

Appeal Nos. A105309 (Consolidated With No. A103211)

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION 1

THE PEOPLE, EX REL. ROCKARD J.
DELGADILLO AS CITY ATTORNEY, et al.,

Plaintiffs and Appellants,

vs.

ELLETT BROTHERS, INC., B & B GROUP,
INC., et al.,

Defendants and Respondents.

On Appeal from the Superior Court, County of San Diego,
Hon. Vincent F. DiFiglia, Presiding
JCCP Case No. 4095

RESPONDENT'S BRIEF OF ELLETT BROTHERS, INC.

ALAN J. LAZARUS (SBN 129767)
DRINKER BIDDLE & REATH, LLP
50 Fremont Street, 20th Floor
San Francisco, CA 94105-2235
Telephone: (415) 591-7500
Facsimile: (415) 591-7510

Attorneys for Defendant/Respondent
ELLETT BROTHERS, INC

Appeal Nos. A105309 (Consolidated With No. A103211)

**IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION 1**

THE PEOPLE, EX REL. ROCKARD J.
DELGADILLO AS CITY ATTORNEY, et al.,

Plaintiffs and Appellants,

vs.

ELLETT BROTHERS, INC., B & B GROUP,
INC., et al.,

Defendants and Respondents.

**On Appeal from the Superior Court, County of San Diego,
Hon. Vincent F. DiFiglia, Presiding
JCCP Case No. 4095**

RESPONDENT'S BRIEF OF ELLETT BROTHERS, INC.

ALAN J. LAZARUS (SBN 129767)
DRINKER BIDDLE & REATH, LLP
50 Fremont Street, 20th Floor
San Francisco, CA 94105-2235
Telephone: (415) 591-7500
Facsimile: (415) 591-7510

Attorneys for Defendant/Respondent
ELLETT BROTHERS, INC

TABLE OF CONTENTS

I. INTRODUCTION	1
II. STATEMENT OF THE CASE	1
CERTIFICATION OF WORD COUNT	4

I.

INTRODUCTION

Defendant and Respondent Ellett Brothers, Inc. (Ellett) adopts in its entirety the brief filed on behalf of the Defendant Manufacturers and Distributors on May 10, 2003 in the Consolidated Appeal, No. A103211. For the reasons stated therein, the Judgment must be affirmed.

Ellett submits this separate brief for the limited purpose of clarifying the procedural history as to Ellett, which differs somewhat from the procedural posture as to the other manufacturer and distributor Defendants/Respondents and caused Plaintiffs/Appellants to take this separate appeal. Ellett does so because on the present record the Court is likely to be confused as to the procedural status of this appeal and as to the procedural history which led up to it.

II.

STATEMENT OF THE CASE

Ellett is a distributor of sporting equipment, including equipment for outdoor activities such as camping, archery, and shooting sports, located in South Carolina. *See Ruling on Motions for Summary Judgment (7), Filed April 10, 2003*, at 31:10-12 (“MSJ Ruling”). Ellett was sued in the underlying litigation along with numerous other companies that manufacture, distribute or otherwise market firearms. The allegations against Ellett mirrored those against the other distributor Defendants, and Ellett defended on the same basis.

Ellett was a party to the omnibus motion for summary judgment that resulted in the MSJ Ruling, and sought summary judgment on the same grounds as the other Defendants against the allegations of the complaint that Ellett was liable under California law for unfair business practices.

However, Plaintiffs simultaneously sought summary adjudication against Ellett and certain other distributor Defendants no longer parties to the litigation (MKS Supply, Inc. and Southern Ohio Gun Distributors, Inc.) on separate allegations that these distributors had engaged in certain *unlawful* business practices that formed a separate ground for liability unique to these distributor Defendants.¹ Plaintiffs' motion for summary adjudication was denied. *See MSJ Ruling* at 36-38. Ellett filed a cross-motion for summary adjudication, seeking adjudication that it was *not* liable for unlawful business practices. That motion was also denied. *See MSJ Ruling* at 31-35.

Because these additional issues had been raised as to Ellett and not adjudicated on the cross-motions, the order granting summary judgment that forms the basis for the appeal in number A103211 was not entered as to Ellett. The unadjudicated claims against Ellett were set for trial. Ultimately on October 16, 2003, the parties resolved these separate unlawful business practice claims by entering into a Stipulated Final Judgment re Ellett Brothers, Inc. *See* Exhibit 3 to Motion to Consolidate Appeals, Filed February 13, 2004. The parties resolved only the claims that were the subject of Plaintiffs' Motion for Summary Adjudication as to Ellett. The Stipulated Judgment did not purport to resolve any of the other

¹ The separate allegations as to Ellett were that it was in technical noncompliance with Penal Code section 12072 (f)(1) (requiring the receipt of certain proof of licensure before firearms could be sold to California firearms dealers) and Penal Code section 12020.5 (prohibiting the advertisement or "offer or exposure for sale" of certain firearms). The latter allegation was based on Ellett's inclusion in its catalog and on its web site of certain firearms that are lawful for sale in other states but are characterized as assault weapons under California law, and therefore restricted for sale to only certain entities and agencies with special licenses. The central issue of dispute on both claims was statutory construction, and there was also a challenge to the constitutionality of the latter's application to Ellett's catalog. *See Ruling on Motions for Summary Judgment* (7), Filed April 10, 2003, at 31-35.

claims against Ellett, and expressly failed to resolve the claims against Ellett predicated on its general distribution practices.²

Following entry of the Stipulated judgment on October 16, 2003, and service on Plaintiffs of the Stipulated Judgment on November 25, 2003, Plaintiffs filed the Notice of Appeal in No. A105309 on January 26, 2004. They moved to consolidate the appeal with No. A103211 on February 13, 2004, and the Court granted the motion and consolidated the appeals for briefing, argument and decision on March 1, 2004.

