

No. 97-5958

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ADMINISTRATIVE COMMITTEE OF THE
SEA RAY EMPLOYEES' STOCK OWNERSHIP
AND PROFIT SHARING PLAN, et al.,

Plaintiffs-Appellees,

v.

DANIEL ROBINSON, et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of Tennessee, Northern Division

BRIEF OF PLAINTIFFS-APPELLEES
ADMINISTRATIVE COMMITTEE OF THE SEA RAY
EMPLOYEES' STOCK OWNERSHIP AND PROFIT SHARING PLAN, et al.

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**DISCLOSURE OF CORPORATE AFFILIATIONS
AND FINANCIAL INTEREST**

Pursuant to Sixth Circuit Rule 25, Plaintiffs-Appellees Administrative Committee of the Sea Ray Employees' Stock Ownership and Profit Sharing Plan and William J. Barrington, Diane M. Yaconetti, and William R. McManaman, in their capacity as members of that Committee, make the following disclosure:

1. Are the parties subsidiaries or affiliates of a publicly held corporation?

Plaintiff-Appellee Administrative Committee of the Sea Ray Employees' Stock Ownership and Profit Sharing Plan administers the ESOP plan maintained by the Sea Ray Division of Brunswick Corporation for the benefit of its participant employees. Brunswick Corporation is a publicly traded company. Prior to a recent reorganization of Sea Ray, the ESOP Plan was maintained by Sea Ray Boats, Inc., which was a subsidiary of Ray Industries, Inc., which was in turn a wholly owned subsidiary of Brunswick Corporation. At the relevant times, plaintiffs-appellees William J. Barrington, Diane M. Yaconetti, and William J. McManaman were members of the Committee and employees of Brunswick Corporation.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome?

Brunswick Corporation

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STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs-Appellees believe that this case is well suited for summary affirmance without oral argument. The issues have been fully briefed in this Court and below and are exhaustively analyzed in the 79-page report and recommendation of the Magistrate Judge, which was accepted in whole by the district court. To the extent the court below erred, its errors favored appellants. In the event appellants' request for oral argument is granted, however, we also ask to be heard.

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**BRIEF OF PLAINTIFFS-APPELLEES ADMINISTRATIVE COMMITTEE OF THE
SEA RAY EMPLOYEES' STOCK OWNERSHIP AND PROFIT SHARING PLAN, et al.**

ISSUE PRESENTED FOR REVIEW

Whether the district court properly granted summary judgment to plaintiffs because, as plaintiffs had correctly determined, no partial termination of the Sea Ray Employees' Stock and Profit Sharing Plan occurred between July 1, 1989, and June 30, 1991.

STATEMENT OF FACTS

The issue in this case is whether, as the result of a reduction in employment levels at Sea Ray Boats, Inc. ("Sea Ray"), between 1989 and 1991, there was a partial termination of the Sea Ray Employees' Stock Ownership and Profit Sharing Plan (the "Plan"). Plaintiff plan administrators contend, and the District Court agreed, that no partial termination occurred.

Defendants pretend—setting forth purported "facts" that do not appear in the record and that are not supported by record citation—that the facts are in dispute.^{1/} However, as the court below determined after a careful review of the record, the facts material to the partial termination issue are not genuinely in dispute:

^{1/} For example, neither the chart set out at page 15 of the Class I Brief nor its breakdown of figures appear in the opinions below or in the record, and the chart admittedly depends on certain (erroneous) assumptions. Class I's brief includes numerous other purported statements of "fact" that are unsupported by any record citation. See Class I Br. 25-28.

1. The Plan And Its Partial Termination Provisions

The Plan is maintained for the benefit of participating employees of the Sea Ray Division of Brunswick Corporation. It is a defined contribution stock bonus and profit sharing plan governed by the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1002(3) & (34), and a qualified plan within the meaning of the Internal Revenue Code ("Code" or "IRC"), 26 U.S.C. § 401.

The Plan is administered by plaintiff Administrative Committee of the Sea Ray Employees' Stock Ownership and Profit Sharing Plan (the "Committee"). At the relevant time, plaintiffs William J. Barrington, Diane M. Yaconetti, and William R. McManaman were members of that Committee. Report and Recommendation of the Magistrate ("R&R") 2-4, JA 917-918. Plan Section 16(c) broadly confers on the Committee "all powers necessary to enable it to administer the Plan." These include "determining the appropriate allocations to Participants' Accounts," "determining the amount of benefits payable to a Participant," and "construing and interpreting the Plan and Trust Agreement and adopting rules for administration of the Plan that are consistent with the terms of the Plan documents and of ERISA and the Code." Plan § 16(c), JA 68, 70; R&R 3, 28, JA 918, 943.

The Plan is funded by the employer; participating employees make no contributions to the Plan. The Plan's assets are allocated to the individual accounts of participating employees. As ERISA and the Code require, each participant's benefits are "based solely on the amount

contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account." 29 U.S.C. § 1002(34); 26 U.S.C. § 404; R&R 2-3, JA 917-918.

Sea Ray begins contributing to the Plan on behalf of employees after one year of service. However, employees do not become fully vested in their account balances (*i.e.*, do not fully "own" their account balances) until they have worked at the company for seven years. Vesting occurs gradually according to the following formula:

<i>Credited Service</i>	<i>Vested (or Nonforfeitable) Percentage</i>
Less than 3 years	0%
3 years	20%
4 years	40%
5 years	60%
6 years	80%
7 years	100%

Plan § 10, JA 59-60. ERISA expressly permits gradual vesting using this formula. 29 U.S.C. § 1053(a)(1)(B); R&R 4, JA 919.

In usual circumstances, if an employee leaves the company before completing seven years of service, the nonvested (or forfeitable) portion of his or her account balance is reallocated among remaining Plan participants. Plan §§ 6, 10, JA 52, 60. However, under the terms of Plan Section 19, if there is a partial termination of the Plan, the account balances of the participants affected by the partial termination become fully vested (nonforfeitable), and the terminated employees

are entitled to retain their full account balances without regard to years of service. R&R 4-5, JA 919-920. Section 19 was included in the Plan in order to assure its favorable tax treatment. Code § 411(d)(3) provides that, in order to be tax qualified, a plan must include a provision that "upon its termination or partial termination * * * the rights of all affected employees to benefits accrued to the date of such termination [or] partial termination * * * or the amounts credited to the employees' accounts, are nonforfeitable." R&R 5 n.4, JA 920.^{2/}

2. The Plan's Recent History

Sea Ray manufactures and sells a full line of fiberglass motor boats, including sport boats, sport cruisers, and luxury yachts. R&R 7, JA 922. Purchase of these high-ticket, durable goods is postponable. In consequence, Sea Ray's business is greatly affected by fluctuations in the economy. Economic Intelligence Co., *Report to Brunswick Corporation 1* ("EIC Report"), JA 871; R&R 10, JA 925.

The U.S. boating industry "went through an enormous, unprecedented cyclical expansion during the 1980s. Growth surged an average of 35 percent per year from 1983 through 1986, and sales remained at historically high levels from 1986 through 1988." Boat sales then "dropped sharply in 1989 through 1991" and remained flat through 1993. *EIC Report*, at 5, 7, JA 875, 877. Sea Ray's sales mirrored these

^{2/} Terminations of Plan participants did not create or increase the possibility of a reversion of Plan assets to Sea Ray. Reversion is not a possibility with a defined contribution profit-sharing and ESOP like the Sea Ray Plan. See 1 Michael J. Canan, *Qualified Retirement and Other Employee Benefit Plans* 293 (1995) ("A profit-sharing or stock bonus plan cannot return any of its assets to the employer. Thus, forfeitures by participants must be reallocated to other participants"); R&R 74, JA 989. Under ERISA, the Plan could not and did not include a provision that would allow reversion.

trends. From 1985 to 1988, the number of boats sold by Sea Ray increased substantially. Sea Ray added \$100 million in volume to its business every year. R&R 8, JA 923. Then, starting with a relatively small decline from 1988 to 1989, the number of boats sold dropped precipitously through 1991. The decline in sales in 1989 was across all product lines except luxury yachts. Yachts continued to sell relatively well until 1990, when a federal luxury tax targeted high ticket consumer goods. R&R 10, JA 925. Sea Ray's sales for this time frame were as follows (R&R 12, JA 927):

<i>Year</i>	<i>Units Sold</i>
1985	12,456
1986	15,916
1987	22,355
1988	24,538
1989	23,214
1990	14,343
1991	10,542

The expansion and subsequent contraction in boat sales was reflected in the number of Plan participants. As of July 1, 1985 (a year in which Sea Ray sold 12,456 boats), there were 1,501 participants employed at seven locations (Cmplt. ¶ 50; R&R 9, JA 924):

<i>Division</i>	<i>Participants</i>
Oxford Plant Oxford, Michigan	377
Phoenix Plant Phoenix, Arizona	259
Merritt Island Plant Merritt Island, Florida	303
Knoxville Plant Knoxville, Tennessee	294

Tellico Plant Vonore, Tennessee	114
Palm Coast Plant Palm Coast, Florida	21
Ray Industries Knoxville Corporate Headquarters	133
<u>Total:</u>	<u>1,501</u>

By July 1, 1989, Sea Ray had expanded to thirteen locations and there were 3,832 Plan participants (Cmplt. ¶ 51; R&R 7-9, JA 922-924):

<i>Division</i>	<i>Participants</i>
Oxford Plant	506
Phoenix Plant	239
Merritt Island Plant	433
Knoxville Plant	474
Tellico Plant	426
Palm Coast Plant	438
Cherokee Cove Plant Madisonville, Tennessee	327
Product Development & Engineering Merritt Island, Florida	145
Fort Mill Plant Fort Mill, South Carolina	76
Transportation Division Knoxville, Tennessee	79
Riverview Plant Knoxville, Tennessee	217
Sykes Creek Plant Merritt Island, Florida	58
Ray Industries	58
<u>Total:</u>	<u>3,832</u>

The total number of Plan participants during the 1989-1990 Plan year was 4,084—the number at the beginning of the year, 3,832, plus the number added during the year, 252. R&R 21, JA 936.

