

IN THE IOWA DISTRICT COURT OF DALLAS COUNTY

DUANE SMITH AND BROOKE SMITH,
on behalf of themselves and all others
similarly situated,

Plaintiffs,

-vs-

MARTIN BROTHERS DISTRIBUTING
COMPANY, INC., and IOWA
EDUCATORS CORPORATION d/b/a
IOWA EDUCATORS CONSORTIUM,

Defendants.

Case No. CVCVO36691

**CLASS ACTION PETITION
AND JURY DEMAND**

DALLAS COUNTY, TX
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CLERK OF DISTRICT COURT

Plaintiffs Duane Smith and Brooke Smith (hereinafter "Plaintiffs"), for their Petition, upon personal knowledge as to facts pertaining to themselves and upon information and belief as to all other matters, against Defendants Martin Brothers Distributing Company, Inc. ("Martin Brothers" or "Martin"), and Iowa Educators Corporation d/b/a Iowa Educators Consortium ("IEC") (collectively "Defendants"), state as follows:

INTRODUCTION

1. Since the year 2000, Defendants have engaged in a conspiracy to restrain competition in the market for retail sale of food at schools in Iowa and have attempted to monopolize that market in violation of state antitrust laws. Defendants' scheme has caused thousands of Iowa families to pay higher prices for food at Iowa schools than they would have paid absent the conduct alleged herein.

2. Defendants' illegal conduct has harmed competition and consumers and is the kind of conduct the antitrust laws are meant to prevent and punish.

3. Plaintiffs, on behalf of themselves and all those similarly situated, seek injunctive relief under the Iowa antitrust laws, and damages under the Iowa antitrust laws, and under the Iowa common laws of civil conspiracy and unjust enrichment.

PARTIES

4. Plaintiffs Duane Smith and Brooke Smith are Iowa citizens and residents of Adel, Dallas County, Iowa. Plaintiffs are the parents of children who attend school at Adel DeSoto Minburn School in Adel, Dallas County, Iowa. Plaintiffs paid for food at Iowa schools for consumption by their children during the period October 12, 2000 to the present ("Class Period"). Plaintiffs suffered injury as a result of conduct described herein.

5. Defendant Martin Brothers is an Iowa corporation engaged in food distribution to schools and to other institutional customers. Martin Brothers' corporate headquarters and principal place of business are located at 406 Viking Road, Cedar Falls, Black Hawk County, Iowa.

6. Defendant Iowa Educators Corporation is an Iowa corporation and conducts business in the name of the "Iowa Educators Consortium" or the "IEC." It was created as a Chapter 504 nonprofit corporation in 2000 by the Iowa Area Education Agencies ("AEAs"). The IEC's principal place of business is located at 3712 Cedar Heights Drive, Cedar Falls, Black Hawk County, Iowa.

FACTS

A. The IEC

7. Chapter 273 of the Iowa Code established Area Education Associations (“AEAs”) throughout the state. The AEAs are governmental bodies tasked with efficiently providing services to multiple school districts in a particular geographic area.

8. The IEC was created in the year 2000 by the AEAs then in existence to provide a purchasing program for K-12 schools throughout Iowa.¹ The program allows member schools to participate in advantageous pricing based on their combined purchasing volume for a variety of products. The IEC utilizes its volume purchasing power to negotiate lower prices for these products from manufacturers or other suppliers. One of these products is school food, which is purchased by the schools and then resold to consumers at the schools.

9. In every procurement category other than school food (*e.g.*, class room supplies, furniture, office products), multiple distributors can utilize the reduced prices the IEC negotiates with suppliers and then compete for a given school’s business for that product category based on the same prices.

10. With respect to school food, however, the IEC awards just one company the title of “prime distributor.” The prime distributor is the only school food distributor that is permitted to access the lower prices the IEC negotiates with food manufacturers. No other school food distributor has access to these lower prices and therefore the prime distributor’s competitors must compete for a given school’s school food business on an uneven playing field.

¹ Litigation over the legality of the IEC’s formation and operation as a non-profit corporation under Chapter 504 of the Iowa Code is currently pending before the Iowa Supreme Court. Hawkeye Food service Distribution, Inc., v. Iowa Educators Corporation et al. Docket No. 08-2056, submitted to the Iowa Supreme Court after oral argument on October 13, 2010.

