

No A09-1855

STATE OF MINNESOTA  
IN COURT OF APPEALS

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Darwin Roberts, Dave Dubs, Greg Morse, John Westhoffl, Kenneth Mathewson,  
Jeff Small, Arthur Buntrock, Roger Grindstaff, James Baron, Jack Herr, Vincent Bernu,  
Richard Sydow, Steve Eklund, Leroy Atkinson, Michael Kroupa, Diana Makimen,  
Suzzy Harper, Gary Harper, and Thomas Kimmes, individually and on behalf of all  
others similarly situated,

Appellants,

vs.

Brunswick Corporation and Lund Boat Company,

Respondents.

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BRIEF OF RESPONDENTS BRUNSWICK CORPORATION  
AND LUND BOAT COMPANY

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## STATEMENT OF THE ISSUE(S)

- I. Did the district court err in concluding that the Genmar Industries, Inc. (“Genmar”) vacation policy, constituted a unilateral employment contract when: (1) the handbook in which it was published expressly disclaimed the creation of any contractual obligations; and (2) Appellants themselves, both in written acknowledgements and in trial testimony, disclaimed that the handbook constituted a contract?**

The district court found that the Genmar vacation policy constituted a unilateral contract.

### **Most apposite cases:**

*Audette v. Northeast State Bank*,  
436 N.W.2d 125, 127 (Minn. Ct. App. 1989)

*Schmittou v. Wal-Mart Stores, Inc.*,  
No. 01-1763, 2003 U.S. Dist. LEXIS 15767 (D. Minn. Aug. 22, 2003)

*Garmarker v. Sterling Elec. Const. Co., Inc.*,  
No. C4-95-1205, 1995 Minn. App. LEXIS 1304 (Minn. Ct. App. Oct. 17, 1995)

- II. Was it clear error for the district court to conclude that Respondents effectively modified the Genmar vacation policy in October 2004?**

The district court made the following factual determinations: (1) the Genmar policy did not provide for accrual of vacation time; rather vacation pay was “earned” on July 1, and as such Genmar was free to modify the policy; (2) Respondents clearly communicated in October 2004 that they were revoking the old Genmar policy and implementing a new “earn and burn” policy effective July 1, 2005; and (3) that Appellants and other employees understood and were aware of this modification in October 2004, and continued to work thereafter.

Therefore, the district court concluded as a matter of law that any unilateral contract created by the Genmar vacation policy was effectively modified in October 2004, and such modification was accepted by the Appellants when they continued to work thereafter.

**Most apposite cases:**

*Brown v. Tonka Corp.*,  
519 N.W.2d 474, 477 (Minn. Ct. App. 1994)

*Pine River State Bank v. Mettille*,  
333 N.W.2d 622 (Minn. 1983)

*Feges v. Perkins Rests., Inc.*,  
483 N.W.2d 701, 708 (Minn. 1992)

**III. Was it clearly erroneous for the district court to determine that Appellants suffered no damages as a result of the modification of the Genmar vacation policy?**

The district court made the following factual determinations: (1) that while the two policies differ, the net effect was that the Appellants received the same vacation under the new vacation policy as they did under the old Genmar policy; and (2) that Appellants received at least as much, if not more, vacation under the new policy as they would have under the old policy and therefore suffered no loss of vacation benefits.

Therefore, the district court concluded as a matter of law that Appellants did not establish an essential element of their breach of contract claim.

**Most apposite cases:**

*Jensen v. Duluth Area YMCA*,  
688 N.W.2d 574, 578-79 (Minn. Ct. App. 2004)

*Armstrong, et al. v. Diamond Shamrock Corp.*,  
455 N.E.2d 702, 705 (Ohio Ct. App. 1982)

*Franklin Mfg. Co. v. Union Pac. R.R. Co.*,  
248 N.W.2d 324, 325 (Minn. 1976)

## STATEMENT OF THE CASE

Appellants, current and former employees of Lund Boat Company and Brunswick Corporation (“Respondents”), filed a class action complaint in Otter Tail County District Court on June 27, 2007 asserting, in pertinent part, breach of contract. Specifically, Appellants claimed that the vacation policy set forth in the employee handbook of Respondents’ predecessor, Genmar, constituted a unilateral contract, and that Respondents’ effort to modify the contract effective July 1, 2005 were ineffective. (AA. 1-9.)<sup>1</sup>

On August 25, 2008, the district court, the Honorable Mark F. Hansen presiding, certified a class with respect to Appellants’ breach of contract claim, defining the class as:

All persons employed by Brunswick Corporation and Lund Boat Company at the New York Mills, Minnesota plant through July 1, 2005, whose vacation time was calculated according to the model calendar year (beginning July 1 and ending June 30), and who ordinarily would have earned vacation time on July 1, 2005 under the Genmar vacation policy in the Genmar Handbook.

(AA. 26.) The district court specifically addressed the issue of whether or not employees were “earning” vacation throughout each model year by clarifying that the definition of the class “acknowledges that according to the Genmar Handbook, employees had to be

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<sup>1</sup> All references to Appellants’ Appendix are cited as “AA,” and all references to Appellants’ Addendum are cited as “AD.” All references to Respondents’ Appendix are cited as “RA.” Each of these citations are followed by the relevant page number.

employed on July 1, 2005” in order to be credited for vacation time calculated based upon time in service. (*Id.*)

The parties filed cross motions for summary judgment, which the district court denied on August 25, 2008, ruling that issues of fact precluded a finding as to whether a contract existed. (AA. 16-55.) Respondents filed a Petition for Discretionary Review with this Court on September 24, 2008 regarding the issue of whether the Genmar employee handbook, specifically the Genmar Policy, constituted a unilateral contract. (RA. 1-8.) That petition was denied on November 18, 2008. (RA. 9-10) In denying Respondents’ petition, this Court noted that the district court’s ruling appeared to involve important legal issues, but that consideration of those issues was not warranted on interlocutory appeal. (*Id.* at 10)

Upon request to the district court for reconsideration by Respondents, the district court issued Findings of Fact, Conclusions of Law, and an Order on October 21, 2008 granting Appellants’ Motion for Summary Judgment in part. (AA. 35-36.) The district court concluded that the Genmar vacation policy constitute a unilateral contract of employment. (AA. 36) The district court also found that there were material issues of fact regarding the effect of the contract. (*Id.*)

Appellants’ contract claim was tried to the district court on January 27-29, 2009. After receiving post-trial briefs and proposed findings of fact and conclusions of law from both parties, the court returned a judgment in favor of Respondents on June 11, 2009. The district court affirmed its determination that the Genmar employee handbook

constituted a unilateral employment contract, but found that Respondents effectively modified the contract and, in any event, Appellants suffered no damages. (AD. 1-16.)

On July 2, 2009, Appellants filed a Motion for a New Trial and for Amended Findings of Fact, Conclusions of Law, and Order of Judgment. (AA. 42-43) In an order dated August 12, 2009, the court partially amended its findings of fact, but otherwise denied Appellants' motions. (AD. 18.) The court further modified its Findings of Fact to correct a clerical error in an order dated August 24, 2009. (AD. 24-25.) Respondents now appeal the district court's determination that the Genmar employee handbook constituted a unilateral employment contract. Appellants appeal the district court's judgment and the denial of Appellants' motion for new trial and amended findings.

## **STATEMENT OF THE FACTS**

### **I. THE PARTIES**

Appellants are current and former hourly plant employees of Respondents Lund Boat Company and Brunswick Corporation who worked at the Lund Boat facility in New York Mills, Minnesota during the period of July 1, 2004 to June 30, 2005 and were still employed by Respondents on July 1, 2005. Appellants were initially employed by Lund and Genmar Industries, Incorporated, which owned Lund prior to Brunswick. Brunswick acquired Lund from Genmar on April 1, 2004. (Tr. 24:2-6; 79:17.)<sup>2</sup>

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<sup>2</sup> References to the Trial Transcript are cited as "Tr." followed by the relevant page numbers and lines. All references to trial exhibits are cited as "Ex." followed by the exhibit number.

## II. THE GENMAR VACATION POLICY

### A. The Terms and Conditions of the Genmar Vacation Policy

Prior to the purchase of Lund by Brunswick, Genmar's vacation policy provided the following:

The following paid vacation will be granted to employees meeting the qualifications. Vacation pay is **earned on July 1** of each model year and **calculated based on** the time in service during the previous model year. A model year starts on July 1 of one calendar year and ends on June 30 of the following calendar year. All service with the Company will be calculated as of June 30 for purposes of determining vacation pay earned on the following July 1.

...

Vacation time earned previously and unused during a plant shutdown may be taken at any time before June 30 during the current model year . . . .

(Ex. 102, p 20.) The Genmar vacation policy also set forth a schedule, which indicates the amount of vacation available to employees based on their "service with the company on June 30th":

<u>Service with the Company on June 30th</u>	<u>Paid Vacation</u>
Less than 240 regular working days but more than 20 regular working days	1/2 day (4 Hours) for every 24 regular working days served.
One year or 240 working days.	1 week (40 hours) pay.
One and one-half years	1 week and 1 day (48 hours) pay.
Two years	1 week and 2 days (56 hours) pay.
Three years	2 weeks (80 hours) pay.
Four years	2 weeks (80 hours) pay.
Five years	2 weeks (80 hours) pay.
Eight years	3 weeks (120 hours) pay.
Fifteen years	4 weeks (160 hours) pay.