Unfavorable economic conditions and declining sales beginning in 1989 forced Sea Ray to consolidate operations, close plants, and reduce its workforce. In 1990, Sea Ray closed the Fort Mill plant and consolidated operations at Cherokee Cove with those at Tellico, and operations at Riverview with those at Knoxville. R&R 13-16, JA 928-931. By June 30, 1990 (a year in which Sea Ray sold 14,343 boats), the number of Plan participants had declined to 3,060 (Cmplt. ¶ 52; R&R 10-11, JA 925-926):

<i>Division</i>	<i>Participants</i>
Oxford Plant	315
Phoenix Plant	193
Merritt Island Plant	430
Knoxville Plant	494
Tellico Plant	569
Palm Coast Plant	411
Product Development & Engineering	168
Transportation Division	65
Sykes Creek Plant	88
Ray Industries	327
<u>Total:</u>	<u>3,060</u>

The total number of Plan participants during the 1990-1991 Plan year was 3,111—the number at the beginning of the year, 3,060, plus the number added during the year, 51. R&R 21, JA 936. For the two Plan

years 1989-1991, the total number of participants was 4,139—the number at the beginning of the period, 3832, plus 303 participants added during the period. *Ibid.*

Unfavorable economic conditions continued into 1991. In that year (in which Sea Ray sold 10,542 boats), Sea Ray closed the Oxford plant. R&R 17, JA 932. By June 30, 1991, the number of Plan participants had declined to 1,968 (Cmplt. ¶ 53, R&R 11, JA 926):

<i>Division</i>	<i>Participants</i>
Phoenix Plant	171
Merritt Island Plant	323
Knoxville Plant	360
Tellico Plant	348
Palm Coast Plant	215
Product Development & Engineering	128
Transportation Division	49
Sykes Creek Plant	116
Ray Industries	259
<u>Total:</u>	<u>1,968</u>

3. The Plan Committee's Determination That No Partial Termination Had Occurred

The decline in Plan participation raised concerns among the members of the Committee that a partial termination might have occurred during the 1989-1990 and 1990-1991 Plan years. Exercising its Section 16 powers to interpret the Plan and determine allocations to participants' accounts, the Committee discussed the partial termination question at two June 1992 meetings. At its June 12, 1992 meeting, the

Committee considered figures on terminations as reflected on Sea Ray's Plan Termination Reports (Pls. Exhs. II and III, JA 696-862), including the reasons for those terminations. Minutes of June 12, 1992 Committee Meeting, at 1, JA 864; see Class I Br. 39-40 (conceding that the Committee was presented with these figures). The Committee summarized the cyclical business reasons for the decline in Plan participation and discussed the governing legal standards, including the "facts and circumstances" test for partial termination that has been adopted in administrative and judicial interpretations of IRC Section 411(d)(3). June 12 Minutes, at 1-3, JA 864-866; R&R 5-6, JA 920-921.

Subsequently, at its June 26, 1992 meeting, the Committee determined that no partial termination had occurred, expressly utilizing the "facts and circumstances" test to make this determination. Minutes of June 26, 1992 Committee Meeting, at 1, JA 868; R&R 6, JA 921. The Committee

discussed the fact that layoffs were dictated by business conditions in a cyclical business. * * * The Committee members concluded that there were no facts or circumstances other than the layoff due to the cyclical business which would dictate a finding of a Partial Termination. It was noted that forfeitures would not reduce the Company's required contributions or create or increase the possibility of a reversion to the Company. It was also noted that the terminations were not motivated by a desire to discriminate in favor of highly compensated employees, as evidenced by the fact that terminated employees were the first to be recalled as jobs became available * * *.

June 26 Minutes, at 1, JA 868. Thus, the Committee determined that participants who terminated employment at Sea Ray from 1989 to 1991 and who were not fully vested in their account balances were not entitled to become fully vested. The nonvested portions of their account

balances would be forfeited and allocated to the remaining participants in the Plan. The Committee held the reallocation of these forfeitures in abeyance until it obtained a judicial determination of whether there has been a partial termination of the Plan. *Id.* at 2, JA 869; Cmplt. ¶¶ 61-62.

4. The Present Litigation

The Committee filed this action for a declaratory judgment, naming two putative classes as defendants. Class I defendants are all those former Sea Ray employees (and their beneficiaries) who were participants in the Plan, whose service at Sea Ray ended between July 1, 1989, and June 30, 1991, and who had an interest in the Plan that was not fully vested when their employment ended. Class II defendants are all the present and former Plan participants (and their beneficiaries) who may be entitled under the terms of the Plan to receive a portion of the account balances forfeited by Class I members if there has been no partial termination. Plaintiffs' suit seeks a declaration that there has not been a partial termination of the Plan, that members of Class I are therefore not entitled to the accelerated full vesting of their account balances that would flow from a partial termination, and that the nonvested portions of the Class I members' account balances should therefore be allocated to the remaining Plan participants, the members of Class II. R&R 2-3, JA 917-918.

5. The Magistrate Judge's Report And Recommendation

The parties filed cross-motions for summary judgment. Magistrate Judge Thomas Phillips recommended in a comprehensive, 79-page opinion that the summary judgment motions of the plaintiffs and the Class II defendants be granted and that the motion of the Class I defendants be denied. R&R 79, JA 994.

Initially, the Magistrate Judge held that the Committee's determination that there had been no partial termination could be upset only if it was arbitrary and capricious. Following *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), the court held that a plan administrator's exercise of discretionary powers granted by the plan is reviewed for abuse of discretion. R&R 21-29, JA 936-944. Here, the court reasoned, Plan Section 16(c) granted the Committee "all powers necessary * * * to administer the Plan," including authority to "constru[e] and interpre[t] the Plan," determine "appropriate allocations to Participants' Accounts," and determine "the amount of benefits payable to a Participant." Thus, the court held, the "Plan clearly grants the Committee the authority to interpret the term 'partial termination,'" which appears in Plan Section 19. And whether there had been a partial termination affects appropriate allocations to participants' accounts and the amount of their benefits. R&R 28-29, JA 943-944.

The Magistrate Judge then concluded that the Committee's determination that there had been no partial termination of the Plan was reasonable and not arbitrary and capricious. Following *Kreis v. Charles O. Townley, M.D. & Assocs.*, 833 F.2d 74 (6th Cir. 1987), the

court held that under the IRS's "facts and circumstances" test, "two general inquiries" are relevant to whether there has been a partial termination: "the percentage of Plan participants who were involuntarily excluded from the Plan" and "the motives of the decision maker." R&R 44, JA 959.

Percentage of involuntary terminations. To determine the percentage of involuntary terminations, the court found that "the Plan should be analyzed in separate years" because "[t]he circumstances surrounding the large boat layoffs [in 1990-1991] were distinctly different than those for the small boats" in 1989-1990. After yachts continued to sell well in 1989-1990, the federal luxury tax resulted in an "additional large wave of layoffs" in 1990-1991 that otherwise would not have occurred. R&R 53, JA 968.

The court also held that voluntary terminations from Sea Ray should not be counted as terminations for purposes of determining whether there had been a partial termination.^{3/} Thus, the court excluded from the relevant terminations 648 employees who, during the two-year period in issue, quit voluntarily, retired, died, or became disabled. The court refused to hold, as the Class I defendants had urged, that all terminations after layoffs first began should be regarded as involuntary on a "constructive discharge" theory. R&R 55, 65, 69, JA 970, 980, 984. With these principles in mind, the court calculated the

^{3/} For summary judgment purposes only, and to Class I's advantage, the Committee agreed that terminees who had already become fully vested in their account balances (because they had been employed by Sea Ray for seven or more years) should be included in the calculation. R&R 61, JA 976.

percentage reductions using the following formula (R&R 70-72, JA 985-987):

$$\frac{\text{Total reduction - excludable employees}}{\text{Total participants including those added during year,}}$$

which produced the following percentage reductions:

1989-1990:	$\frac{(1,024 - 373)}{4,084}$	= 15.9%
1990-1991:	$\frac{(1,143 - 275)}{3,111}$	= 27.9%
1989-1991:	$\frac{(2,167 - 648)}{4,139}$	= 36.7%.

The court agreed with Class I that, "generally, a percentage [reduction in plan participants] above 50 percent will be determinative of the occurrence of a partial termination." "[F]igures below 20 percent" will rarely indicate a partial termination. When terminations are between 20 percent and 50 percent, the court held, following *Kreis*, 833 F.2d at 79-80, and *Halliburton Co. v. Commissioner*, 100 T.C. 216, 237 (1993), *aff'd*, 25 F.3d 1043 (5th Cir. 1994), a "sliding scale" applies. Between those figures, the percentage reduction "will be significant only if combined with other factors," in particular evidence of employer abuse of the plan or bad faith. R&R 66-67, JA 981-982.