11. Since its formation the IEC has had one, and only one, prime distributor – defendant Martin Brothers.

12. Since its formation the IEC has had one, and only one director, a former Martin Brothers' food distribution manager who was intimately involved in the discussions that led to the formation of the IEC. The manager, Mr. Daniel Dreyer, then left Martin Brothers to become the IEC's first, and only, Director.

13. Mr. Dreyer has always maintained a close relationship with Martin Brothers. Until recently, the Martin Brothers' website featured photographs of Mr. Dreyer and referred to him as a member of the Martin Brothers' "K-12 Schools Team."²

14. All schools that want to take advantage of the IEC's pricing for school food must contractually agree to purchase at least 60% of their school food from the prime distributor, *i.e.*, from defendant Martin Brothers.³

B. The Iowa School Food Market

15. Schools and school districts typically purchase their school food in bundles from school food distributors, rather than piecemeal from food manufacturers or other sources.

16. The bundles sold to schools differ materially from and are not substitutes for the bundles sold to other institutions such as prisons, hospitals, or nursing homes. For instance, the federal school lunch program requires that schools purchase food in a particular manner to comply with federal regulations.

17. Because of the unique legal and nutritional requirements that govern the school food business, school food distributors treat school food as a separate business segment.⁴

² See Excerpt from Martin Brothers website dated May 27, 2008, attached hereto as Exhibit 1.

³ See Cooperative Food Purchasing Agreement, 2010-11, attached hereto as Exhibit 2.

⁴ See Excerpt from Martin Brothers website, attached hereto as Exhibit 3.

18. School food distributors that sell to schools face increased transportation and other costs when shipping items long distances. As a result, an increase in the price of school food bundles in Iowa would not result in school districts satisfying their school food needs from out-of-state firms.

19. Potential competitors in the Iowa school food market face substantial barriers to entry, including the need to invest significant up-front capital. For example, the cost of trucks for local transportation of school food products over a large network of schools can be prohibitive.

20. The exclusive pricing negotiated by the IEC is offered only to Iowa schools. As a creation of the AEAs, which are statutorily authorized under Iowa Code Chapter 273 to provide services only within their respective boundaries, the IEC cannot legally serve the interests of those outside the state.

21. Other school food distributors that might consider entering the Iowa school food market are effectively deterred by these price discounts available exclusively to Martin Brothers as the IEC's only prime distributor. The IEC has thus erected a market barrier preventing school food firms outside of Iowa from competing for the business of Iowa schools.

22. For these reasons, with respect to school food, the state of Iowa is a distinct "geographic market" for antitrust purposes.

C. Dwindling Competition within the Iowa School Food Market

23. Traditionally, Iowa schools and school districts used more than one school food distributor. As of 1999 (the year prior to the formation of the IEC), the Iowa school food market was highly fragmented. No single competitor came close to holding a dominant position in terms of total market share. At that time, there were approximately twenty-five distributors

serving schools in Iowa. Ten years later, there are only three legitimate competitors with more than a *de minimis* presence remaining in this market: Martin Brothers, Hawkeye Food Service Distribution, Inc. ("Hawkeye"), and Reinhart Food Service, L.L.C.

24. Since the formation of the IEC, Martin Brothers' market share has rapidly increased. During a period when the relevant marketplace volume has been flat or declining, Martin Brothers' school food sales volume has increased from \$6,000,000 to \$35,000,000 in fewer than ten years.⁵

25. Today, Martin Brothers is easily the dominant player in the Iowa school food market.

D. Defendants' Conspiracy to Restrain Competition in and Attempt to Monopolize the Iowa School Food Market

26. Martin Brothers' success has not resulted from superior service or a better product. In fact, the product, school food, is the same product manufactured by the same companies as that provided by Martin Brothers' competitors. Rather, Martin Brothers' success came from its agreement with the IEC to restrain trade in and eliminate competition from the Iowa school food market and its attempt to monopolize that market.

27. Defendants claim that school food prices have decreased for the IEC's members as a result of the arrangement favoring Martin Brothers. The reality is that prices would actually be even lower if the IEC would allow distributors other than Martin Brothers equal access to the prices negotiated by the IEC.

28. Martin Brothers and the IEC carry out their scheme by: (i) utilizing the IEC's combined purchasing power to negotiate lower prices from school food manufacturers; (ii) only permitting its prime distributor – always Martin Brothers – to access and use those low prices;

⁵ See Exhibit 4.

