.

10 **DATED** this 6th day of February, 2008.

11  
12  
13 02-06

s/ Wm. Fremming Nielsen  
WM. FREMMING NIELSEN  
SENIOR UNITED STATES DISTRICT JUDGE