Employer motives. The Magistrate Judge recognized that an employer may act in bad faith and abuse a plan by excluding participants to increase the amount of a reversion of plan assets to the employer, to increase the plan benefits of a favored group of employees, or to decrease the employer's contributions to the plan. R&R 73-74, JA 988-989. The Committee, the court held, had properly determined that the

terminations were not motivated for any of these reasons but were dictated by business conditions during a cyclical downturn. R&R 74, JA 989. As the court noted, Class I does "not argue that Sea Ray was motivated by improper motives in terminating the employees," and "[there is] [n]o evidence of abuse" of the tax qualified status of the Plan. R&R 74, JA 989.

"Since there is no evidence of abuse," the Magistrate Judge held, "the percentage of participants terminated was insufficient for a finding of a partial termination" and "the Committee's determination" that no partial termination had occurred was therefore a "reasonable interpretation of the Plan and of the cases and regulations concerning partial termination." R&R 78-79, JA 993-994.

6. The District Court's Decision

The district court, Judge James Jarvis, accepted the "exceptionally well-reasoned" report and recommendation of the Magistrate Judge. Memorandum & Order 2 ("Mem."), JA 94. The court held that the Magistrate Judge "was clearly correct" in applying the arbitrary and capricious standard of review, and that it was "entirely reasonable" to analyze each year separately because of the "distinct causes" of the layoffs in each year. Mem. 3-4, JA 95-96_. After "carefully conduct[ing] a *de novo* review of the record," the district court "agree[d] that the percentage of Plan participants terminated was insufficient for a finding of a partial termination" and that the Committee should therefore be granted summary judgment. Mem. 3, 5, JA 95, 97.

SUMMARY OF ARGUMENT AND STANDARD OF REVIEW

I. The district court correctly reviewed the Committee's determination that no partial termination had occurred under the arbitrary and capricious standard. Supreme Court and Circuit precedent establish that when plan documents grant the plan administrator discretion to make a determination—whether that determination is one of fact or law—a court upholds the administrator's determination unless it is arbitrary and capricious. Here, as the district court held, Plan provisions clearly grant the Committee discretion to decide whether there has been a partial termination. Whether the district court applied the correct standard of review is a legal question, which this Court reviews *de novo*. *Whisman v. Robbins*, 55 F.3d 1140, 1143-1144 (6th Cir. 1995).

II. The district court correctly held that the Committee's determination that there was no partial termination was reasonable and not arbitrary and capricious. Indeed, that determination was legally correct.

The district court agreed with Class I that a diminution in plan participation above 50% indicates that a partial termination has occurred, but held that, even looking at both Plan years at issue together, only 36.7 per cent of Plan participants were terminated. The district court held, applying the IRS's "facts and circumstances" test and following decisions of this and other courts, that a percentage of diminution of that magnitude does not indicate a partial termination unless there is evidence that the employer abused the tax-advantaged status of the Plan. Here, Sea Ray terminated employees during an

economic downturn for business reasons; there is no evidence, and Class I has not claimed, that Sea Ray abused the Plan.

The district court properly rejected Class I's argument that, for purposes of the 50 per cent rule, terminations should be measured without regard to an employee's reasons for leaving. The case-law, mirroring the position of the IRS, includes only *involuntarily* excluded participants in the partial termination calculation. Contrary to Class I, employees are not presumed to have been involuntarily discharged if they left a plant after layoffs began; the district court correctly recognized that an employee is constructively discharged in such circumstances only if there is no reasonable prospect of continuing work, which was not the case here. Nor was it unreasonable for the Committee to analyze the Plan years at issue separately; caselaw and IRS endorse that approach.

The district court's grant of summary judgment to the Committee and Class II is reviewed *de novo*. Its denial of summary judgment to Class I is reviewed for abuse of discretion as to matters of fact and *de novo* as to matters of law. *Douglas v. Argo-Tech Corp.*, 113 F.3d 67, 70 (6th Cir. 1997).

III. Even if the Committee's determination is reviewed *de novo*, summary judgment for the Committee should be upheld. As a matter of law, the percentage diminution in Plan participation was not enough to cause a partial termination by itself. Moreover, the history and purpose of the partial termination rule demonstrates that whether the employer abused the tax-advantaged status of the Plan is an important

"fact or circumstance" to be considered in deciding whether a partial termination took place. Such abuse is not even alleged here.

ARGUMENT

I. THE DISTRICT COURT PROPERLY REVIEWED THE COMMITTEE'S DETERMINATION THAT THERE WAS NO PARTIAL TERMINATION UNDER THE ARBITRARY AND CAPRICIOUS STANDARD

Supreme Court precedent and decisions of this and other courts of appeals establish that the district court correctly applied the arbitrary and capricious standard of review to the Committee's determination that there had been no partial termination.

A. The Caselaw Requires That The Committee's Decision Be Reviewed Under The Arbitrary And Capricious Standard

In *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 111-112, 115 (1989), the Supreme Court held that when plan documents grant a plan administrator discretion to make a determination, a court reviews that determination under the arbitrary and capricious standard. Thus, an administrator's decision to deny a benefits claim based upon an interpretation of the plan will be upset only if it is arbitrary and capricious, provided the plan gives the administrator "discretionary authority to determine eligibility for benefits or to construe the terms of the plan." *Id.* at 115; see *Abbott v. Pipefitters Union Benefit Plan*, 94 F.3d 236, 240 (6th Cir. 1996); *Wendy's Int'l v. Karsko*, 94 F.3d 1010, 1012 (6th Cir. 1996); *Whisman v. Robbins*, 55 F.3d 1140, 1143-1144 (6th Cir. 1995).

While this case arises in a different context than *Firestone*, which involved a claim for wrongful denial of benefits under 29 U.S.C. § 1132(a)(1)(B), the overarching tenet of *Firestone*—that principles of trust law determine the proper standards of review under ERISA—is one

of general application. See *Firestone*, 489 U.S. at 110-111; *Wells v. United States Steel & Carnegie Pension Fund, Inc.*, 950 F.2d 1244, 1248 (6th Cir. 1991). And the pertinent principle of trust law is that judicial review of a fiduciary's exercise of discretionary powers granted by a trust document is deferential. As the Supreme Court explained (489 U.S. at 111):

Trust principles make a deferential standard of review appropriate when a trustee exercises discretionary powers. See Restatement (Second) of Trusts § 187 (1959). * * * [O]ver a century ago we remarked that "[w]hen trustees are in existence, and capable of acting, a court of equity will not interfere to control them in the exercise of a *discretion vested in them by the instrument* under which they act."

This trust law principle is not limited to denial-of-benefits claims. In *Abbott*, 94 F.3d at 240-241, this Court reviewed the plan administrators' decision setting employee contribution rates under the arbitrary and capricious standard. And in *Sutter v. BASF Corp.*, 964 F.2d 556, 562 (6th Cir. 1992), it applied the arbitrary and capricious standard of review to a plan administrator's refusal to amend the plan. See also *Ershick v. United Missouri Bank*, 948 F.2d 660, 666 (10th Cir. 1991) (deference to administrators' investment decision); *Morales v. Pan Am. Life Ins. Co.*, 914 F.2d 83, 86-88 (5th Cir. 1990) (deference to determination to allow lump-sum payments to certain participants).

The powers conferred on the Committee by Plan Section 16(c) to determine allocations to participants' accounts, determine what benefits are payable, and construe and interpret the Plan, satisfy *Firestone*. See *Abbott*, 94 F.3d at 238, 240 (where plan empowers

administrators to decide "questions * * * as to any claim for benefits, * * * as to the construction of the language or meaning of the rules and regulations * * * or as to any writing, decision, instrument, or accounts in connection with the operation" of the plan, administrators' actions are reviewed "to determine only if they were arbitrary and capricious"); *Sutter*, 964 F.2d at 559, 562.

Class I contends (Br. 32) that the Plan's grant of discretion was not clear enough to trigger *Firestone* deference, because the Plan "contains no language defining a partial termination." While the grant of discretion to a plan administrator must be "clear," it need not be so narrowly specific as Class I pretends. *Firestone* held that a court should defer to a plan administrator's benefit determination if the Plan grants the administrator discretionary authority *either* to determine benefits "or to construe the terms of the plan." 489 U.S. at 115 (emphasis added). And in *Davis v. Kentucky Fin. Cos. Retirement Plan*, 887 F.2d 689, 694 (6th Cir. 1989), this Court reviewed a plan administrator's interpretation of the term "employee" under the arbitrary and capricious standard, though that term was nowhere defined in the plan.

Anyway, as the district court concluded, the Plan's grant of discretionary authority was specific. Plan Section 19 provides what is to occur in the event of a "partial termination." JA 74. Section 16(c) "grants the Committee the authority to interpret the term 'partial termination'" in Section 19. R&R 29, JA 944. The Committee also had the authority under Section 16(c) to determine "appropriate allocations to Participants' Accounts." This necessarily carried with it the power to

determine whether a partial termination had occurred. If there had been a partial termination, the Committee would have been required to fully vest the accounts of terminated participants under Plan Section 19; since there was no partial termination, the Committee was required to allocate the forfeited portions of terminated participants' accounts to the accounts of remaining participants. Plan §§ 6, 10, JA 50-54, 60. These explicit sources of authority in the Plan entitle the Committee's determination to deference under *Firestone*.