(iii) always awarding Martin Brothers the prime distributor contract even though Martin Brothers has not always submitted the lowest bid; and (iv) contractually requiring member schools that wish to access these lower prices to satisfy 60% of their school food needs from the prime distributor. Since as a practical matter it simply is not convenient for IEC members to purchase just 60% of their school food from Martin Brothers, while fulfilling 40% of their needs from a Martin Brothers' competitor, this effectively gives Martin Brothers 100% of member schools' school food business.

29. By promising food manufacturers a block of business that would grow as more schools joined, and wielding the implicit threat to exclude manufacturers that declined, Defendants were able to command prices that were lower than what the individual schools could obtain directly from the manufacturers.⁶

30. Mr. Dreyer, the IEC's Director and defendant Martin Brothers' former manager, requires food manufacturers to guarantee that the IEC will receive the lowest net prices through the best discounts and allowances.⁷ And Defendants not only regularly threaten manufacturers not to share the exclusive IEC pricing with distributors other than Martin Brothers,⁸ but also attempt to intimidate schools that seek to disclose the IEC pricing to Martin Brothers competitors in the Iowa school food market.⁹

31. Although the IEC is ostensibly overseen by a board comprised of representatives from AEAs, it is in reality controlled by Mr. Dreyer. And the IEC selects the prime distributor for its school food procurement program at its sole discretion.

⁶ Manufacturers participating in the IEC food cooperative include such prominent names as General Mill, Kellogg, and Sara Lee.

⁷ Exhibit 5, letters to manufacturers.

⁸ See, e.g., Letter and Email from Dan Dreyer to "Broker/Vendor" dated May 15, 2007, attached hereto as Exhibit 6.

⁹ See, e.g., Letter of Elizabeth Hanna dated May 14, 2007, Letter of David H. Mason dated May 16, 2007 and Letter of Noah N. Popp dated May 17, 2007, attached hereto collectively as Exhibit 7.

32. During the IEC's first two years of existence (2000-2001), no bidding occurred for the IEC's prime distributor position and all the IEC's business for school food was given to Martin Brothers. This amounted to a no-bid contract and gave Martin Brothers a two year head-start in rounding up schools to participate in its volume discounting and in obtaining volume discounts from school food manufacturers that are unavailable to its competitors.

33. Bidding was initiated in 2002. Upon information and belief, Martin Brothers was awarded the 2002 prime distributor bid even though it did not have the lowest price.

34. For the next five years, until 2007, the IEC did not re-open the prime distributor contract for bidding.

35. On information and belief, in 2007, Hawkeye, one of Martin Brothers' two remaining viable competitors, provided a bid that was lower than Martin Brothers' bid on the original basket of goods for which the competitors submitted bids.¹⁰ But the IEC then removed from the basket many of the items for which Martin Brothers was not the low bidder.¹¹ Even after the IEC reconfigured the market basket to favor Martin Brothers, Hawkeye was still the low bidder.¹² Nevertheless, Martin Brothers was awarded the 2007 bid and remained (and remains) the IEC's only prime distributor.

36. Since 2007, the IEC has chosen to renew the Martin Brothers' prime distributor contract rather than seek new bids.

37. In return for steering business to Martin Brothers, the IEC collects what it calls an "administrative fee" based upon a percentage of sales to member schools. This fee purportedly pays the IEC's operating expenses, which include Mr. Dreyer's salary, benefits, discretionary pension contribution, automobile, and travel and entertainment expenses.

¹⁰ See Summary of 2007 bids by total price of market basket, attached hereto as Exhibit 8.

¹¹ See Email from Dan Dreyer dated February 17, 2007, attached hereto as Exhibit 9.

¹² *Id.*

38. Contrary to its claim that all savings from discounted prices are returned to member schools, the IEC keeps a hefty balance in excess of one million dollars. The money paid by Martin Brothers to the IEC appears to be more “kickback” than “administrative fee.”

39. Exactly where the administrative fee goes is unknown because neither the IEC, as a non-profit corporation created under Iowa Code Chapter 504A, nor Martin Brothers as a private company, is subject to state audits.