(*Id.* at 21.) Because this schedule contemplates “service” reaching to fifteen years and beyond, the term “service” refers to an employee’s entire career with the company. The language of the Genmar vacation policy is clear that employees did not earn or accrue vacation as they worked. The policy states:

*Any employee with one year or more of service who terminates his or her employment prior to July 1 in any year will forfeit his or her right to unearned vacation pay. Any employee with less than one year of service who terminates his or her employment prior to July 1 will forfeit his or her right to vacation pay.*

(*Id.* (emphasis added).) Employees were not entitled to a pro-rated share of vacation if their employment terminated prior to July 1 of a model year. The only two circumstances in which employees received a pro-rated share of vacation prior to July 1, 2005 were upon retirement or death. (*Id.* at 21-22 (emphasis added).) Neither circumstance is applicable to the Appellants in this case.

The Genmar vacation policy was set forth in the benefits section of the Company’s employee handbook (the “Genmar Handbook”). The Introduction to the Genmar Handbook states:

This handbook has been prepared for your common guidance . . . . Keep in mind, however, that due to the ever-changing needs of the company, these guidelines or policies may change.

*Nothing in this handbook should be construed as a contract. Lund Boats has the right to change these policies, procedures, and benefits as it deems appropriate without notice. Responsibility for final interpretation of any specific issues as they relate to policies, procedures, and benefits lies with the senior management of Lund Boats.*

(*Id.* at 2 (emphasis added).) In addition, the benefits section of the Genmar Handbook (which includes the vacation policy) has the following prefatory statement:

The Company has the discretionary authority to interpret and construe benefit plan or program provisions and to determine the status of employees, participants and beneficiaries for the purpose of such plans or programs. . . . The Company *reserves the right to amend or terminate any or all of its employee benefit programs at any time.* If there is any conflict between any of the *summaries* provided below and *the terms of a plan or program, the terms of the plan or program will govern.*

(*Id.* at 20 (emphasis added).)

Appellants have acknowledged their understanding that neither the Genmar handbook nor the Genmar vacation policy constituted a contract of employment. In acknowledging receipt of the Genmar Handbook, Appellants expressly acknowledged that “nothing in this handbook, nor any statements made during my employment are to be interpreted either as a written, verbal, or implied employment contract. . .” (*Id.* at 25; Exs. 117-135.) Appellants’ testimony also established that they did not understand the vacation policy to constitute a contractual commitment of Respondents. Appellant Jack Herr testified that he did not consider the handbook to be a contract between himself and the Respondents. (Tr. 173:9-11.) Other Appellants testified that they did not pay much attention to, understand, or rely upon the contents of the Genmar Handbook. (Tr. 173:4-5; 208:10-12; 235:5-21; 244:12-18.) Other Appellants testified that they knew the Genmar vacation policy could be changed by their employer at any time, even without notice. (*See* Tr. 192, 204.)

## **B. The Administration of the Genmar Vacation Policy**

The terms of the Genmar vacation policy do not provide for a payout of vacation earned the previous July 1. (Tr. 48:13-24; Ex. 102.) However, it was Respondents' practice to pay employees in the last pay period in June for any unused vacation that had been so earned. (Tr. 30:11-18; 65:20-24.)

After Brunswick acquired Lund in April 2004, it followed the Genmar vacation policy for the 2004 and 2005 model years. Employees were paid in cash in June 2004 for any vacation time that had been granted on July 1, 2003, but not used between July 1, 2003 and the end of June 2004. (Tr. 28:23-31:16.) In addition, employees were granted vacation time on July 1, 2004 based on their "[s]ervice with the Company on June 30<sup>th</sup> [2004]" in accordance with the Genmar policy. (*Id.*) Employees were able to use this vacation time during the 2005 model year and any of this vacation time that was not used was paid to employees during the last pay period in June 2005. (*Id.*)

## **III. RESPONDENTS' MODIFICATION OF THEIR VACATION POLICY**

Not only did Appellants acknowledge in writing that the Genmar vacation policy could be modified at any time, Appellants testified they understood that the policy could be modified at any time. (*See, e.g.*, Tr. 192:12-14; 237:16-25.) For example, plaintiff Steve Eklund testified that he understood the company changed policies described in the handbook from time to time, that he understood the policies were revised at the time the change was communicated to employees, and that neither the company nor the employees had to wait for a new edition of the employee handbook to come out for such a modification to be effective. (Tr. 237:16-25.)

While Brunswick chose to follow the Genmar vacation policy initially, Brunswick also advised employees shortly after its acquisition of Genmar in early 2004 that it would be transitioning to a new benefits platform, including a new vacation policy, in approximately January 2005. (Tr. 302-03; Ex. 106.) In order to have all of its employees on the same benefits, Brunswick decided to change Lund's benefits and policies, including the vacation policy, so that those benefit programs would be consistent with Brunswick's benefits and policies. (Tr. 255:6-9; 300:2-301:3; 302:6-15.) Indeed, Brunswick changed most of the existing employee benefit programs for Lund employees in 2005. (Tr. 255:6-9; 300:19-24.)

**A. The Town Hall/Open Enrollment Meeting**

On October 5, 2004, Respondents held a meeting (the "Open Enrollment Meeting") for all Lund employees at the New York Mills Town Hall to present information about the 2005 Benefits Open Enrollment process, which was scheduled to occur October 23, 2004 through November 5, 2004. (Tr. 66:16-68:9; 118:21-23; 178:12-17; 214:7-11; 254:3-255:18; 280:5-24; 299:23-25.) The purpose of the meeting was to go over upcoming benefit and policy changes and explain the open enrollment process to employees. (Tr. 300:1-301:3.) Respondents' plant was shut down and all employees were required to attend the meeting. (Tr. 67:5-11.)

At the Open Enrollment meeting, Brunswick Director of Human Resources, Gary Ilkka, announced that the vacation policy was going to change effective January 1, 2005 to Brunswick's "Earn & Burn" policy (the "Brunswick vacation policy"). Ilkka testified that he announced at the meeting that the old Genmar vacation policy was being revoked

with the implementation of the new "Earn & Burn" policy. (Tr. 257:7-25; 271:19-21.)

Ilkka also explained that under the new vacation policy, employees would receive the same or more vacation, but that vacation would now be deemed earned over the course of the year (rather than simply granted on the first day of the year) and could not be rolled over to the following year. (Tr. 66:12-18; 139:14-140:10; 185:14-23; 214:7-15; 254:3-258:19; 280:5-281:12; 306:10-308:21.)

Under the new Brunswick vacation policy, the rate at which each employee earned vacation time per pay period was designed to add up to the same amount of total vacation available to employees over the course of a year as under the old Genmar policy. (Exs. 111, 112.) The only exception to this was that newer employees received more vacation under Brunswick policy than under the old Genmar policy. (Tr. 68:22-69:1; 256:13-21; 257:7-14; 284:5-7.)

Because the Brunswick vacation policy ran on a calendar year, employees were told that their vacation time would now be "[b]ased on number of years of service each Jan 1" (instead of June 30). (Ex. 109.) Respondents also communicated to employees that that they would receive the same amount of vacation under the Brunswick policy as they would have received under the Genmar policy, and that they would be able to take their vacation at any time during the year. (Tr. 68:22-69:1; 256:13-21; 257:7-14; 284:5-7; Exs. 109, 110.)

Appellants testified that they understood from the October 5, 2004 Open Enrollment meeting that they would not be receiving a credit of vacation on July 1, 2005 under the old Genmar vacation policy. (Tr. 185:14-186:8; 217:18-219:16.)

## **B. Distribution of the User's Guides**

Following the Open Enrollment meeting, Respondents sent by mail to each employee's home address a 2005 User's Guide, which contained information regarding all of the new benefits, including the Brunswick vacation policy. (Tr. 73:3-74:19; 309:19-22, 312:1-19; 160:17-20; 240:17-15; 242:4-8; Exs. 109, 110-12.) Included in the User's Guide was Brunswick's new vacation policy, which stated:

Brunswick provides vacation to allow you to take time away from work. The amount of vacation time you can take each calendar year is based on your length of service with the Company on Jan. 1. While you may take your vacation allotment any time during the year, you are earning that allotment on a per pay period basis throughout the year.

(Ex. 112, p. 3.) The policy included a vacation schedule that indicated how much vacation an employee would receive based on his or her service with the company. (*Id.*) The vacation policy in the User's Guide is more detailed than the vacation policy that was ultimately distributed in the Brunswick employee handbook. This is consistent with the language of the Brunswick employee handbook which states, "Please see your Brunswick User's Guide for current benefit plant information." (Ex. 104, p. 29.)

## **C. Carpet Department Meeting**

As a result of the Open Enrollment Meetings, employees clearly understood that they would not be credited with vacation under the old Genmar policy on July 1, 2005. (Tr. 185:14-186:8; 217:18-219:16.) According to one Appellant, the plant was in an "uproar" over the change in vacation policy. (Tr. 189:12-16.) Employees were upset because they believed that they were "losing" vacation as a result of the change to the Brunswick vacation policy. (Tr. 114:3-6; 116:5-14; 185:14-188:24; 219:8-16.)

Employees, including many of the Appellants in this action, complained to Lund Human Resources Manager, Carol Guse, and Lund Human Resources Representative, Lisa Preuss, immediately following the Open Enrollment meetings about “losing” vacation that they mistakenly believed they were “accruing” for the next July 1. (Tr. 69:7-18; 259:2-260:11; 280:25-282:18; Exs. 114-116.)