Class I's argument that the Plan's grant of authority to the Committee was not "clear" enough relies primarily on *Perez v. Aetna Life Ins. Co.*, 96 F.3d 813 (6th Cir. 1996). Class I Br. 31-32. Class I fails to note that the *Perez* decision was vacated when this Court granted en banc review. 106 F.3d 146 (1997). Nor did the vacated panel decision help Class I, as the district court recognized. Mem. 3, JA 95. The plan language in *Perez* was not remotely like the language of the Sea Ray Plan, which very clearly gives the Committee broad discretionary authority, including authority to determine if there has been a partial termination.

B. The District Court Properly Rejected Class I's Argument That De Novo Review Is Required Because Whether There Has Been A Partial Termination Is A Question Of Law

Class I incorrectly asserts (Br. 32-33) that the Committee's determination was not entitled to *Firestone* deference because whether a partial termination has occurred is a question of law.

The inquiry into whether there has been a partial termination is intensely factual. As the district court observed, whether there has been a partial termination depends on the "facts and circumstances"

(R&R 30-31, JA 945-946), including whether there has been a "sharp reduction in levels of plan participation; [an] increase in the possibility of discrimination in favor of officers, shareholders or highly-compensated employees; [or] the creation or increase of the possibility that plan assets may revert to the employer," none of which factors is by itself controlling. R&R 37, JA 952. When a decision involves multiple fact-findings and balancing numerous elements, judicial deference to that fact-bound decision is particularly appropriate.

Even if the Committee's determination involved analysis of legal principles incorporated into the Plan, nothing in *Firestone* suggests that it does not apply to the review of a plan administrator's determinations of law. To the contrary, *Firestone* concerned the interpretation of a benefit plan—*i.e.*, the interpretation of a contract and trust document—which is always a question of law. *Lake v. Metropolitan Life Ins. Co.*, 73 F.3d 1372, 1376-77 (6th Cir. 1996) (level of benefits available under a plan is "a matter of contract interpretation"); *Golden v. Kelsey-Hayes Co.*, 73 F.3d 648, 653 (6th Cir. 1996) ("[q]uestions of contract interpretation are generally considered questions of law"); *Ulmer v. Harsco Corp.*, 884 F.2d 98, 101-102 (3d Cir. 1989) (plan interpretation is a question of law); *Estate of West*, 560 N.W.2d 810, 812 (Neb. 1997) ("interpretation of the words of * * * a trust is a question of law").

As the district court recognized (R&R 27-28, JA 942-943), this Court has implicitly held that *Firestone* governs review of plan administrators' plan interpretations that involve questions of law. In

Davis, the plan granted the retirement committee "discretion * * * to interpret its terms." R&R 27, JA 942. The committee exercised this discretion to determine whether a decedent was an "employee" within the meaning of the plan. As the plaintiff in *Davis* argued (887 F.2d at 693) and as Class I concedes (Class I Obj. to R&R 19 ("Class I Obj."), JA 998), the question whether "a person is an employee" generally is "a legal question." Nevertheless, this Court applied the arbitrary and capricious standard of review to the committee's determination whether the decedent was an "employee." 887 F.2d at 694.

Other courts have likewise used the arbitrary and capricious standard to review plan administrators' interpretations of legal concepts incorporated in the plan. See *Cvelbar v. CBI Ill., Inc.*, 106 F.3d 1368, 1379-1380 (7th Cir. 1997) (arbitrary and capricious standard applies to plan administrator's interpretation of IRC provision referred to in plan); *Trombetta v. Cragin Fed. Bank ESOP*, 102 F.3d 1435, 1438-1439 (7th Cir. 1996) (reviewing determination that plaintiffs were not "employees"); *James v. Louisiana Laborers Fund*, 29 F.3d 1029, 1032-1033 (5th Cir. 1994) (reviewing determination that rested on interpretation of state criminal law); *Blessing v. Deere & Co.*, 1997 WL 728875, *7-8 (S.D. Iowa Nov. 4, 1997) (reviewing determination regarding existence of common law marriage under state law) (included in Addendum); *Helton v. ACS Group*, 964 F. Supp. 1175, 1179-1180 (E.D. Tenn. 1997) (reviewing interpretation of state criminal law).

Weil v. Retirement Plan Admin. Comm., 913 F.2d 1045 (2d Cir. 1990) (*Weil II*)—the only case cited by Class I—misinterprets *Firestone* and is inconsistent with *Davis* and with the other decisions just cited. The district court correctly rejected *Weil* (R&R 27, J.A. 942) when it followed *Firestone* and *Davis* by reviewing the Committee's determination that there was no partial termination under the arbitrary and capricious standard.^{4/}

II. THE DISTRICT COURT CORRECTLY HELD THAT THE COMMITTEE'S DETERMINATION THAT THERE HAD BEEN NO PARTIAL TERMINATION WAS NOT ARBITRARY AND CAPRICIOUS

The district court correctly held that the Committee's determination that there was no partial termination of the Plan was reasonable and not arbitrary and capricious. Indeed, that determination was legally correct.

A. Class I Misstates The Arbitrary And Capricious Standard And Misallocates The Burden Of Proof

This Court explained in *Davis* that "[w]hen it is possible to offer a reasoned explanation, based on the evidence, for a particular outcome, that outcome is not arbitrary or capricious." 887 F.2d at 693. Class I agreed below that *Davis* properly explained the arbitrary and capricious standard (Class I Obj. at 2), and that is the standard the district court applied. R&R 26, 29, JA 941, 944. Class I cannot now

^{4/} Class I acknowledges that under *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-845 (1984), courts defer to agency interpretations of a statute that an agency administers. Class I Br. 32. Like an agency and its statutes, a plan administrator is governed by, and charged with interpreting and applying, the terms of the plan.

complain that the standard means something else. *Thurman v. Yellow Freight Sys.*, 97 F.3d 833, 835 (6th Cir. 1996); *In re Harshbarger*, 66 F.3d 775, 777 n.3 (6th Cir. 1995).

Nevertheless, Class I now focuses (Br. 33, 35) on the statement in *Baker v. UMWA Health & Retirement Funds*, 929 F.2d 1140, 1144 (6th Cir. 1991), that a determination is arbitrary and capricious unless it is "the result of a deliberate, principled reasoning process * * * supported by substantial evidence." But *Baker* did not signal a change in the arbitrary and capricious standard. Since *Baker* (whose formulation has never been repeated in a published opinion) this Court has continued to describe the arbitrary and capricious standard—"the least demanding form of judicial review" (*Davis*, 887 F.2d at 693)—as requiring courts to uphold an administrator's plan interpretation if it is "reasonable" or "rational." *E.g.*, *Smith v. Ameritech*, 129 F.3d 857, 863 (6th Cir. 1997); *Wendy's*, 94 F.3d at 1012; *Abbott*, 94 F.3d at 240; *Yeager v. Reliance Standard Life Ins. Co.*, 88 F.3d 376, 381 (6th Cir. 1996); *Perry v. United Food & Comm. Workers Union*, 64 F.3d 238, 242 (6th Cir. 1995); *Bartling v. Fruehauf Corp.*, 29 F.3d 1062, 1071 (6th Cir. 1994).

Class I also claims (Br. 34-36) that the Committee has the burden of proving that its determination was not arbitrary and capricious. Initially, it is difficult to see the relevance of the burden of proof. The case proceeded on cross-motions for summary judgment in which all parties contended that the material facts are not in dispute, and the district court found that to be the case.

As the party claiming benefits in an ERISA action, however, Class I bears the burden of showing that the plan administrator's decision was unreasonable. *Hall v. Mullins*, 621 F.2d 253, 255 (6th Cir. 1980); *Dowden v. Blue Cross & Blue Shield*, 126 F.3d 641, 644 (5th Cir. 1997); *Mann v. Prudential Ins. Co.*, 790 F. Supp. 1145, 1151 (S.D. Fla. 1992); *Poole v. Seattle-First Nat'l Bank*, 741 F. Supp. 837, 846 (E.D. Wash. 1990). The burden of proof does not shift, as Class I contends (Br. 35), merely because this is a declaratory judgment action brought by the Committee. See *John Morrell & Co. v. United Food & Comm. Workers Union*, 825 F. Supp. 1440, 1450 (D.S.D. 1993), *aff'd*, 37 F.3d 1302, 1304 (8th Cir. 1994); *Seattle Audubon Soc'y v. Lyons*, 871 F. Supp. 1291, 1307-1308 (W.D. Wash. 1994), *aff'd*, 80 F.3d 1401 (9th Cir. 1996).

Class I relies, in its burden of proof argument and elsewhere (Br. 34-35, 42-43, 46), on *In re Gulf Pension Litig.*, 764 F. Supp. 1149 (S.D. Tex. 1991). But in affirming *Gulf Pension*, the Fifth Circuit stated that because it did not decide the partial termination question, the district court's views on that issue were not conclusive even between the parties. *Borst v. Chevron Corp.*, 36 F.3d 1308, 1314 n.11 (5th Cir. 1994). Class I also cites (Br. 34) the IRS's *Plan Termination Handbook*. It is no surprise that the IRS takes the position that employers bear the burden of proof, since it is often a party against employers in partial termination cases. The Tax Court has not adopted the IRS's position (see *Halliburton Co. v. Commissioner*, 100 T.C. 216, 240 (1993), *aff'd*, 25 F.3d 1043 (5th Cir. 1994)), and the IRS's internal policy has nothing to do with who bears the burden of proof in

a judicial action. The IRS's substantive views concerning partial terminations may be of interest, but federal courts do not defer to an agency's procedural rules.^{5/}

Class I has not shown why this Court should depart from the rule that a party seeking benefits has the burden of proof. But whoever has the burden, we demonstrate below, the Committee is entitled to prevail.