E. Federal Investigation

40. The United States Department of Agriculture (USDA) recently notified the Iowa Department of Education that the IEC’s bidding practices violate federal law.¹³

47. Under federal law, to contract with Martin Brothers on behalf of its member schools, the IEC must qualify as a “purchasing cooperative.” The USDA questioned the legitimacy of the IEC’s claim to be a purchasing cooperative, stating: “We understand that the IEC refers to itself as a purchasing cooperative, but the information you have provided about its operation in procuring the most recent food vendor contract has raised serious questions about whether it is appropriate to identify IEC as such a cooperative.”

48. The USDA also addressed illegalities in the IEC’s bid processes. Referring to the IEC’s contract with Martin Brothers, the USDA stated: “Beyond the question of whether the IEC does, in fact, act as a purchasing cooperative, there appear to be significant instances in the IEC contract of non-conformance with procurement and cost policies that SFAs [school food authorities] are required to follow in operating the NSLP [National School Lunch Program].”

¹³ See December 2009 Letter from Darlene Sanchez to Julia Thorius, attached hereto as Exhibit 10; see also Clark Kauffman, “USDA: School agent broke rules,” *Des Moines Register*, March 4, 2010, 1A, 8A, attached hereto as Exhibit 11.

49. Among the practices identified by the USDA as violating federal procurement law are (1) the contract allows Martin Brothers to sell SFAs goods that were not part of the original “market basket” of items and thus were not subject to a free and open competitive bidding process, and (2) the “distributor fee” charged to schools and paid to Martin Brothers is calculated illegally, a “clear violation” of federal law.¹⁴

EFFECT/DAMAGES

50. As more schools are ensnared in Defendants’ scheme by the lower prices, the IEC gains even greater leverage to negotiate even lower prices. The IEC’s membership and Martin Brothers’ market share continue to grow. And the harm to competition all grows along with it, inexorably leading to a monopoly for Martin Brothers when the remaining two competitors are forced from the market or their market shares become negligible.

51. Defendants’ conspiracy to restrain competition in the Iowa school food market resulted in harm to Plaintiffs and the proposed Class because it resulted in them paying higher prices for school food than they would have paid in the absence of Defendants’ conspiracy. If other school food distributors were given access to and could utilize the reduced prices the IEC negotiates for school food, competition would drive prices below those charged by Martin Brothers resulting in lower prices for the purchase of food at Iowa schools for the Class.

52. As a direct and proximate result of Defendants’ unlawful contract, combination and conspiracy, Plaintiffs and Class members were injured and financially damaged in their business and property by having paid more for school food than they would have absent Defendants’ unlawful activities. The total amount of damages is presently undetermined.

¹⁴ See Exhibit 10.

CLASS ACTION ALLEGATIONS

53. Plaintiffs bring this action pursuant to Iowa Rules of Civil Procedure 1.261 *et seq.* on behalf of themselves and the following Class:

All persons who purchased food for personal use and not for resale at K-12 schools in Iowa that utilized the IEC to procure school food at any time since October 12, 2000 to the present.

54. Excluded from the Class are Defendants, their respective parents, subsidiaries and affiliates and any judge or magistrate presiding over this action and members of their families.

55. *Numerosity.* The Class is so numerous that joinder of all members is impracticable. While the exact number of absent Class members is unknown to Plaintiffs at this time, it is ascertainable by appropriate discovery and Plaintiffs are informed and believe, based upon the nature of trade and commerce involved and upon the fact that the IEC states that over 350 schools participate in its school food procurement program, that the proposed Class may include thousands of members, thus satisfying the requirement of Rule 1.261(1).

56. *Common Questions of Law or Fact.* As required by Rule 1.261(2), there are questions of law or fact common to the Class. These common questions of law or fact include:

- (a) Whether the relevant market consists of school food in the State of Iowa;
- (b) Whether Martin Brothers has attempted to monopolize the relevant market;
- (c) Whether Defendants contracted, combined or conspired to unlawfully exclude competitors and potential competitors and unlawfully restrain trade from the relevant market;

- (d) Whether Defendants' unlawful conduct caused Plaintiffs and members of the Class pay more for school food than they otherwise would have paid;
- (e) Whether Plaintiffs and members of the Class are entitled to declaratory, equitable and/or injunctive relief.