Many of the complaints received by Lund Human Resources came from employees in the carpet department. Therefore, Guse asked Brunswick Plant Manager Jim Hegarty in early October 2004 to meet with employees in the carpet department and explain the changes to the vacation policy. (Tr. 114:3-6.) At the meeting, Appellants Darwin Roberts, Thomas Kimmes, and Leroy Atkinson and other employees expressed to Hegarty that they were upset that they were not going to be receiving a vacation credit on July 1, 2005 under the old Genmar policy and that they thought they were losing a year’s worth of vacation. (Tr. 116:8-11; 144:5-9; 186:7-191:2.) Hegarty explained how the new policy would work and how employees would receive the same amount of vacation they had always received; the only difference being that employees would now be “earning” vacation over the course of the year rather than on July 1, and therefore would be entitled to a payout of untaken vacation if they left their employment before the end of the vacation year. (*Id.*; Exs. 104, p. 30; 112, p. 22.)

#### **D. Informational Meetings**

After the meeting in the carpet department, Guse and Hegarty decided to hold informational meetings regarding the vacation-policy change for all employees on October 14 and 15, 2004, to ensure that all employees understood the transition to the

Brunswick vacation policy, and to announce that the Company had decided to move the effective date of the new policy from January 1, 2005 to July 1, 2005. (Tr. 69:19-71:4; 96:6-12; 119:18-25.) In the meetings, Hegarty reiterated to employees that although they were not going to be credited with vacation under the new Genmar vacation policy on July 1, 2005, they had never been earning or accruing vacation under that plan during the course of the model year in the first place, that they were still going to receive the same amount of vacation to enjoy in the relevant vacation year, and that the Company had no intention of awarding double vacation on July 1, 2005. (Tr. 115:9-116:14; 123:21-124:20; Ex. 105.)

Employees were advised in the meetings that they would be receiving a half-year's worth of vacation to use between July 1, 2005 and December 31, 2005, in order to transition them to the calendar year method used under the Brunswick vacation policy. (Tr. 70:17-71:4.) During these meetings, employees expressed concern that if they were going to be receiving only a half-year's worth of vacation between July 1, 2005 and December 31, 2005, they would not have enough vacation banked during this period to use for hunting season in the Fall. (Tr. 71:5-15; 120:1-14; 284:8-23.) In response to these concerns, Brunswick decided to implement an 18-month "transition period" that would allow employees to use an 18-month allotment of vacation from July 1, 2005 to December 31, 2006 at any point during that period. (Tr. 71:16-72:6; 120:25-121:20.)

**E. Employees' Complaint Letters About The Vacation-Policy Change**

As Hegarty and Guse addressed employees' concerns, Brunswick began to receive letters from employees expressing complaints that they felt they were losing vacation.

One letter from an anonymous employee (now known to be named Appellant Darwin

Roberts) stated:

#### Concerning Vacation

In the New York Mills City Hall on May 6, 2004 Brunswick representatives sat down with over four hundred fifty of us Lund employees and presented us with a look at our new benefit package. They explained to us that we should not worry about any of our benefits because they will remain exactly as they are until we get through the transition into the Brunswick benefit package. Now we find out that on July 1, 2005 the vacation we have earned, (remember we are not through the transition yet) we will only receive one half and on January 1, 2006 there is no vacation until we earn it or borrow it.

What happened to our other half of vacation July 1, 2005, and our six months of earning vacation from July 1, 2005 to January 1, 2006? We all realize you have to make this transition, but it should not be at your employees expense.

(Tr. 181:12-16; Ex. 114.)

Another anonymous letter sent to the Brunswick Human Resource Department on October 18, 2004 stated:

This is concerning Lund vacation, in which there has been much misunderstanding through the earn and burn system.

My first year I worked for Lund's I earned one week of vacation, which I received at the beginning of next year and every year since I received time or pay for the previous year just like we did this last July 2004. Now we find out, just a couple weeks ago, that we are working this year, for no accumulated or earned vacation time.

A perfect example would be, if I had terminated employment with Lunds last July 1, 2004, I would have received my full 4 weeks vacation pay and if I would have started working for another company that was under the earn and burn system I would start receiving vacation right away. Never the less, as a first year employee, but would be earning vacation. Now, being a Lund employee, I can't start earning no more vacation time till Jan. 1, 2006

We feel if you want to make a transition from one vacation package to a new one, we should be paid off from the old one just like you are doing with our incentive package (Jan. 2005).<sup>3</sup>

(Tr. 259:21-260:11; Ex. 115.) A third anonymous letter sent in October 2004 also expressed the complaint that the employee thought he or she was losing vacation:

Now we find out on July 1, 2005 we will receive one half of our vacation and on January 1, 2006 we have no vacation until we earn it or borrow it. What happened to the other half of vacation, July 1, 2005 and our 6 months of earning vacation from July 1, 2005 to Jan. 1, 2006?

**Just think** if new employees start here, Jan. 1, 2006 they will start earning vacation from the start with us, only they didn't have to lose 4 weeks vacation through a transition.

(Tr. 259:21-260:11; Ex. 116.)

#### **F. The Gain Share Meetings**

On October 28, 2004, Respondents held quarterly gain sharing meetings for all Lund Boat Company employees at the New York Mills facility. (Tr. 74:20-75:11; 282:19-283:16.) Whole departments were shut down for the sole purpose of having employees attend these meetings in the plant training room. (Tr. 125:1-10.) At these meetings, Hegarty gave a PowerPoint presentation to employees explaining the 18-month vacation transition period. (Tr. 75:12-76:11; 124:21-125:16; 283:6-16; Ex. 105, pp. 3-4.)

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<sup>3</sup> Even this employee did not expect double vacation on July 1, 2005, Rather, she seemed to be suggesting that Brunswick should pay out whatever vacation the employees would have "earned" through the October 2004 announcement of the change in policy. Of course, since employees had not earned any vacation for 2005 as of October 2004, this argument was unavailing.

Hegarty communicated to employees that the Brunswick policy would be in effect on July 1, 2005 and that employees would be able to use an 18-month allotment of vacation at any time between July 1, 2005 and December 31, 2006. (*Id.*)

According to Carol Guse, Hegarty said the following at the Gain Share meeting:

Well, Mr. Hegarty first laid out how we got here. You know, we talked about open enrollment, there being issues with vacation being on a calendar year; we switched that to July 1, and then we thought that a six-month transition would be okay to get to a calendar year, but there were some employees who felt that wasn't enough so we then made the accommodation to the 18 --- 18-month period.

(Tr. 76:4-11.)

Appellants testified that they clearly understood by the end of October 2004 that Brunswick would be implementing the new vacation policy on July 1, 2005 and that they would not be given a credit of vacation under the old Genmar vacation policy in 2005.

(Tr. 141:1-8; 144:5-9; 185:14-187:5; 188:19-189:6; 218:4-219:16. *See also* Tr. 281:9-12; 286:15-287:7.) Based on Respondents' communications to employees about the vacation-policy change, the nature of the employees' complaints, and Appellants' own admissions, Appellants clearly understood and publicly acknowledged by the end of October 2004 that they were not going to receive a vacation credit under the Genmar vacation policy on July 1, 2005. Had the Appellants expected they were going to receive a credit of vacation on July 1, 2005 under the Genmar policy, they would not have complained that they were losing vacation or that they were not going to have enough vacation for hunting season.

#### **IV. APPELLANTS CONTINUED TO WORK**

Despite announcements in October 2004 and the Appellants' understanding regarding the change in vacation policy, Appellants continued to work. The Appellants' testimony revealed that although they were unhappy with the change, they were willing to continue working at Lund. (Tr. 188:25-189:6.)

On July 1, 2005, the Brunswick vacation policy was in effect and employees began accruing, and were able to use, vacation under the Brunswick policy. (Tr. 82:23; Ex. 136.) The new Brunswick employee handbook was published on June 1, 2005 and replaced the old Genmar employee handbook. (Ex. 104, p. 2.) The Brunswick Handbooks were distributed to employees in mid-July 2005. (Tr. 38:14-39:6.)

Appellants admitted, and Respondents' payroll records establish, that Appellants received the exact same amount of vacation under the new Brunswick vacation policy that they would have received had the old Genmar policy remained in effect. (Tr. 82:23-84:5; 188:11-15; 192:12-19; 209:8-15; 226:2-14; 230:18-20; 242:11-14; Exs. 136-37.) No evidence or testimony was presented at trial that suggested that the Appellants were advised that they would receive a vacation credit on July 1, 2005 under the old Genmar vacation policy in addition to vacation credit under the new Brunswick vacation policy.

#### **SUMMARY OF ARGUMENT**

The district court erred in concluding that the Genmar handbook constituted a unilateral employment contract because the handbook contained specific language disclaiming the formation of a contract. Minnesota law provides that an appropriate disclaimer in an employee handbook prevents employees from claiming contractual

rights under that handbook even where other provisions of the handbook are specific and unequivocal. *Michaelson v. Minn. Mining & Mfg. Co.*, 474 N.W.2d 174, 180 (Minn. Ct. App. 1991); *Audette v. Northeast State Bank*, 436 N.W.2d 125, 127 (Minn. Ct. App. 1989). Appellants also acknowledged at trial and in their signed receipts of the Genmar handbooks that no contract existed. Therefore, Respondents ask that the Court reverse the district court's legal conclusion (reviewable under a de novo standard of review) that the Genmar employee handbook, particularly the Genmar vacation policy, constituted a unilateral employment contract.