B. The District Court Properly Found That The Committee's Determination Was Reasonable

In conducting its "reasonableness" inquiry, the district court rejected many of the Committee's arguments about the prerequisites for finding a partial termination. The court sided with Class I when it held that layoffs due to an economic downturn can trigger a partial termination. R&R 43, JA 958. It agreed with Class I that the most significant factor in assessing whether there has been a partial termination is the percentage diminution in plan participation. R&R 3, 66, JA 918, 981. And it accepted Class I's contention that a percentage diminution may be determinative "'standing alone,'" without evidence of employer abuse of the plan. R&R 66, JA 981. The court specifically

^{5/} Class I contends that its proof "has been entirely dependent on what Sea Ray would make available to it" and throws in the baseless and irresponsible assertion that the Committee has made only "some" evidence available to Class I. Br. 35-36. There was full discovery in this case, and Class I was always free to file motions to compel discovery in the district court if it believed that the Committee was withholding relevant evidence. If Class I thought it needed additional evidence to meet the Committee's motion for summary judgment, it could have responded with a request for further discovery under Fed. R. Civ. P. 56(f). In fact, Class I filed its own motion for summary judgment, demonstrating that it, too, believed that the material facts in this case are not in dispute and that further discovery was unnecessary.

concluded in Class I's view that "a percentage above 50 percent will be determinative of * * * a partial termination." R&R 67, JA 982.^{6/}

Class I's appeal thus comes down to a narrow disagreement with the district court over what reasonable bounds govern the Committee's application of the percentage diminution test to the facts. As the district court recognized, the Committee had considerable leeway, because "there is no magical figure at which a partial termination occurs." R&R 66, JA 981; see IRS, *Plan Termination Handbook* § 252(6), JA 663 ("There is no fixed turnover rate which determines whether a partial termination occurred"). Where the percentage diminution is below 20 per cent, no partial termination may be found according to the IRS and the caselaw.^{2/} Where it is above 50 per cent in a single year,

^{6/} The Committee believes that there can be no partial termination absent employer abuse of the tax-advantaged status of a plan. Part III, *infra*. Since there was no evidence of abuse, the Committee's determination was right as a matter of law, and obviously also reasonable. Class I is not helped by the fact that the district court used a standard *more generous* to them, one allowing a partial termination absent employer abuse.

^{2/} *E.g.*, *Kreis*, 833 F.2d at 83 (discharge of 15 per cent and 13.6 per cent of plans' participants not a partial termination); *Halliburton*, 100 T.C. at 240 (19.85 per cent); *Babb v. Olney Paint Co.*, 764 F.2d 240, 244 (4th Cir. 1985) (14.7 per cent); *Taylor v. Food Giant, Inc. Salaried Employees Pension Plan*, 6 Emp. Benefits Cas. 1291 (N.D. Ga. 1984) (13 per cent); *Wishner v. St. Luke's Hosp. Center*, 550 F. Supp. 1016 (S.D.N.Y. 1982) (3.7 per cent); *Beck v. Shaw Indus., Inc.*, 2 Emp. Benefits Cas. 2366 (N.D. Ga. 1981) (6.3 per cent); IRS Special Ruling, 9 Standard Fed. Tax Rep. (CCH) ¶ 6911 (Sept. 11, 1978) (16.7 per cent). The 20 per cent threshold figure is also supported, this Court noted in *Kreis*, 833 F.2d at 83, by the fact that "ERISA requires a plan administrator to notify the employer about the departure of plan participants only if such departure involves at least 20% of the total number of plan participants." See 29 U.S.C. § 1343(b)(3).

a partial termination is highly likely.^{8/} When the percentage diminution lies between 20 and 50 per cent, the facts and circumstances test requires examining factors such as plan abuse and bad faith, creating the "sliding scale" endorsed by this Court in *Kreis*, 833 F.2d at 79-80, and the Tax Court in *Halliburton*, 100 T.C. at 237 ("Between the two extremes, * * * the surrounding facts and circumstances have been considered in conjunction with the percentage drop," such as "abuse on the part of the employer"). R&R 67, JA 982.

Under this standard, the district court properly held that the Committee's decision was well within reasonable bounds. None of Class I's specific objections to the district court's application of the arbitrary and capricious standard withstand scrutiny.

1. Class I misapplies the "50 per cent rule"

Class I contends (Br. 37) that the Committee, when it made its determination, should "have realized that the percentage of all participants lost exceeded 50%." But Class I conjures a reduction over 50 per cent only by making two significant errors.

First, Class I looks (Br. 36-37) at the "gross contraction" in plan participation, without regard to employees' reasons for leaving. As we show in subsection 2, that is legal error. Once excludable employees are considered, the reduction in Plan participation was only

^{8/} IRS, Doc. 6678, *Plan Termination Standards 2* (1981), citing Rev. Rul. 81-27, 1981-1 C.B. 228 (57.6 per cent), and Rev. Rul. 73-284, 1973-2 C.B. 139 (80 per cent); see also *Tipton & Kalmbach, Inc. v. Commissioner*, 83 T.C. 154 (1984) (34 per cent and 51 per cent in consecutive years); *Peter M. Boruta, M.D., P.C. v. Commissioner*, 55 T.C.M. (CCH) 670 (1988) (66-2/3 per cent); Rev. Rul. 72-439, 1972-2 C.B. 223 (70 per cent).

36.7 per cent, even over the two year period 1989-1991. R&R 71-72, JA 986-987.

Second, Class I would apply the 50 per cent rule to the two year period rather than to each plan year individually. We explain in subsection 3 that it is generally inappropriate to aggregate reductions in plan participation over multiple plan years, and it would have been inappropriate here where different events caused the reductions. Looking at the two plan years separately, the percentage diminutions in Plan participation were 15.9 per cent in 1989-1990 and 27.9 per cent in 1990-1991. R&R 70, 72, JA 985, 987.

2. Class I's "gross contraction" approach is insupportable

Class I imagines that where there is a "gross contraction" in Plan participation over 50 per cent, measured without regard for participants' reasons for leaving, there is a partial termination. This contention lacks any support in the cases, is contrary to the position of the IRS as reflected in the *Plan Termination Handbook*, and is contrary to the governing rule in this Circuit.

Class I relies on *Halliburton* (Br. 36), but that case refutes its "gross contraction" approach.^{2/} To "decide the size of the drop to be utilized in applying the percentage test" the Tax Court carefully determined which employees should be excluded from that calculation. 100 T.C. at 238. The parties agreed that employees who died, retired

^{2/} The "gross contraction" approach is inconsistent with what Class I says (Br. 41) is "the best definition of partial termination": "A partial termination occurs when * * * a significant percentage of employees covered by the plan are *involuntarily* excluded or terminated from participating in the plan." *Morales v. Pan Am. Life Ins. Co.*, 718 F. Supp. 1297, 1302 (E.D. La. 1989) (emphasis added), *aff'd*, 914 F.2d 83 (5th Cir. 1990). *Morales* considers only contraction due to involuntary terminations.

normally, were terminated for cause, or were transferred, should be excluded. *Id.* at 238-239. And after observing that "case law overwhelmingly holds that employees who voluntarily separate from their employer should not be counted," the Tax Court also held that "voluntary, non-employer-initiated terminations are not to be considered in deciding whether a partial termination has occurred." *Id.* at 240-241.

The issue in *Weil v. Retirement Plan Admin. Comm.*, 933 F.2d 106, 107 (2d Cir. 1991) ("*Weil III*"), also relied on by Class I (Br. 36), was whether fully vested terminees should be included when making a partial termination calculation. The court of appeals did not discuss the broader and unprecedented proposition advanced by Class I. The case did not present that issue, because the employees had all been "*discharged* from their jobs" when the company moved its corporate headquarters and closed or sold a number of divisions. 933 F.2d at 107 (emphasis added). In *Weil I*, the court of appeals instructed the district court that in making the partial termination calculation it should disregard employees who "left their employment voluntarily or were dismissed for reasons unrelated to [the corporate event]." 750 F.2d 10, 13 (2d Cir. 1984). The court of appeals did not modify that holding, or discuss the issue again, in its subsequent opinions.

Furthermore, in *Weil III*, the court of appeals understood the IRS's "long-standing position" to be that which it "expressly set forth in its *Plan Termination Handbook*." 933 F.2d at 107. The *Handbook* provides that only "employer-initiated terminations" are to be included

in the partial termination calculation and that employees who leave voluntarily are not included. *Plan Termination Handbook* § 252(7), JA 663; see also *Handbook Ex. 1 (Examination Tips)* ¶ 4, JA 680.

In *Kreis*, this Court followed the approach taken by every other court to consider the issue and held that the partial termination determination is based not on "gross contraction," but on "the percentage of plan participants who are *involuntarily excluded from the plan by the participants' employer in connection with a major corporate event.*" 833 F.2d at 79 (emphasis added). Participants who died, retired, became disabled, were terminated for cause, or quit voluntarily do not come within that definition. There is no support anywhere for Class I's "gross contraction" approach. It was reasonable—indeed, legally required—for the Committee not to take that approach in determining whether a partial termination had occurred.

3. It was not unreasonable to consider plan years separately

Class I asserts (Br. 41-43) that it was unreasonable for the Committee to treat the two plan years in issue separately. This argument has no merit.