57. *Fair and Efficient Adjudication of a Controversy.* A class action satisfies the requirement of Rules 1.262(2)(b), because a class action will permit the fair and efficient adjudication of the controversy. Plaintiffs satisfy the criteria enumerated in Rule 1.263 for determining this issue, *inter alia* as follows:

- (a) First, joint and common interests exist among members of the Class because they have all overpaid for food procured by their schools through a single school food distributor per the criteria of Rule 1.263(1)(a); Moreover, the prosecution of separate actions by members of the Class would create the risk of inconsistent or varying adjudications with respect to individual members of the Class that would establish incompatible standards of conduct for Defendants per Rule 1.263(1)(b); Furthermore, there are the common questions of whether Defendants contracted, combined or conspired to restrain trade and whether Martin Brothers attempted to monopolize the relevant market. The adjudication of these questions with respect to individual members of the Class as a practical matter would be dispositive of the interests of the Class as a whole per the criteria in Rule 1.263(1)(c). Finally, the common questions predominate over any individual questions per the criteria in Rule 1.263(1)(e).

- (b) Moreover, absent a class action, most members of the Class would likely find the cost of litigating their claims to be prohibitive, and will have no effective remedy at law in satisfaction of the criteria in Rule 1.263(1)(f),(g),(m). Absent a class action, Class members will continue to suffer harm and Defendant's misconduct will proceed without remedy.
- (c) There are no unusual management difficulties that would preclude class treatment. The Class treatment of common questions of law and fact is also superior to multiple individual actions or piecemeal litigation in that it conserves the resources of the courts and the litigants, and promotes consistency and efficiency of adjudication
- (d) Finally, there are no other known actions brought by Class members that are not representative parties and thus they have no apparent substantial interest in individually controlling the prosecution of a separate action.

58. *Adequate Representation.* In accordance with Rule 1.262(2)(c) and 1.263(2), Plaintiff will fairly and adequately protect the interests of the Class. Plaintiffs have retained counsel with substantial experience in antitrust consumer class actions and complex litigation. Plaintiffs and their counsel are committed to vigorously prosecuting this action on behalf of the Class, and have the financial resources to do so. Moreover, neither Plaintiffs nor their counsel have any interests adverse to those of the members of the Class.

TOLLING OF STATUTE OF LIMITATIONS

59. Plaintiffs restate and reallege, and incorporates herein by reference, the preceding paragraphs as though fully set forth herein.

60. Defendants' conduct was and is, by its nature, self-concealing. Defendants, through a series of affirmative act or omissions, suppressed the dissemination of truthful information regarding the illegal conduct, and have actively foreclosed Plaintiffs and the Class from learning of their illegal, unfair and/or deceptive acts.

61. By reason of the foregoing, the claims of Plaintiffs and the Class are timely under any applicable statute of limitations, pursuant to the discovery rule, the equitable tolling doctrine, and fraudulent concealment.

COUNT I
(AGAINST ALL DEFENDANTS)

**RESTRAINT OF TRADE IN VIOLATION OF THE IOWA
COMPETITION LAW – I.C.A. § 553.1-553.19**

62. Plaintiffs restate and reallege, and incorporate herein by reference, the preceding paragraphs as though fully set forth herein.

63. Iowa code § 553.4, part of the Iowa Competition law, prohibits “contract][s], combination[s], or conspiracy[ies] between two or more people” that “restrain or monopolize trade or commerce in a relevant market.”

64. For the reasons stated above, the relevant product market within the meaning of the antitrust laws is the market for school food. The relevant geographic market is the State of Iowa.

65. The IEC, working independently and in concert with Martin Brothers, has formed agreements with school districts throughout Iowa pursuant to which each school district must purchase at least 60% of its school food from Martin Brothers. The agreements constitute contracts or combinations within the meaning of Iowa code § 553.4.

66. The purpose and effect of these agreements is to unreasonably restrain trade and competition in the Iowa school food market in violation of Iowa code § 553.4. Martin Brothers knowingly combined with the IEC to effectuate the exclusive dealing.

67. The conduct of Martin Brothers and the IEC constitutes restraint of trade in violation of the Iowa Competition Law.

68. Defendants' conduct has injured Plaintiffs in that Plaintiffs paid more for food at Iowa schools than they would have absent Defendants' conduct.

69. Pursuant to Iowa Code § 553.12, Plaintiffs are entitled to recover actual damages, exemplary damages, and their costs of bringing suit, including a reasonable attorney fee.

COUNT II
(AGAINST ALL DEFENDANTS)

COMMON LAW CIVIL CONSPIRACY

70. Plaintiffs restate and reallege, and incorporate herein by reference, the preceding paragraphs as though fully set forth herein.