Regarding Appellants' appeal, it is noteworthy that Appellants do not challenge the district court's application of law to facts, but rather the district court's factual findings, specifically: (1) whether Appellants truly were earning vacation during the course of a model year under the old Genmar policy; (2) whether Respondents effectively communicated the revised policy to Appellants in October 2004; and (3) whether Appellants suffered any damages as a result of any purported breach. The district court's determinations on each of these factual issues was not clearly erroneous. Indeed, the great weight of the evidence clearly supports the district court's findings:

- (1) Although Appellants allege they were "earning" or "accruing" vacation under the old Genmar vacation policy between July 1, 2004 and June 30, 2005, the actual policy states to the contrary: "vacation pay is earned on July 1 of each model year" and "an employee with one year or more of service who terminates his or her employment prior to July 1 in any year will forfeit his or her right to unearned vacation pay.";
- (2) Appellants were advised in no uncertain terms throughout 2004 that the old Genmar vacation policy was being revoked and a new "Earn & Burn" vacation policy was being implemented effective July 1, 2005; and

- (3) Appellants clearly understood in October 2004 that they were not going to be receiving a credit of earned vacation under the old Genmar vacation policy on July 1, 2005, but rather would be receiving vacation under the new “earn and burn” Brunswick vacation policy.

Given these facts, Respondents clearly modified the vacation policy under Minnesota law. *Brown v. Tonka Corp.*, 519 N.W.2d 474, 477 (Minn. Ct. App. 1994).

The district court also correctly decided that Appellants suffered no damages as a result of the modification of the Genmar vacation policy. They received the same vacation they would have received had the old Genmar vacation policy never been modified. Indeed, some of the class members in this case received more vacation under the new policy than they would have received had the old Genmar policy never been modified. The absence of any damages is fatal to a breach of contract claim. *Jensen v. Duluth Area YMCA*, 688 N.W.2d 574, 578-79 (Minn. Ct. App. 2004)

A reversal of the district court’s decision would be contrary to the evidence, the law, and the concept of fundamental fairness. Therefore, Respondents request that the Court affirm the district court’s determination that the Respondents effectively modified the Genmar vacation policy, the district court’s determination that Appellants suffered no damages as a result of the modification, and the district court’s denial of Appellants’ Motion for New Trial and Amended Findings.

## ARGUMENT

### I. STANDARD OF REVIEW.

The standard for review of a bench trial is governed by Minn. R. Civ. P. 52.01, which provides: “Findings of fact ... shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.” In an appeal from a bench trial, the Court does not reconcile conflicting evidence. *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn.1999). The Court must “view the record in the light most favorable to the judgment of the district court.” *Rogers v. Moore*, 603 N.W.2d 650, 656 (Minn.1999) (citation omitted). The Court may not reverse the district court's judgment merely because it views the evidence differently. *Id.*; see *Vangsness v. Vangsness*, 607 N.W.2d 468, 474 (Minn. Ct. App. 2000) (stating “that the record might support findings other than those made by the [district] court does not show that the . . . findings are defective”). Rather, the district court’s factual findings must be clearly erroneous or “manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole” to warrant reversal. *Id.* (quotation omitted).

The Court is not bound by and need not give deference to the district court’s decision on a purely legal issue, however. *Frost Benco Elec. Ass'n v. Minn. Pub. Utils. Comm'n*, 358 N.W.2d 639, 642 (Minn.1984). Where the relevant facts are undisputed, the existence of a contract is a question of law, which this court reviews de novo. *TNT Props., Ltd. v. Tri-Star Developers LLC*, 677 N.W.2d 94, 101 (Minn. Ct. App. 2004); *Triple B & G, Inc. v. City of Fairmont*, 494 N.W.2d 49, 53 (Minn. Ct. App. 1992).

Appellants had the burden in their breach-of-contract action of proving the formation of a contract; performance by plaintiff of any conditions precedent; a breach of the contract by defendant; and that the breaching conduct is a proximate cause of resulting damages. *D.H. Blattner & Sons, Inc. v. Firemen's Ins. Co. of Newark, N. J.*, 535 N.W.2d 671, 675 (Minn. Ct. App. 1995), *review denied* (Minn. Oct. 18, 1995); *Indus. Rubber Applicators, Inc. v. Eaton Metal Prods. Co.*, 171 N.W.2d 728, 731 (Minn. 1969), *overruled on other grounds*, *Standslast v. Reid*, 231 N.W.2d 98 (Minn. 1975). Appellants did not meet their burden of proof.

The district court erred in finding that the Genmar vacation policy constituted a unilateral employment contract. However, the district court's determination that Respondents effectively modified the Genmar vacation policy in October 2004 is clearly supported by the weight of the evidence. The district court's determination that the Appellants suffered no damages as a result of the modification is also supported by the weight of the evidence.<sup>4</sup>

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<sup>4</sup> Appellants also appeal the district court's denial of their motion for a new trial and amended findings. In reviewing the denial of Appellants' motion, the Court is

governed by the rule that the findings of the trial court . . . are entitled to the same weight as the verdict of a jury and will not be reversed on appeal unless they are manifestly and palpably contrary to the evidence. This rule applies whether an appeal is from a judgment or an order granting or denying a new trial.

*Costello v. Johnson*, 265 Minn. 204, 211 (Minn. 1963).

## **II. THE DISTRICT COURT ERRED IN CONCLUDING THAT THE GENMAR VACATION POLICY CONSTITUTED A UNILATERAL CONTRACT.**

Despite specific and unambiguous language in the Genmar handbook and the handbook acknowledgment forms disclaiming the existence of a contract, the district court determined that the Genmar employee handbook, particularly the Genmar vacation policy, constituted a unilateral employment contract. (AA. 39-40.) Despite testimony from the Appellants at the bench trial that no contract existed, the district court affirmed that a unilateral employment contract existed in its Findings of Fact, Conclusions of Law, Order for Judgment (AD. 9.) The district court's decision on contract formation should be reversed.

### **A. Respondents' Disclaimers Effectively Preclude Any Finding that a Contract was Formed.**

It is well established under Minnesota law that an appropriate disclaimer in an employee handbook adequately protects employers from claims the handbook and its policies (even policies that are specific and unequivocal) constitute a contract. *See, e.g. Michaelson v. Minn. Mining & Mfg. Co.*, 474 N.W.2d 174, 180 (Minn. Ct. App. 1991) (employee handbooks that include appropriate disclaimers do not create enforceable contracts); *Audette v. Northeast State Bank*, 436 N.W.2d 125, 127 (Minn. Ct. App. 1989) (same). While the Minnesota Supreme Court has not opined on this issue, the Eighth Circuit Court of Appeals has predicted that the Supreme Court "would hold that a disclaimer prevents an employee from claiming contractual rights under an employee handbook even when other provisions of the handbook are specific and unequivocal."

*Miller v. Citizens Sec. Group, Inc.*, 116 F.3d 343, 349 (8th Cir. 1997); *see also, Morrow v. Air Methods, Inc.*, 897 F. Supp. 418, 422 (D. Minn. 1995), *aff'd*, 92 F.3d 1189 (8th Cir. 1996) (Table); *Lee v. Sperry Corp.*, 678 F. Supp. 1415, 1418 (D. Minn. 1987).

Therefore, it should have been dispositive of Appellants' claim that: (1) the Introduction to the Employee Handbook explicitly states, "**Nothing in this handbook should be construed as a contract;**" (Ex. 102 at 2) (emphasis added); (2) the section of the handbook relating to benefits states, "The Company reserves the right to amend or terminate any or all of its employee benefit programs at any time," (*Id.* at 20); and (3) forms signed by Appellants acknowledging receipt of the handbook state that "**nothing in this handbook, nor any statements made during my employment are to be interpreted either as a written, verbal, or implied employment contract. . .**" (*Id.* at 25; Exs. 117-135) (emphasis added).

Despite the above, the district court determined that the Genmar vacation policy constituted a unilateral contract. In doing so, the district court erred in its interpretation of inapposite case law, specifically *Brown v. Tonka Corp.*, 519 N.W.2d 474 (Minn. Ct. App. 1994.), *Lee v. Fresenius Med. Care, Inc.*, 741 N.W.2d 117 (Minn. 2007), and *Berglund v. Grangers, Inc.*, No. C8-97-2362, 1998 WL 328382 (Minn. Ct. App. June 23, 1998).

1. ***Brown v. Tonka Corp.***

In *Brown* the employer did not challenge the district court's determination that a unilateral contract existed, and the court applied contract law to the vacation policy without addressing the question of contract formation. Moreover, in *Brown* there was no

disclaimer, which in this case prevents the formation of any contract. *See Schmittou v. Wal-Mart Stores, Inc.*, No. 01-1763, 2003 U.S. Dist. LEXIS 15767 (D. Minn. Aug. 22, 2003) (distinguishing *Brown* because the vacation policy in *Brown* had no disclaimer).