First, as the district court recognized (R&R 53, JA 968), even when a single corporate event causes a decline in plan participation stretching over more than one plan year, the percentage reduction is properly calculated separately for each plan year. *Tipton & Kalmbach*, 83 T.C. 154 (calculating reductions of 34 per cent and 51 per cent in consecutive years before concluding that there was a partial termina-

tion); *Plan Termination Handbook* § 252(5)(c), JA 663 (separating the Tipton reductions into two years).^{10/}

Class I relies on *In re Gulf Pension Litig.*, 764 F. Supp. 1149 (S.D. Tex. 1991). This Court is not bound by decisions of district courts, and there is particular reason to disregard the controversial partial termination analysis of *Gulf Pension*. As explained above (p. 25), the Fifth Circuit's disposition deprives the district court's partial termination analysis of any weight.

It was reasonable to conclude here, as the district court held, that the reduction in Sea Ray Plan participation was the result of distinct corporate events: an initial downturn in the demand for small boats, while large yachts continued to sell well, followed by a sharp decline in the demand for yachts, caused by the federal luxury tax on boats costing more than \$100,000. R&R 53, Mem. 4, JA 968, 96. The impact of the luxury tax caused "significant terminations" at the Florida plants in December 1990 and March-May 1991. R&R 48, 52-53, JA 963, 967-968; Class I Exhs. 2, 4, 8, JA 122, 159, 240. Even Class I admitted below that the effect of the luxury tax was at least a 25 per

^{10/} Considering plan years separately makes perfect sense. Given turnover rates in industry that average 15-20 per cent per year, even in normal times, many employers will experience 20 per cent or more turnover in two years, a figure sufficient to trigger a partial termination inquiry. See, e.g., Mark A. Huselid, *The Impact of Human Resource Management Practices on Turnover, Productivity, and Corporate Financial Performance*, 38 Acad. Mgmt. J. 635 (1995) (survey of major industries showed average turnover of 18.36 per cent); Gerald L. White, *Employee Turnover: The Hidden Drain on Profits*, 72 HR Focus 15 (Jan. 1995) (in "many industries * * * turnover rates exceed 75 percent"); BNA, *Quarterly Reps. on Job Absence & Turnover* (Dec. 14, 1989; Mar. 8, 1990; June 14, 1990; Sept. 13, 1990) (Pls.' Ex. VII), JA 882-889 (median turnover rate for all companies for the year beginning July 1989 was 12.2 per cent).

cent reduction in Plan participation in 1990-1991 (Class I Obj. 12, JA 997), an impact that has no correlate in the 1989-1990 plan year and that makes it appropriate to treat the two years separately. There is not one court decision or IRS ruling in which separate corporate events of this sort have been aggregated over multiple years in order to calculate the percentage reduction in plan participation.

Even if Class I were correct that the plan years at issue should be aggregated, that would still produce a reduction of just 36.7 per cent. R&R 71-72, JA 986-987. Absent any evidence of Plan abuse, see Part III, *infra*, it was reasonable for the Committee to conclude that such a reduction did not amount to a partial termination.

4. Class I's "constructive discharge" theory is unfounded

Class I contends (Br. 44-46) that the Committee's determination was unreasonable because the Committee did not count as "involuntarily discharged" employees who left after layoffs began but before the closing of the plant at which they worked was announced. As the district court noted, the Committee considered that "anyone who left employment at [a] plant after the announcement of th[at] plant closing was [an involuntary] layoff." R&R 56, JA 971. Class I insists (Br. 46) that this presumption of constructive discharge should begin much earlier, as soon as there are layoffs at a plant. There is no legal support for this contention, and nothing to suggest that the Committee's considered decision (R&R 77, JA 992) not to treat all resigna-

tions after layoffs began as constructive discharges was "unreasonable."

The district court did not deny that layoffs at a plant may raise such compelling job security concerns that resignations must be considered involuntary. But it agreed with the Tax Court's decision in *Halliburton*—which Class I treats as authoritative on the constructive discharge question (Br. 44-45)—that an employee's "[s]imple concern over future long-term employment" is not a sufficient basis for labeling that employee's resignation a constructive discharge; there must instead be "clearly no prospect of continuing to work." R&R 65-66, JA 980-981. Accord *Kreis*, 833 F.2d at 82 (an employee is not constructively discharged unless working conditions are "'so difficult or unpleasant that a reasonable person in the employee's shoes would [feel] compelled to resign'").

Halliburton held that "employees who voluntarily relinquished employment" should "not be counted in deciding whether a partial termination occurred." 100 T.C. at 239, 242. The court explained:

[S]ome employees might leave their jobs of their own accord, even when economic conditions are bad, because of dissatisfaction with their situations or for personal reasons. The partial termination rule was not intended to protect such persons—they do not have the same expectation with respect to the vesting of their accrued benefits that involuntarily separated employees do. Moreover, vesting their benefits would not necessarily deter abuse by employers.

Id. at 241-242. The court acknowledged that there is a constructive discharge when it is "shown that the participant * * * resigned due to intolerable working conditions created by the employer" or "after it is clear that there is no prospect of continuing to work." *Id.* at 240 (emphasis added). But because employees' separation forms did not indicate that they left "because of anticipated discharge" or "had been

forced to resign" (*id.* at 242), they would not be counted for partial termination purposes.^{11/} The *Halliburton* court thus rejected the precise argument Class I now makes: that employees who leave voluntarily during a period of corporate layoffs are presumed to be constructively discharged.^{12/}

Class I's constructive discharge argument is also factually insupportable. Sea Ray management thought at first that the layoffs would be temporary. After an initial round of layoffs in July 1989 and the closure of the Fort Mill plant, Sea Ray told employees in September 1989 that "[a]dditional * * * layoffs are not anticipated." JA 155 (Class I Ex. 3-B). The company did not make any additional permanent layoffs until July-September of 1990 (R&R 16-17, JA 931-932), and in November 1990 the company announced that it would close the Oxford plant in 60 days. R&R 17, JA 932. The impact of the luxury tax on yachts caused layoffs in Florida in December 1990 and March-May 1991. *Ibid.*

^{11/} As to employees who took early retirement, the court also said that "[a]llthough it is possible that the condition of Halliburton's business was a factor weighed by some retirees in deciding whether to accept * * *, such consideration does not make the resulting choice to retire involuntary." *Ibid.*

^{12/} Nothing in the *Halliburton* opinion substantiates Class I's claim (Br. 46) that the employer asked employees whether they were leaving in anticipation of being laid off. All the opinion says is that, just as in this case, many employees made statements about why they were leaving, and none indicated that it was because of anticipated discharge. *Halliburton*, 100 T.C. at 221, 242.

Thus, Sea Ray management tried hard to retain its workforce and did not "constructively discharge" its employees. Moreover, the company stayed in business, recalled many of the workers who were laid off during the 1989-1991 period, and continued to employ thousands of workers. R&R 79, JA 994. With the exception of employees who left the Fort Mill and Oxford plants after the company announced that it would close those facilities, no Sea Ray employees who left voluntarily did so only "after it [became] clear that there [was] no prospect of continuing work for the employer," and no Sea Ray employee was "compelled to resign."

Class I is not helped by the COS form for Ken Cartner, which it claims (Br. 46-47), without citation, to represent "what had to be the thoughts of many employees." Mr. Cartner's COS form notes that he left Sea Ray because of a perceived lack of job security and because he had the opportunity to return from a previous layoff to an old job that involved outdoor work, which he enjoyed. JA 539 (Class I Ex. 21). There is no indication that Mr. Cartner felt that it "was clear that there [was] no prospect of continuing to work" at Sea Ray. His simple concern over job security is not enough, as a matter of law, to turn his resignation into a constructive discharge.^{13/} Moreover, the question

^{13/} Class I suggests (Br. 46-48) that the district court improperly refused to consider evidence contained in COS forms. Class I wanted to establish through these forms that some voluntary terminees left Sea Ray for other jobs or left without giving a reason. Class I Br. 26-28, 46; Class I Br. in Supp. of Mot. for Summ. J. 50-52. Since it is plain that such terminees would not count as constructively discharged, there was no reason for the district court to consider the forms. Below, Class I also appealed to COS forms with respect to certain allegedly laid off terminees not included in Class I. Since the district court's calculation proceeded by taking *all* terminees and subtracting those identified as excludable, Class I's continued reference to this issue (Br. 26-28) is frankly mysterious.

whether there is no prospect of further work must be judged objectively, not according to the views of particular employees. *Kreis*, 833 F.2d at 82. At no Sea Ray plants (except at the Oxford and Fort Mill plants after their closings were announced) was it ever objectively reasonable to believe that there was no prospect for continued employment.

Moreover, factual indeterminacy about whether a particular termination was voluntary or employer-initiated would not be enough to prevent summary judgment for the Committee. The question is whether the Committee's resolution of that indeterminacy is reasonable. Class I admits (Br. 39-40) that when the Committee made its determination that there had been no partial termination, it had before it "[f]igures on plan participants lost" derived from Sea Ray's Plan Termination Reports. Pls. Exhs. II & III, JA 696-862. The IRS recognizes that annual plan reports and other corporate materials, like these Plan Termination Reports, can be relied on to establish that "termination of employees were not employer-initiated," but were "voluntary." *Plan Termination Handbook* Ex. 1 (Examination Tips) ¶ 4(a), JA 680 (Class I Exh. 23). Class I has never explained why it was unreasonable for the Committee to exclude from employer-initiated terminations those individuals who were listed on Sea Ray's Plan Termination Reports sim-

ply as "quit" with no other explanation as to why they left.^{14/}

Accordingly, it is legally correct, and therefore also reasonable, to exclude all voluntary terminees (except those who left Fort Mill or Oxford after the closure announcements) from the partial termination calculation. None of Class I's attacks on the district court's conclusions have merit: it is unquestionably "possible to offer a reasoned explanation, based on the evidence," for the Committee's conclusion that there was no partial termination. *Davis*, 887 F.2d at 693. In fact, that conclusion was correct as a matter of law.