71. Civil conspiracy is a violation at common law where two or more persons come to a meeting of the minds regarding a course of action to be accomplished, commit one or more overt acts in furtherance of that course of action, and damages result as a proximate cause thereof.

72. Here, Martin Brothers and the IEC came to a meeting of the minds to unreasonably restrain trade and competition in the Iowa school food market, to orchestrate a group boycott of all other Iowa school food distributors, and to attempt to monopolize the Iowa school food marketplace.

73. Martin Brothers and the IEC committed one or more overt acts in furtherance of this course of action, including engaging in acts in violation of the Iowa Competition Law, I.C.A. § 553.1-553.19

74. As a proximate result of the conspiracy between Defendants, Plaintiffs and members of the proposed Class have suffered damages in an amount to be determined at trial.

COUNT III
(AGAINST ALL DEFENDANTS)

UNJUST ENRICHMENT

75. Plaintiffs restate and reallege, and incorporate herein by reference, the preceding paragraphs as though fully set forth herein.

76. To the detriment of Plaintiffs and members of the Class, Defendants have been, and continues to be, unjustly enriched as a result of the unlawful and/or wrongful acts described herein, and continue to so benefit to the detriment and at the expense of Plaintiffs and members of the Class. Specifically, Defendants have been unjustly enriched by Martin Brothers' receipt of inflated and uncompetitive prices for school food charged to schools and ultimately paid for by Plaintiffs and Class members, which Martin shares with the IEC through the "administrative fee."

77. Defendants have benefited from their unlawful acts and it would be inequitable for Defendants to be permitted to retain any of the ill-gotten gains resulting from the increased market share and uncompetitive prices for school food made by the schools and school districts and ultimately borne by Plaintiffs and the Class.

78. Accordingly, Plaintiffs and members of the Class seek full restitution of the Defendants' enrichment, benefits and ill-gotten gains acquired as a result of the unlawful and/or wrongful conduct alleged herein.

WHEREFORE, Plaintiffs pray that:

A. The Court determines that this action may be maintained as a class action pursuant to Rule 1.261 *et seq.* of the Iowa Rules of Civil Procedure, and declaring Plaintiffs as the representative of the Class and their counsel as counsel for the Class;

B. The Court declares the conduct alleged herein to be unlawful in violation of the Iowa antitrust laws and the common laws of civil conspiracy and unjust enrichment;

C. Plaintiffs and each member of the Class recover actual and exemplary damages to the extent such are provided by the law;

D. Plaintiffs and each member of the Class recover the amounts by which the Defendants have been unjustly enriched in accordance with state law;

E. Defendants be enjoined from continuing the illegal activities alleged herein;

F. Plaintiffs and the Class recover their costs of suit, including reasonable attorneys' fees and expenses as provided by law; and

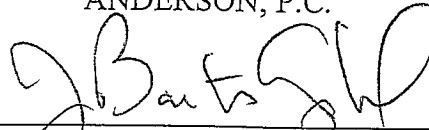
G. Plaintiffs and the Class be granted such other, further, and different relief as the nature of the case may require or as may be determined to be just, equitable and proper by this Court.

JURY DEMAND

Pursuant to Iowa Rule of Civil Procedure 1.902, Plaintiff demands a trial by jury on all issues so triable.

Dated: January __, 2011

HUDSON MALLANEY SHINDLER &
ANDERSON, P.C.



J. Barton Goplerud, AT0002983
Jenna L. Green, AT0010606
5015 Grand Ridge Drive, Suite 100
West Des MOINES, Iowa 50265
Telephone: (515) 223-4567
Facsimile: (515) 223-8887
Email: jbgoplerud@hudsonlaw.net
jgreen@hudsonlaw.net

HAGENS BERMAN SOBOL SHAPIRO

Steve W. Berman
1918 Eighth Avenue, Suite 3300
Seattle, WA 98101
Telephone: (206) 623-7292
Facsimile: (206) 623-0594
E-mail: steve@hbsslaw.com

Elizabeth A. Fegan
Timothy P. Mahoney
Daniel J. Kurowski
1144 West Lake Street, Suite 400
Oak Park, IL 60301
Telephone: (708) 628-4949
Facsimile: (708) 628-4950
E-mail: beth@hbsslaw.com
timmm@hbsslaw.com
dank@hbsslaw.com

ATTORNEYS FOR PLAINTIFFS

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