It is also significant that the *Brown* court based its decision to apply contract law to a vacation policy on cases involving collective bargaining agreements:

An employer's liability for employees' vacation pay is wholly contractual. *Tynan v. KSTP, Inc.*, 247 Minn. 168, 177, 77 N.W.2d 200, 206 (1956). Courts have long recognized that an employer is obligated to provide vacation pay when employees have met the vacation pay eligibility requirements. *See id.* at 184, 77 N.W.2d at 210 (where contract [a collective bargaining agreement] that contained paid vacation provision remained in effect, employee who had met work requirements was entitled to vacation time or pay in lieu thereof); *Teamsters Local Union 688 v. John J. Meier Co.*, 718 F.2d 286, 289 (8th Cir. 1983) (employer obligated to pay vacation benefits even though employees did not return to work because employer and union had not reached new collective bargaining agreement); *Local Union No. 186 v. Armour & Co.*, 446 F.2d 610 (6th Cir. 1971) (employer that closed plant in September was obligated to pay vacation benefits [under the collective bargaining agreement] to all employees who had worked the requisite 150 days in the calendar year, despite fact that they were not working on January 1 of following year), *cert. denied*, 405 U.S. 955 (1972).

*Brown*, 519 N.W.2d at 477. The key distinction between the cases cited by the *Brown* court and the present case is that the cases cited in *Brown* involved union employees seeking to enforce provisions of a collective bargaining agreement. In those cases, there was no dispute that each vacation policy involved was part of a binding contract — a collective bargaining agreement. There is no collective bargaining agreement in the present case.

2. *Lee v. Fresenius Med. Care, Inc.*

The *Fresenius* decision, as it applies to the issue of contract formation, is distinguishable in several ways. First, the issue before the *Fresenius* court was whether a former employee was entitled to payment in lieu of the paid time off that she alleged she earned. *Id.* at 122. The parties in *Fresenius* agreed that an employment contract existed. *Id.* at 122-23. Indeed, the *Fresenius* decision contains no discussion on the issue of handbook disclaimers. Moreover, the plaintiff did not assert that the employer had breached the contract or that the terms of the handbook entitled her to payment in lieu of paid time off. *Id.* at 124. Instead, the plaintiff argued that the contract terms were unlawful under Minnesota's prompt payment statute, Minn. Stat. § 181.13(a). Given the posture in which this case came to the Court, the conclusion in *Fresenius* that the employee handbook constituted an employment contract was dicta, with the Court simply ignoring the possible significance of a disclaimer.<sup>5</sup> *Id.* at 123. *Fresenius* is simply not instructive on the issue of contract formation.

3. *Berglund v. Grangers, Inc.*

The district court's reliance on *Berglund* also was misplaced. Plaintiff Berglund resigned from his employment with Grangers, choosing his last day of employment in

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<sup>5</sup> By assuming that the policy was contractual, the Supreme Court was able to squarely resolve the primary question presented in *Fresenius*: whether Minn. Stat. § 181.13(a) creates a substantive right, allowing a terminated employee to use that statute as the basis for a claim for wages, even when the employee's employment contract denies payment for those wages. *See, Fresenius, supra*, at 125. A factual finding that the plaintiff had no contractual right to vacation would have failed to resolve the legal question before the Court.

apparent reliance on the statement of an office manager that he would be entitled to collect the vacation benefits he accrued during the prior year. However, a company vice president later decided that Berglund would not get the vacation pay because, under the company's policy, the vacation did not accrue until the anniversary of the employee's hire date – which in this case was just a few days after Berglund's actual last day of employment. Wanting for obvious reasons to find for Berglund, the Court declined to follow *Audette* based on its view that because vacation benefits are a form of compensation, an employee's right to vacation cannot be limited by a statement that the vacation policy is not contractual.<sup>6</sup> Of course, this is exactly the argument that was rejected by the Minnesota Supreme Court in *Fresenius*. Therefore, *Berglund*, an unpublished decision without precedential value, becomes inapplicable here.

In declining to enforce the disclaimer at issue, the Court in *Berglund* purported to rely on *Brown* and *Tynan* stating that “case law has established that where an employer offers vacation benefits, such benefits are ‘wholly contractual because they are a form of compensation.’” *Berglund*, 1998 WL 328382 at \*3 (quoting *Brown v. Tonka Corp.*, 519 N.W.2d 474, 477 (Minn. Ct. App. 1994) and *Tynan v. KSTP, Inc.*, 77 N.W.2d 200, 206 (Minn. 1956)). However, the Supreme Court's decision in *Fresenius* clearly establishes that the *Berglund* court misconstrued this phrase “an employer's liability for employees’

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<sup>6</sup> The Court determined that the handbook constituted a contract and that because the handbook was ambiguous as to whether an employee had to work on or past his or her anniversary date to complete a benefit year, it construed the handbook against Grangers to find that Berglund was entitled to the vacation benefits. *Id.* at \*4.

vacation pay is wholly contractual.”<sup>7</sup> That phrase means only that under Minnesota law, vacation arrangements are a private matter to be determined by the employer (or perhaps negotiated with employees) and are not a matter of statutory right. *Fresenius, supra*, at 126 (“No statute or case law in Minnesota mandates the terms on which paid time off must be offered, or that it be offered at all. As we stated in *Tynan*, employers’ liability as to vacation-pay rights is wholly contractual.”). The phrase does not mean that employees have contractual rights to vacation even when the employer had no intention of entering into a contract. Thus, if an employer and employee do enter into a contract regarding vacation, the contract will be enforced based on its own terms without regard to statutory definitions as to what constitutes “compensation.”

Given the flaws in the *Berglund* decision, it is not surprising that another panel of the Minnesota Court of Appeals came to a different conclusion. In *Garmarker v. Sterling Elec. Const. Co., Inc.*, No. C4-95-1205, 1995 Minn. App. LEXIS 1304 (Minn. Ct. App. Oct. 17, 1995), a former employee claiming short-term disability and dental benefits argued that benefit descriptions in his employee handbooks constituted offers for unilateral contracts. *Id.* at \*1. This Court upheld the trial court’s holding that the handbooks did not create offers. *Id.* at \*2. The Court agreed with *Audette* in stating that “employers can avoid contractual liability by inserting clear, concise, and understandable

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<sup>7</sup> The *Berglund* Court’s reliance on *Tynan* was further misplaced because that case involved a collective bargaining agreement and therefore provided no guidance with regard to the interpretation of an employee handbook disclaimer.

disclaimers of contractual intent into the handbooks.” *Id.* at \*1.

The Genmar handbook and the Genmar handbook acknowledgement form that the Appellants signed, clearly and concisely disclaim contractual intent.<sup>8</sup> (Exs. 102; 117-135.) *Audette, Garmarker*, and the host of other Minnesota decisions holding that appropriate handbook disclaimers prevent contractual liability apply to this case. The decisions cited by the district court are not dispositive of the issue of contract formation as it relates to employee handbooks with disclaimers. Accordingly, the district court’s determination that the Genmar handbook constituted a unilateral employment contract must be reversed.

**B. Appellants’ Own Testimony Supports a Finding that the Genmar Handbook Did Not Constitute a Contract.**

Testimony and evidence introduced at trial further supports the conclusion that the district court erred in finding that a unilateral contract existed. For example, Appellants’ testimony indicates that Appellants themselves did not consider that the employee handbook rose to the level of a formal contractual obligation. Appellant Jack Herr testified that he did not consider Respondents’ employee handbook to constitute a contract of employment. (Tr. 173.) Appellant Steve Eklund testified that he probably did not read the employee handbook carefully, and admitted that he was not even aware of certain contents of the handbook. (Tr. 235.)

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<sup>8</sup> Appellants do not and cannot assert that they were unaware of the disclaimers. (Tr. 203:5-204:6; 234:25-235:8; Exs. 117-135.)

Appellants' testimony also indicates that they could not have relied on the old Genmar vacation policy because they did not understand its terms. While the Appellants claim that they were earning vacation to use beginning July 1, 2005 between July 1, 2004 and June 30, 2005, the handbook specifically disclaims this notion. *See discussion infra.* Indeed, when Appellant Steve Eklund was asked to identify what in the handbook made him believe that he had earned vacation over the course of 2004-2005 to be granted on July 1, 2005, he replied, "I wouldn't say anything in the handbook other than the president, and what the president said was gospel." (Tr. 244.) Finally, Appellants testified that they understood the Genmar vacation policy could be changed by their employer at any time, even without notice. (*See* Tr. 192, 204; Ex. 102.)

This evidence strongly rebuts any suggestion that a unilateral contract was formed as between Genmar and the Respondents with respect to the vacation policy. There does not appear to have been any meeting of the minds as to what the vacation policy provided. *Ryan v. Ryan*, 193 N.W.2d 295, 297 (Minn. 1971) (requiring "meeting of minds on the essential terms of the agreement" to form a contract); *A. E. Staley Mfg. Co. v. Northern Coops., Inc.*, 168 F.2d 892, 895 (8th Cir. 1948) ("In order that there may be an agreement, the parties must have a distinct intention common to both and without doubt or difference. Until all understand alike, there can be no assent, and, therefore, no contract.") (applying Minnesota law). There does not appear to be an understanding by the Appellants that the vacation policy constituted a contractual commitment by Respondents. *Kreimeyer v. Hercules Inc.*, 892 F. Supp. 1364, 1368-69 (N.D. Utah 1994) (because acceptance of an employee handbook policy is a necessary element of finding

the existence of a unilateral contract, evidence that the Appellants had insufficient awareness of the policy in question precludes the finding of a unilateral contract).