III. EVEN IF REVIEWED *DE NOVO*, THE COMMITTEE'S PARTIAL TERMINATION DETERMINATION SHOULD BE UPHELD

Even if the Committee's partial termination determination is reviewed *de novo*, it should be upheld. The inquiries to be made under the facts and circumstances test are whether a substantial percentage of employees has been involuntarily excluded from the plan and whether the employer has abused the plan. *Kreis*, 833 F.2d at 79-80. We have shown in Part II that the percentage of employees excluded from the Plan was not so substantial, as a matter of law, as to create a partial

^{14/} Class I acknowledges (Br. 33-34) that *Miller v. Metropolitan Life Ins. Co.*, 925 F.2d 979, 986 (6th Cir. 1991), holds that a reviewing court should consider the "evidence available to the administrator" when the decision was made, not only information mentioned in some summary of the administrator's deliberations and determination. Class I's contention that the Committee's decision was unreasonable because the meeting minutes do not actually set forth figures on employee terminations (Br. 39-40) is simply wrong. Class I concedes (Br. 39) that those figures were "presented" to the Committee, and the meeting minutes reflect that the Committee considered "the number of plan participants and the reasons for the termination of participants at each of the Company's locations for each of the two plan years." June 12 Minutes, at 1, JA 864.

termination. In this section, we show that, as a matter of law, the anti-abuse prong of the partial termination test was not satisfied either.

A. Plan Abuse Is A Critical Factor In Determining Whether A Partial Termination Has Occurred

The partial termination rule addresses the concern that an employer may abuse the tax advantaged status of a plan by terminating employees in order either to discriminatorily allocate forfeitures to the officers, shareholders, and highly compensated employees who remain (the "prohibited group"), or to revert forfeitures to the employer. A clear sign of this purpose is that while ERISA has extensive vesting rules to protect employee interests, those rules do not require vesting upon partial termination of a plan. 29 U.S.C. § 1053. Rather, that vesting occur upon plan termination is a requirement of tax qualification for a plan, imposed by the Internal Revenue Code. As we explain in Part III.B, the partial termination rule was designed to prevent abuse of the tax benefits accorded to plans, not to benefit short term employees at the expense of long service employees by accelerating vesting of their benefits in the event of a termination.

Abuse of the tax advantaged status of a plan in the form of a discriminatory allocation of forfeitures is a concern in the case of defined contribution plans—the type of plan involved here—because amounts previously contributed to such a plan would inure to the benefit of the prohibited group who would be the last to have their employment terminated and who would thus stand to benefit from

forfeitures arising from the severance of other participants. Reversions to the employer are a concern in the case of defined benefit plans because contributions could be made and deducted in high-tax years and reverted in low-tax years, permitting plans to be used as tax avoidance mechanisms.

Citing "ERISA's goal of curbing the abuse of private retirement pension plans," this Court held in *Kreis* that a "necessary" inquiry in determining whether there has been a partial termination is whether the employer "excluded the plan participants in a predatory effort to profit" from the plan in these ways. 833 F.2d at 80 (emphasis added). Other courts have likewise concluded that the goal of the partial termination rule is to prevent employer abuse of benefit plans, and that where a "valid business justificatio[n] was the motivation" for terminating plan participants, rather than "impermissible favoritism towards principal [plan] beneficiaries" or a desire to capture a reversion of plan assets, no partial termination occurred. *Babb*, 764 F.2d at 244; accord *Sage v. Automation, Inc. Pension Plan*, 845 F.2d 885, 891-892 (10th Cir. 1988) (an "independent reaso[n]" why there was no partial termination in *Babb* was that the terminations were "justified from a business standpoint" and "not made in order to favor the principal beneficiaries of the plan"); *Freeman v. Central States Pension Fund*, 32 F.3d 90, 92 (4th Cir. 1994).

Thus, the court of appeals in *Firestone*, 828 F.2d 134, 151 (3d Cir. 1987), held that a partial termination should be found "only if

* * * the plan appears to have been created as a mechanism for deferring the recognition of income, and thereby reducing taxes, rather than as a mechanism for the provision of retirement benefits to employees" (emphasis added). The Third Circuit rejected an argument that the partial termination rule was designed to protect employee expectancies rather than prevent plan abuse. *Ibid.*; accord *Gluck v. Unisys Corp.*, 960 F.2d 1168, 1183-1185 (3d Cir. 1992).

In arguing that there can be a partial termination absent plan abuse, Class I relies (Br. 38) on flawed reasoning in the Tax Court's *Halliburton* decision. It is not true that the partial termination rule differs from anti-abuse rules because those rules "operate by stripping away the tax benefits associated with qualified plans, while the partial termination rule operates by requiring that plan assets be applied" in certain ways. *Ibid.*, quoting *Halliburton*, 100 T.C. at 227. The partial termination rule is like other anti-abuse rules cited in *Halliburton* in that it does not impose absolute requirements on plans but rather operates by depriving non-conforming plans of tax-favored status. See Code § 411(d)(3). So the reasoning of *Halliburton* actually supports the view that the partial termination rule is an anti-abuse rule and not a provision designed to protect employee expectancies.^{15/}

^{15/} *Amato v. Western Union*, 773 F.2d 1402, 1409 (2d Cir. 1985), and S. Rep. No. 93-383, at 1 (1973) (Class I Br. 38-39) do not discuss partial termination. *United Steelworkers v. Harris & Sons Steel Co.*, 706 F.2d 1289 (3d Cir. 1983), and *Chait v. Bernstein*, 835 F.2d 1017 (3d Cir. 1987), predate *Gluck*, in which the Third Circuit confirmed that a partial termination depends on the potential for employer abuse. 960 F.2d at 1183.

B. The History Of The Partial Termination Rule Demonstrates That Its Purpose Is To Prevent Employer Abuse

The history of the partial termination rule confirms that an employer's motive is critical in determining whether a partial termination has occurred.

1. The partial termination rule was intended to prevent plan abuse

The partial termination rule can be traced back to requirements the IRS imposed administratively, at a time when the Internal Revenue Code had no minimum vesting requirements, expressly to prevent the abuses identified above. PS No. 22, 3 Standard Fed. Tax Serv. (CCH) ¶ 6552 (1944); Rev. Rul. 55-186, 1955-1 C.B. 39. Code Section 401(a)(7), enacted in 1962, codified existing IRS administrative procedures intended to prevent tax abuses. See H.R. Rep. No. 87-378 (1961), reprinted in 1962-3 C.B. 261, 269; *id.* at 375-376; S. Rep. No. 87-992 (1961), reprinted in 1962-3 C.B. 303, 328. Although the statute referred only to full plan terminations, the regulation issued under Section 401(a)(7) also referred to partial terminations. Treas. Reg. § 1.401-6(b)(2) (1963).

ERISA subsequently amended the Code to impose vesting requirements as a condition of a plan's tax-qualified status. Congress enacted a new IRC Section 411 devoted to the vesting rules and amended Section 401(a)(7) to require that a plan satisfy Section 411 in order to be tax-qualified. In connection with that structural change, the termination rule was moved from Section 401(a)(7) to Section 411(d)(3) and, like the prior regulation, the statute made reference to partial as well as full terminations.

The legislative history reflects no Congressional intent with respect to Section 411(d)(3) other than a restatement of prior law. S. Rep. No. 93-383, at 50 (1973); H.R. Rep. No. 93-807 (1974), reprinted in 1974 U.S.C.C.A.N. 4670, 4731; H.R. Conf. Rep. No. 93-1280 (1974), reprinted in 1974 U.S.C.C.A.N. 5038, 5058. An intent to broaden the partial termination rule to protect employee expectancies where there is no abuse of a plan's tax-qualified status is nowhere discernable in ERISA's text or legislative history.^{16/} In fact, the four parts of ERISA show a contrary intent.

Title I. Title I of ERISA, captioned "*Protection of Employee Benefit Rights*," includes what is generally referred to as "ERISA." Congress found that "employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions." ERISA § 2(a), 88 Stat. 832. Accordingly, the policies of ERISA included "vest[ing] the accrued benefits of employees with significant periods of service." § 2(c), 88 Stat. 833. Consistent with these Congressional findings and policies, Title I required every retirement plan to include a vesting schedule at least as favorable as the statutory alternatives (full vesting after 10 years, graduated vesting between 5 and 15 years, or a vesting schedule based upon combined years of age and service). § 203(a), 88 Stat. 854-855. These vesting rules

^{16/} If the purpose of the partial termination rule had been to discourage large-scale layoffs or to protect the pension benefits of employees who suffered such layoffs, Congress and the IRS would have adopted a bright-line rule defining the circumstances under which employees would be entitled to vesting. That is the approach Congress took in the Worker Adjustment and Retraining Notification Act of 1988, a statute that was intended to deal with the consequences of large-scale layoffs. See 29 U.S.C. § 2101(a) (defining the terms "plant closing" and "mass layoff").

reflected Congress' intent to protect long service employees, but *not* to impose a rapid vesting requirement that would discourage employers from establishing and maintaining retirement plans.^{17/} Unsurprisingly, then, the "employee protection" part of ERISA, Title I, does not include the partial termination rule or any other rule providing accelerated vesting to participants who do not meet the Title I graduated vesting rules.