Additionally, the express disclaimer that the policy could be amended or terminated at any time strongly mitigates against the finding of a unilateral contract. *See Brown v. Sabre, Inc.*, 173 S.W.3d 581, 585-89 (Tex. Ct. App. 2005) (holding that no contract existed between employer and employee as to vacation when policy was unilaterally and voluntarily undertaken by employer with understanding that it could be revised or revoked at anytime). Considering the Appellants' testimony along with the express disclaimers contained in the Genmar handbook, the district court erred in finding that a contract existed. Therefore, the district court's decision on contract formation must be reversed.

**III. THE DISTRICT COURT DID NOT ENGAGE IN CLEAR ERROR IN CONCLUDING THAT RESPONDENTS EFFECTIVELY MODIFIED THE GENMAR VACATION POLICY.**

Even if this Court were to affirm the district court's determination that the Genmar vacation policy constituted a unilateral employment contract, Respondents were free to modify the Genmar vacation policy before Appellants had a vested interest in vacation. The evidence clearly demonstrates that Respondents did just that. Therefore, the district court's finding that Respondents modified the Genmar vacation policy must be affirmed.<sup>9</sup>

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<sup>9</sup> Appellants concede that "the question of whether a contract has been modified is an issue of fact." App. Br. at 18, n. 6 (citing *Feges v. Perkins Rests., Inc.*, 483 N.W.2d 701, 707 (1992)).

**A. Appellants Had Not Earned or Accrued Any Vacation for the July 1, 2005 Model Year As of October 2004.**

Appellants' claim relies on their assertion that they were "earning" or "accruing" vacation as they worked during the year preceding July 1, 2005. This claim is not supported by the facts, and it was not clear error for the district court to rule to the contrary.

As previously discussed, an employer's liability with regard to vacation is "wholly contractual." *Lee v. Fresenius Med. Care, Inc.*, 741 N.W.2d 117, 126 (Minn. 2007). Therefore, if the court accepts Appellants' argument that the Genmar policy is a contract, it is the actual terms of that contract, and not Appellants' mistaken understanding of it, that are controlling with respect to the issue of whether Appellants were earning vacation prior to July 1, 2005. As established *infra*, the Genmar vacation policy explicitly and unequivocally states that no vacation is earned until July 1 of each model year. The language of the policy is clear that Appellants "earned" vacation under the Genmar policy on July 1 and not before that. Consideration of work performed in the past is relevant only for purposes of determining the *amount* of vacation available to the employee on July 1. (*Id.*) The policy never uses the term "accrued" and never states that employees "accrued" or earned vacation *during* a previous model year. Importantly, the policy states just the opposite: if an employee quits or was terminated prior to July 1, 2005, that employee was not eligible to receive any vacation that would otherwise have

been credited on July 1, 2005.<sup>10</sup> In dismissing Appellants' assertion that they were "earning" vacation as they worked, the district court acknowledged these facts by stating, "If Plaintiff's theory was correct, Genmar would have paid out unused vacation time for any individual who left their employment, for whatever reason, during any time of the year. That was not the case." (AD. 12.) Given that the district court's findings with respect to Appellants' assertion were based on the language of the policy itself, they cannot be clearly erroneous.

Minnesota courts have repeatedly found that if a vacation policy sets a condition precedent to the earning of vacation (such as being employed on a specific date before vacation is deemed earned), then an employee has no vested interest in or right to vacation before that condition precedent has been met. *See Tynan v. KSTP, Inc.*, 77 N.W.2d 200, 207-08 (Minn. 1956) (noting that had the vacation policy at issue required employment on a specific day before vacation could be deemed earned, then plaintiff would have had no contractual right to vacation); *Berglund v. Grangers, Inc.*, No. C8-97-2362, 1998 WL 328382 \*\*10-12 (Minn. Ct. App. June 23, 1998) (a right to vacation benefits does not attach until conditions precedent have been met); *Brown v. Tonka Corp.*, 519 N.W.2d 474, 477 (Minn. Ct. App. 1994) (suggesting that employees would not have been deemed to be accruing vacation over the course of a year had the

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<sup>10</sup> By contrast, in those instances when a benefit was to be "earned" by working, the Genmar Handbook stated so with clarity. Thus, the Incentive Time policy provided that each full-time employee would "earn two (2) hours *per month* if . . . ." (Ex. 102, p. 22.)

vacation policy at issue “require[d] employment on a specific date as a condition precedent to earning vacation time”); *see also Simons v. Midwest Tel. Sales and Serv., Inc.*, 433 F. Supp. 2d 1007, 1011(D. Minn. 2006) (because vacation policy requires that employees be employed at least one week after vacation, employer had no contractual obligation to pay employees for vacation days not taken as of termination date).

Because Appellants could not have earned vacation under the old Genmar vacation policy until July 1, 2005, they had no vested right to vacation under the old Genmar vacation policy until that day. *See Tynan*, 77 N.W.2d at 207-08; *Berglund*, 1998 Minn. App. LEXIS 724 at \*\*10-12; *Brown*, 519 N.W.2d at 477; *cf. Knudsen v. Northwest Airlines, Inc.*, 450 N.W.2d 131, 133 (Minn. 1990) (employee has no contractual right to options when option agreement required employment on vesting date, and employee was terminated by employer prior to vesting date) (citing *Pillsbury Co. v. Elston*, 283 N.W.2d 370, 374 (Minn. 1979) (holding repurchase provision of stock option contract enforceable by employer because it was one of conditions of option to which parties agreed)).<sup>11</sup> Stated differently, the performance necessary to effectuate any unilateral contract created by the vacation policy was to be employed on July 1, 2005. *Cf. Brown*, 519 N.W.2d at 477 (suggesting that employees would not have been deemed to be accruing vacation

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<sup>11</sup> That Respondents were free to modify or revoke the vacation prior to July 1, 2005 is further evident when one considers that Respondents could simply have discharged the Appellants on June 29, 2005 without owing them any vacation that otherwise would have been due on July 1, 2005, and then re-hired the Appellants on Tuesday, July 5, 2005 with the new Brunswick vacation policy in place.

over the course of a year had the vacation policy at issue “require[d] employment on a specific date as a condition precedent to earning vacation time”). Therefore, Respondents were free to modify the vacation policy before July 1, 2005 without incurring any future obligations to credit vacation under the old policy on July 1, 2005. *See Feges v. Perkins Rests, Inc.*, 483 N.W.2d 701, 708 (Minn.1992) (an offeror of a unilateral contract always retains the power to modify or revoke the offer so long as the offeree has not begun performance); *Friedenfeld v. Winthrop Res. Corp.*, No. C5-02-1606, 2003 Minn. App. LEXIS 457, \*15 (Minn. Ct. App. Apr. 22, 2003) (holding employer could modify employee’s commission plan because employee had not presented evidence of a vested interest in the commission and continued to work despite not receiving the commission). That is precisely what happened in October 2004.

**B. Minnesota Law Allows Employers to Modify Vacation Policies.**

The Minnesota Supreme Court has long recognized that “employers may modify the terms of contracts created by employee handbooks without great difficulty.” *Feges*, 483 N.W.2d at 708. In *Pine River State Bank v. Mettille*, 333 N.W.2d 622 (Minn. 1983), the Minnesota Supreme Court described the process for modifying a unilateral contract for employment:

In the case of unilateral contracts for employment, where an at-will employee retains employment with knowledge of new or changed conditions, the new or changed conditions may become a contractual obligation. In this manner, an original employment contract may be modified or replaced by a subsequent unilateral contract. The employee's retention of employment constitutes acceptance of the offer of a unilateral contract; by continuing to stay on the job, although free to leave, the employee supplies the necessary consideration for the offer.

*Id.* at 627. The Court recognized that employers may need to modify employment contracts with some frequency:

[W]e do not think that applying the unilateral contract doctrine to personnel handbooks unduly circumscribes the employer's discretion. Unilateral contract modification of the employment contract may be a repetitive process. Language in the handbook itself may reserve discretion to the employer in certain matters or reserve the right to amend or modify the handbook provisions.

*Id.*

In line with *Pine River*, the Minnesota Court of Appeals determined that employers are allowed to modify vacation policies, even if such policies may constitute a unilateral contract. *See Brown*, 519 N.W.2d at 477 n. 2 (upholding trial court's determination that employer had effectively modified its vacation policy). In *Brown*, the employer sent a memorandum to all employees advising that it would no longer allow employees who left the company voluntarily to receive a payout of "accrued, unearned vacation." *Id.* at 476. The Minnesota Court of Appeals concluded that the district court properly determined that the memorandum modified the then-existing vacation contract:

The memorandum contained language specific enough to constitute an offer. *See Lewis v. Equitable Life Assurance Soc'y*, 389 N.W.2d 876, 883 (Minn. 1986) (specific language is necessary for an offer; "general statements of policy do not meet the contractual requirements"). Appellant [Employer] communicated the offer by providing all employees with the memorandum. *See Feges v. Perkins Rests., Inc.*, 483 N.W.2d 701, 707 (Minn. 1992) (employer must communicate offer to employee whom offer addresses). The employees who continued their employment under the new policy accepted the new terms and provided the necessary consideration for the contract. *See Pine River*, 333 N.W.2d at 627 (retention of employment is acceptance and consideration).

*Brown*, 519 N.W.2d at 477 n. 2. Courts applying Minnesota law have found proper modification in similar circumstances. *See Landers v. AMTRAK*, 345 F.3d 669, 674 (8<sup>th</sup> Cir. 2003) (employer's distribution of new personnel policy two weeks before plaintiff's discharge modified employer's earlier policy, particularly where plaintiff admitted that he received the new policy before his termination, understood it superseded the older policy, and he continued to work for the employer).

**C. Respondents Effectively Modified the Genmar Vacation Policy.**

The district court held that Respondents effectively modified the Genmar vacation policy by communicating “a modification from the old Genmar vacation policy to the new Brunswick policy . . . in the October [2004] meetings.” (AD. 13.) Indeed, Respondents: (1) announced the change in policy at an all-employee Open Enrollment meeting on October 5, 2004; (2) issued the User's Guide containing the new vacation policy to all employees in early October 2004; (3) discussed the change in policy at the carpet department and employee informational meetings in mid-October 2004; and (4) reiterated the change in policy in the October 28, 2004 all-employee Gain Share meeting.

That the Appellants understood the Genmar policy was being replaced by the new Brunswick vacation policy and that they would not be receiving a credit of vacation under the old Genmar policy on July 1, 2005 cannot credibly be denied. The district court cited the anonymous complaint letters from employees (one of which named Appellant Darwin Roberts admitted authoring) (*See Ex. 115*) to show that Appellants were aware of the modification. (AD. 13.) Additional evidence supports that they clearly understood the modification in October 2004. For example:

- After testifying that Brunswick Human Resources Director Gary Ilkka announced at the October 5, 2004 “that there were going to be changes made” to the vacation policy “going onwards,” Appellant Tom Kimmes testified he clearly understood he would not be getting any vacation under the old Genmar policy after Jim Hegarty held a carpet department informational meeting in mid-October 2004:

Q: All right. Did anyone ever tell you at any point in time from July 1, 2004 through June 30, 2005, that you were not earning vacation under the Genmar policy?

A: I don't recall the date, but when we talked to Jim Hegarty he come into the carpet department, and at that point in time I understood – he says, basically, you won't be getting it. From that point in time.

\* \* \*

Q: Isn't it true that when you spoke with Mr. Hegarty as part of that carpet department meeting, he made it clear that employees were not going to get credited on -- with vacation on July 1, 2005?

A: Yes.

(Tr. 140-41, 144.)

- Appellant Darwin Roberts testified that he understood from the October 2004 meetings that the new vacation policy was going into effect on July 1, 2005, that he was “losing” whatever Genmar vacation he would otherwise be entitled to receive on July 1, 2005, that Brunswick Human Resources Manager Carol Guse probably told him he was not going to continue earning vacation under the old policy in early 2004, and that he complained to Ms. Guse and others in October 2004 that he thought he was being “cheated out of [his] vacation.” Tr. at 179-81, 182, 185-89. Mr. Roberts further testified that the “whole plant was in an uproar” over this change in vacation policy, but that he decided to continue working at Brunswick even though he felt he was being “cheated out of” his Genmar vacation. (Tr. 188-90.)
- Appellant Jim Baron testified that, as a result of the October 5, 2004 meeting, he understood that he was losing his Genmar vacation to be credited on July 1, 2005, and that he and others (including Appellant Diana

Makinen) had a meeting with Plant Manager Jim Hegarty to express their unhappiness about the decision. (Tr. 218-19.)

- Other Appellants simply claimed that they could not recall whether a change in policy was announced, but do not deny that these announcements were, in fact, made. (Tr. 171, 206-07.)

This testimony is consistent with: (1) the testimony of Brunswick's former Director of Benefits, Noreen Cleary, that employees were advised after the April 2004 acquisition that they would be transitioned to the Brunswick benefit platform (including the new Brunswick vacation policy) on January 1, 2005 (Tr. 302-03); (2) the testimony of Brunswick Human Resources Director Gary Ilkka that he communicated to all Lund Boat Company employees at the October 5, 2004 meeting that the old Genmar vacation policy was being revoked and replaced with the new Brunswick vacation policy in 2005, and that any new vacation they could expect to receive in 2005 would be pursuant to the new Brunswick vacation policy (Tr. 256-57; *see also* Tr. 308-09); (3) the testimony of a number of witnesses that the new Brunswick vacation policy was sent to all employees in mid-October 2004 in the form of the 2005 User's Guide for Brunswick Hourly Employees Boat Group (Tr. 74, 220, 225, 240, 242, 262-63, 309, 312; Trial Ex. 111); (4) the testimony of Gary Ilkka, Lisa Preuss, Jim Hegarty and Carol Guse that Lund Boat company employees were upset in October 2004 that they would not be receiving any vacation under the old Genmar vacation policy that otherwise would have been credited them on July 1, 2005 (Tr. 259, 261-62, 281-83); and (5) the testimony of various witnesses that employees were concerned that they would not have sufficient vacation to

use for deer hunting in the fall of 2005. In light of this, the district court's findings were not clearly erroneous.

The district court also found that "While the employees may not have agreed with the new policy, once they continued their employment they accepted the modification." (AD. 13.) *See Pine River*, 333 N.W.2d at 627 (retention of employment is acceptance and consideration). This, too, is supported by the above facts and does not constitute clear error.

In light of Minnesota law, Respondents did all they needed to do, and more, to modify the Genmar vacation policy.

**D. That Respondents Did Not Issue a Revised Handbook Until Mid-July 2005 is Irrelevant to the Issue of Modification.**

Appellants attempt to place great (if not exclusive) weight on the fact that Respondents did not issue a new employee handbook containing the new Brunswick vacation policy until after July 1, 2005. This is irrelevant in light of the Appellants' own admissions that they: (1) received a copy of the new vacation policy when they received the User's Guide in October 2004; and (2) understood in October 2004 from presentations to employees that the new vacation policy was being instituted on July 1, 2005 and that they would not be receiving any vacation credit under the old Genmar

policy on July 1, 2005.<sup>12</sup>

Appellants' argument is also inconsistent with the Minnesota Supreme Court's admonition that employers should be allowed to modify unilateral contracts "without great difficulty" (*Feges*, 483 N.W.2d at 708) and that policy modifications may be achieved simply by advising employees in some way of the changed policy (*Pine River*, 333 N.W.2d at 627). See also *In re Certified Question, Bankey v. Storer Broad. Co.*, 443 N.W.2d 112, 116 (Mich. 1989) ("Under circumstances where 'contractual rights' have arisen outside the operation of normal contract principles [i.e. a unilateral employment contract based on an employee handbook], the application of strict rules of contractual modification may not be appropriate."); *Adams v. Square D Co.*, 775 F. Supp. 869, 873 (D.S.C. 1991) ("[B]ecause normal rules regarding contract formation are not followed in forming these 'employment contracts,' liberal rules of contract modification should be allowed."). As explained by the Michigan Supreme Court:

[A] "policy" is commonly understood to be a flexible framework for operational guidance, not a perpetually binding contractual obligation. In the modern economic climate, the operating policies of a business enterprise must be adaptable and responsive to change.

\* \* \*

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<sup>12</sup> Appellants claim that the User's Guide and the PowerPoint slides were somehow insufficient to communicate a modification of the Genmar vacation policy because they did not inform Appellants that they were no longer earning vacation under the Genmar policy. To be clear, they were not earning vacation in October 2004. Moreover, Appellants' own testimony and the testimony of other witnesses make it clear that Appellants not only were told, but clearly understood as of October 2004 that they would not be receiving *any* vacation under the old Genmar policy on July 1, 2005.

[If an employment policy could never be changed] short of successful renegotiation with each employee who worked while the policy was in effect, . . . uniformity . . . would be sacrificed.

*Bankey*, 443 N.W.2d at 120.

Indeed, to impose a restriction that employers may never modify specific policies within employee handbooks without issuing new, revised employee handbooks and retrieving signed acknowledgments of receipt from each and every employee would impose a restriction that is inconsistent with the common law and common sense. As reflected in the testimony of witness Noreen Cleary, “the handbook is usually the last thing that gets updated” after a change in benefits is implemented. (Tr. 316.) This is so for a variety of reasons, not the least of which is the impracticality of issuing a brand new employee handbook every time a policy is modified. Notably, Appellants do not claim that those changes to the handbook that were to their benefit (including, but not limited to the addition of certain new benefit policies, a revised 401(k) program) should somehow be revoked or rescinded because they were implemented in advance of the issuance of a new employee handbook. (Tr. 77-80.)

The district court’s finding that Respondents effectively modified the Genmar vacation policy in October 2004 is overwhelmingly supported by the evidence. Appellants conveniently ignore the evidence supporting the district court’s decision and focus on their own self-serving recollection, or lack thereof, to support their breach-of-contract claim. Appellants’ alleged evidence pales in comparison to the substantial evidence supporting the district court’s decision. Consequently, Appellants have no basis for arguing that the Court’s decision was “manifestly contrary to the weight of the

evidence or not reasonably supported by the evidence as a whole.” *Vangness*, 607 N.W.2d at 474. Accordingly, the Court should simply reaffirm the district court’s decision regarding modification.

**IV. THE DISTRICT COURT PROPERLY DETERMINED THAT APPELLANTS SUFFERED NO DAMAGES.**

“A breach of contract claim fails as a matter of law if the plaintiff cannot establish that he or she has been damaged by the alleged breach.” *Jensen v. Duluth Area YMCA*, 688 N.W.2d 574, 578-79 (Minn. Ct. App. 2004); *see also Forbes v. Wells Fargo Bank*, 420 F. Supp. 2d 1018, 1021 (D. Minn. 2006) (granting summary judgment on breach-of-contract claim where plaintiffs failed to establish damages); *St. Hilaire v. Minco Prods, Inc.*, 288 F. Supp. 2d 999, 1010 (D. Minn. 2003) (plaintiff claimed breach of contract where employer did not follow its termination procedures; court granted summary judgment where plaintiff could not prove damages, “an essential element of his breach of contract claim”). The district court’s factual determination that Appellants suffered no lost vacation as a result of the implementation of the Brunswick “Earn & Burn” policy provides a separate and independent basis for affirming the district court’s decision.