Title II. Title II of ERISA amended the Internal Revenue Code and reflected rules that Congress felt should be imposed on plans as conditions for receiving favorable tax treatment. Where Congress deemed a policy appropriate both for employee protection and as a condition for favorable tax treatment, such as the general vesting requirements, the Title II Code amendments were identical to the employee protection measures of Title I. Where a policy was deemed necessary for one purpose but not the other, however, there were significant differences between Titles I and II.^{18/}

The inclusion of the partial termination rule in Title II but not in Title I is therefore telling. Congress's purpose in adopting special vesting rules in Title II was to prevent discrimination in favor of

^{17/} In adopting fairly long minimum vesting periods, Congress "recognized that a requirement for immediate and full vesting"—the sort of vesting that follows from partial termination—"would not be feasible because it would involve such substantial additional costs that *it would impede the adoption of new plans and the liberalization of existing ones.*" H.R. Rep. No. 93-807, 1974 U.S.C.C.A.N. at 4684-4685 (emphasis added).

^{18/} Title I included reporting and disclosure duties and stringent fiduciary standards that were not included in Title II. Title I also provided for civil and criminal enforcement, while Title II provided no private right of action.

officers, shareholders and highly compensated employees. Treas. Reg. § 1.413-1(c). Congress deemed the prohibition of discrimination necessary for favorable tax treatment, but did not include anti-discrimination vesting requirements in the employee protection provisions of Title I. If a retirement plan is not intended to be tax qualified, it need not comply with the non-discrimination provisions at all, including the partial termination rule, although the plan is still subject to ERISA. The statutory scheme thus indicates that the anti-discrimination partial termination rule was designed as a condition of tax qualification, but was not intended as an employee protection measure.

Title III. Title III of ERISA, primarily devoted to administrative matters, reflects that Congress was aware that participants' benefits could be forfeited as a result of mass layoffs. It directed the Secretary of Labor to conduct a study of the additional steps that would be necessary to protect individuals against forfeitures due to terminations of employment arising out of modifications or terminations of Federal contracts, grants or procurement policies. ERISA § 3032(a), 88 Stat. 1000.

Title IV. Title IV established the Pension Benefit Guaranty Corporation ("PBGC") to guarantee vested pension plan benefits. Benefits that become vested because of a partial termination are not guaranteed by the PBGC, however. § 4022(a), 88 Stat. 1016; *Harris & Sons*, 706 F.2d at 1293. Congress rejected a proposal to make partial terminations generally insurable, demonstrating once again that the

goal of the partial termination rule was not employee protection. PBGC Opinion Letter 75-84 (Aug. 24, 1975).

2. The random impact of the partial termination rule shows that it was not designed to protect employee expectancies

The partial termination rule's random impact is evidence that it is designed to prevent tax abuses and not to protect employee expectancies. Contrast an employee with two years of service who would become vested if he were laid off in a corporate event deemed to be a partial termination with a similarly situated employee who could work years more, be laid off in a business downturn that does not lead to a partial termination, and receive no benefit. Under ERISA, this long service employee could work a dozen more years and still forfeit part of his benefit if he were terminated in a downturn that did not result in a partial termination of the plan.

That the rule vests participants only to the extent that their benefits are *funded* also has random effects. IRC § 411(d)(3). In the case of an underfunded defined benefit plan, nonvested participants might achieve no additional vesting upon a partial termination. But if the plan is fully funded, employees with the same expectancies would become vested following a partial termination. Extending the rule to situations where there is no evidence of abuse would penalize diligent employers by vesting additional benefits, increasing plan costs, and thereby creating a perverse incentive to underfund plans.

3. The IRS consistently recognized the anti-abuse goal of the partial termination rule

Prior to the early 1980s, the IRS consistently applied the partial termination rule based upon whether, on the particular facts and circumstances, a failure to vest affected participants would result in an abuse of the tax-qualified status of a plan. There were three published revenue rulings on point, each of which held that a partial termination had occurred. However, those rulings related to situations where there were reductions in participation of 57.6 per cent and 70.6 per cent and the potential for significant discrimination or reversions.^{19/}

In the 1950s, 1960s and early 1970s, the IRS also issued "compendium rulings" which compiled all of the requirements applicable to qualified plans. Consistent with the anti-abuse basis of the rule, those rulings included the partial termination rule under the heading relating to anti-discrimination. Rev. Rul. No. 33, 1953-1 C.B. 267; Rev. Rul. 57-163, 1957-1 C.B. 128; Rev. Rul. 61-157, 1961-2 C.B. 67; Rev. Rul. 65-178, 1965-2 C.B. 94; Rev. Rul. 69-421, 1969-2 C.B. 59; IRS Pub. 778 (1972).

IRS technical advice memoranda issued in the 1960s and 1970s also reflected the anti-abuse policy of the rule. See Tech. Adv. Mem. 6512108240A (Dec. 10, 1965) ("the purpose of [IRC § 401(a)(7)] is to

^{19/} See Rev. Rul. 72-439, 1972-2 C.B. 223 (70.6 per cent of plan participants); Rev. Rul. 72-510, 1972-2 C.B. 223 (superseded by Rev. Rul. 81-27, 1981-1 C.B. 228) (57.6 per cent; following a further winding up, approximately two thirds of the plan's assets would be reallocated among a few remaining participants, see Tech. Adv. Mem. 7202186880A (Feb. 18, 1972)); Rev. Rul. 73-284, 1973-2 C.B. 139 (all but three employees discharged).

prevent the development of abuses under forfeitable plans"; "no partial termination can be said to have occurred unless it can be demonstrated that reallocation of forfeitures among the remaining participants in the plan * * * results in discrimination * * * or in an abuse which Section 401(a)(7) is intended to preclude"); Tech. Adv. Mem. 7411187610A (Sept. 24, 1974) (no partial termination despite declines in participation of 50 per cent in 1969, 49.9 per cent in 1970, and 28 per cent in 1971); see also Tech. Adv. Mem. 7312286880A (Dec. 28, 1973).

4. Current administrative application recognizes that plan abuse is an important element of the facts and circumstances test for partial termination

While placing more focus on the diminution in plan participation, the current IRS Manual continues to recognize that a significant reduction in employment levels does not by itself constitute a partial termination; evidence of plan abuse remains essential. See *Plan Termination Handbook* § 252(8), JA 663 ("factors bearing directly" on plan termination "include whether [the] [p]otential for reversion has been created or increased as a result of participant turnover [and] [t]he possibility for prohibited discrimination has increased"); *id.* § 252(10), JA 664 ("the possibility of reversion, prohibited discrimination, or a reduction in the number of employees covered by the plan may not, in and of itself, reflect that a partial termination has occurred; however, when each of these issues are considered collectively, they may interrelate in such a way as to reflect a partial termination"); *Plan Termination Standards* 2 ("a reduction of 20 per cent of

the number of employees covered would not by itself cause a partial termination, unless there were additional factors such as prohibited discrimination or potential for reversion").

C. Sea Ray's Terminations Were Motivated By Valid Business Considerations And Not By Any Intent To Abuse The Plan

Sea Ray's layoffs of Plan participants were "justified from a business standpoint" and "not made in order to favor the principal beneficiaries of the plan." *Sage*, 845 F.2d at 891-892. After the unprecedented expansion of the boating industry during the 1980s (R&R 8, JA 923), a rapid cyclical decline in sales during 1989-1991 left Sea Ray with excess capacity, requiring it to consolidate operations, close plants, and reduce its workforce. This retrenchment was undoubtedly agonizing for the company, but it was clearly a legitimate—indeed, necessary—business response to unfavorable economic conditions and declining sales. See *Barrington Dep.* 82-90, 134-139 (Class I Ex. 1), JA 118, 120-121; *June 26 Minutes*, at 1, JA 868 (the "layoffs were dictated by business conditions").

As the court below noted, Class I has not argued "that Sea Ray was motivated by improper motives in terminating the employees," and "[n]o evidence of abuse exists" here. R&R 74, JA 989. Since no reversion of Plan assets to Sea Ray is possible (see p. 4 n.2, *supra*), the only possible form of abuse would be discrimination in favor of the prohibited group of officers, shareholders, and highly compensated employees. There is no evidence of such abuse. Nor would terminations have been an effective way to try to discriminate in favor of the prohibited group. The Plan requires reallocating forfeitures among *all*

remaining participants. Plan §§ 6, 10, JA 50-54, 59-61. 1,968 participants remained in the Plan on June 30, 1991 (R&R 11, JA 926), so forfeitures would be spread over a large group, with no favoritism toward the prohibited group. Moreover, "terminated employees were the first to be recalled" to available jobs. June 26 Minutes, at 1, JA 868. Since participants reemployed within five years of layoff are entitled to *restoration* of forfeitures under Section 10(c) of the Plan, this again shows that the layoffs were not discriminatorily motivated.

Terminations were motivated by valid business purposes and not by a desire to discriminate in favor of the prohibited group. There was no abuse of the Plan; consequently, as a matter of law, no partial termination occurred.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted.

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