**A. The Language of the Genmar Vacation Policy Does Not Support Appellants’ Damages Claim.**

Appellants argue that “the vacation pay [they] are seeking in this case is for the work they performed under the Genmar policy from July 1, 2004 to June 30, 2005.” (App. Br. p. 27) As discussed above, the problem with Appellants’ argument is that the language of the Genmar policy, itself, does not support it. The district court reiterated this point in finding that Appellants did not suffer any damages:

To accept there was a loss requires one to find that there was a 'bank' of vacation time, previously accrued, which would have allowed that employee to take 240 hours of vacation time or be compensated for 120 hours of vacation time. As addressed previously, there is no evidence that that was the intent of the Genmar policy; and hence, there was no loss.

(AD. 14.) As the district court explained, Appellants did not earn or accrue vacation before July 1, 2005 because the policy states that they did not. (See Ex. 102, p. 29: "Vacation is earned on July of each model year" and "Any employee with one year or more of service who terminates his or her employment prior to July 1 in any year will forfeit his or her right to unearned vacation pay.") Because Appellants had not earned the vacation before the Respondents modified the contract, they could not have lost it.

Appellants' reliance on an inapposite, unpublished Kansas Court of Appeals decision involving a different vacation policy with different language does nothing to shift the weight of the evidence that supports the Court's conclusion. In *A.O. Smith Corp. v. Kan. Dep't. of Human Res.*, No. 93-477, 2005 WL 3434010 (Kan. Ct. App. Dec. 9, 2005), "vacation was earned for working the complete prior year for use in the following year." *Id.* at \*7. In other words, "working for a year . . . constitute[d] a condition precedent to earning vacation." *Id.* In contrast, the condition precedent to earning vacation under the Genmar vacation policy was being employed on July 1, not working for a year.

The *A.O. Smith* case is also inapposite because it involved claims for unpaid wages under the Kansas Wage Payment Act (KWPA) for "vacation pay accrued during 2000." In affirming the district court's award of accrued vacation pay to employees, the Kansas Court of Appeals reasoned that "allowing employers to sell existing businesses

and escape liability for any wages remaining due employees on the effective date of the sale” would create an unintended loophole in the wage payment statute. The situation described by the Kansas Court of Appeals is not applicable to the present case. The claim tried to the district court here was Appellant’s breach-of-contract claim.<sup>13</sup>

Therefore, the alleged contract’s *actual terms* regarding earning or accrual of vacation benefits is what controls, not what the Appellants believe the terms *contemplated*. The district court correctly concluded that vacation did not accrue over the prior model year, so no vacation was lost when Respondents modified the Genmar policy. The district court relied on the Genmar policy language, itself, to support its finding. Therefore its finding was not clearly erroneous and its decision to deny Appellants’ Motion for New Trial was proper.

**B. Appellants Received the Same, and In Some Instances More, Vacation Under the New “Earn & Burn” Policy.**

Expectation damages attempt to place the plaintiff in the same position as if the breaching party had complied with the contract. *Logan v. Norwest Bank, Minn., N.A.*, 603 N.W.2d 659, 663 (Minn. Ct. App. 1999). Here, nothing is required to put the Appellants in the same position they would have been in had the contract been performed

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<sup>13</sup> Appellants brought a claim for failure to pay wages under Minn. Stat. § 181.101 (AA. 5), but the Minnesota Supreme Court has determined that Minn. Stat. § 181.101 does not apply to vacation. *See Fresenius*, 741 N.W.2d at 126 n. 3. Accordingly, Appellants withdrew their § 181.101 claim. (Tr. 7:14-8:8.) Shortly before trial, Appellants moved to amend their complaint to add a new claim for failure to pay wages under Minn. Stat. § 181.13 on behalf of a subset of the class. The district court denied their motion. (RA. 11-12.)

because Appellants already received the vacation time they would have received had Brunswick never modified the old Genmar vacation policy.

The rule of expectancy damages provides that “a party recovering damages for breach of contract should not be better off because of the breach than he would have been had there been no breach.” *W. Oil & Fuel Co. v. Kemp*, 245 F.2d 633, 644 (8th Cir. 1957) (applying Minnesota law). Yet, that is exactly what Appellants seek. They improperly seek double vacation to be credited them effective July 1, 2005, even though they knew as early as October 2004 that they would not be receiving double vacation. Appellants should not be allowed a windfall.

The evidence establishes that the named Appellants received the same amount of vacation under the new Brunswick policy that they would have received had the Genmar policy remained in effect. (Tr. 82-84; Ex. 137.) The testimony of the named Appellants confirms this; for example:

- Appellant Darwin Roberts testified as follows:

Q: But in terms of the amount of time you’ve had to take off from work, you’ve had the same number of weeks off between the purchase of Lund by Brunswick and today as you would have had had Brunswick never purchased Lund.

A: Yes. That way I did, yes.

\* \* \*

Q: And is it true that there has been no 12-month period since Brunswick’s purchase of Lund that you have not been able to take your full – your full four weeks of vacation?

A: True

(Tr. at 188, 192.)

- Appellant Diana Makinen testified as follows:

Q: Okay. And is it true that you've continued to receive four weeks of vacation for every 12-month period at Lund Boat Company?

A: Yes.

(Tr. 209.)

- Appellant Jim Baron testified as follows:

Q: Do you recall that between July 2005 and December 2006 you took six weeks of vacation?

\* \* \*

A: Yes, I took six weeks.

(Tr. 226.)

- Appellant Steve Eklund testified as follows:

Q: Now you do admit that after Brunswick took over Lund, there was never any change in the actual amount of vacation that you had available to use, is that right?

A: That's right.

(Tr. 242.)

Given this testimony, the district court properly concluded that Appellants failed to demonstrate that they suffered any damages.

Additionally, there is no evidence that Appellants were promised, or even believed they were promised, double vacation on July 1, 2005. To the contrary, the evidence reveals that Appellants understood in the months prior to July 1, 2005 that they were "losing" any right to vacation credit on July 1, 2005 under the old Genmar policy, but

would receive the same or greater amount of vacation under the new Brunswick “earn and burn” policy. There is no evidence that Appellants ever had a reasonable, legitimate expectation of double vacation. As a result, dismissal of Appellants’ breach-of-contract claim for this reason would have been appropriate. *See Armstrong, et al. v. Diamond Shamrock Corp.*, 455 N.E.2d 702, 705 (Ohio Ct. App. 1982) (dismissing plaintiff employees’ claims for unpaid vacation because there was no evidence in the record that anyone promised that employees would receive their accrued and unused vacations while employed by their old employer and would also receive equivalent benefits from subsequent employer); *Franklin Mfg. Co. v. Union Pac. R.R. Co.*, 248 N.W.2d 324, 325 (Minn. 1976) (damages must either have been within contemplation of parties or so likely to result from breach that they can reasonably be said to have been foreseen). For all of these reasons, the district court’s determination that Appellants suffered no lost vacation or damages must be affirmed.

### CONCLUSION

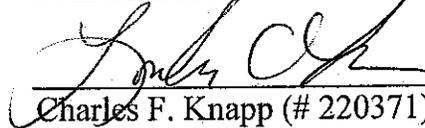
Minnesota law dictates that the unambiguous language of the Genmar handbook disclaiming contract formation effectively prevented the formation of a unilateral contract here. Therefore, the Court should reverse the district court’s determination that the Genmar handbook constituted a contract.

However, even if the Court affirms the district court’s determination that a contract existed, the district court correctly found that Respondents effectively modified any purported unilateral contract created by the old Genmar vacation policy. The district court also correctly found that Appellants have suffered no damages. It made full and

clear findings of fact in support of its decisions on modification and damages. Those Findings of Fact and Conclusions of Law are justified by substantial evidence and Minnesota law. Accordingly, the Court must affirm those Findings and Conclusions and the dismissal of Appellants' breach-of-contract claim.

Dated: December 4, 2009

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**STATE OF MINNESOTA  
IN COURT OF APPEALS**

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Darwin Roberts, Dave Dubs, Greg Morse,  
John Westhoffl, Kenneth Mathewson,  
Jeff Small, Arthur Buntrock, Roger  
Grindstaff, James Baron, Jack Herr,  
Vincent Bernu, Richard Sydow, Steve  
Eklund, Leroy Atkinson, Michael Kroupa,  
Diana Makimen, Suzzy Harper, Gary  
Harper, and Thomas Kimmes, individually  
and on behalf of all others similarly  
situated,

Appellants,

vs.

Brunswick Corporation and Lund Boat  
Company,

Respondents.

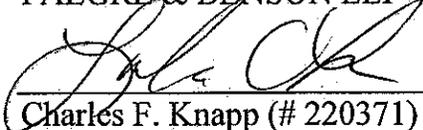
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**CERTIFICATION OF  
BRIEF LENGTH**

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 13,208 words. This brief was prepared using Microsoft Word 2007 software with 13-point font.

Dated: December 4, 2009

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