Dated: May 11, 2004

Respectfully submitted,

DRINKER BIDDLE & REATH LLP



ALAN J. LAZARUS

Attorneys for Defendants/Respondents
ELLETT BROTHERS, INC

² In their Opening Brief at p.5, Plaintiffs/Appellants drastically mischaracterize the nature of the settlement with Ellett, stating that Ellett “settled claims related to the sale of assault weapons in California ...” In fact, what Ellett agreed to do was to add an additional disclaimer to its catalog and any other promotional materials it distributed into California reminding the reader that only firearms that could lawfully be sold within the State would be, unless the purchasing dealer had the necessary special licenses. Ellett did not sell any illegal firearms in the State, and thus did not settle any claims that it had illegally sold assault weapons in California, as Plaintiffs claim. See Exhibit 3 to Plaintiffs’ Motion to Consolidate Appeals, Filed February 13, 2004.

CERTIFICATION OF WORD COUNT

I certify that:

The text of this brief contains 727 words as counted by Microsoft Word word processing program.

Dated: May __, 2004

DRINKER BIDDLE & REATH LLP



ALAN J. LAZARUS

Attorneys for Defendants/Respondents
ELLETT BROTHERS, INC., B & B
GROUP, INC.

CERTIFICATE OF SERVICE

I, Dalia Rom, declare that:

I am at least 18 years of age, and not a party to the above-entitled action. I am an employee of DRINKER BIDDLE & REATH LLP and my business address is 50 Fremont Street, 20th Floor, San Francisco, California 94105, Telephone: (415) 591-7500.

On May 11, 2004, I caused to be served the following document(s):

RESPONDENT'S BRIEF OF ELLETT BROTHERS, INC.

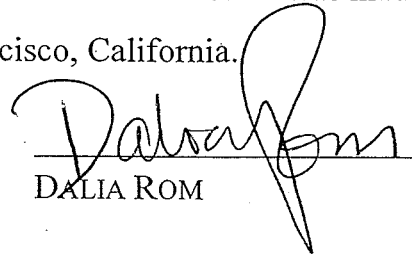
by enclosing a true copy of (each of) said document(s) in (an) envelope(s), addressed as follows:

SEE ATTACHED SERVICE LIST

- ☐ BY OVERNIGHT DELIVERY: I enclosed a true copy of said document(s) in a Federal Express envelope, as addressed below:
- ☐ BY PERSONAL SERVICE: I caused such envelopes to be delivered by hand to the above address(es).
- ☒ BY MAIL: I am readily familiar with the business' practice for collection and processing of correspondence for mailing with the United States Postal Service. I know that the correspondence is deposited with the United States Postal Service on the same day this declaration was executed in the ordinary course of business. I know that the envelope was sealed, and with postage thereon fully prepaid, placed for collection and mailing on this date, following ordinary business practices, in the United States mail at San Francisco, California.
- ☐ BY FACSIMILE: I caused such documents to be transmitted by facsimile transmission as indicated below and by mail.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. I further declare that I am employed in the office of a member of the bar of this court at whose direction the service was made

Executed on May 11, 2004 at San Francisco, California.


DALIA ROM

SERVICE LIST

The People, Ex Rel. Rockard J. Delgadillo as City Attorney, et al. v. Ellett Brother, Inc., et al.
Court of Appeal, First Appellate District No. A105309 (Consolidated with No. A103211)

Dennis Henigan, Brian Siebel,
Daniel Vice, Jonathan Lowy
Brady Center To Prevent Gun Violence,
Legal Action Project
1225 Eye Street, NW, Suite 1100
Washington, DC 20005

Robert J. Nelson, Richard M. Franco
Lieff, Cabraser, Heimann & Bernstein, LLP
275 Battery y Street, 30 Floor
San Francisco, CA 94111-9333

Dennis J. Herrera, San Francisco City Attorney
Owen-J. Clements, Chief of Special Litigation
Kristine A. Poplawski, Ingrid M. Evans
1390 Market Street, 6th Floor
San Francisco, CA 94102-5408

Samuel L. Jackson, Sacramento City Attorney
Gustavo L. Martinez, Deputy City Attorney
City Attorneys Office
980 9th Street, 10 Floor
Sacramento, CA 95814

Thomas F. Casey, III, San Mateo County
Counsel
Brenda B. Carlson, Deputy County Counsel
Office of the County Counsel
400 County Center
Redwood City, CA 94063

John A. Russo, Oakland City Attorney
Randolph W. Hall, Assistant City Attorney
J. Patrick Tang, Deputy City Attorney
One Frank Ogawa Plaza, 6th Floor
Oakland, CA 94612

Patrick J. Coughlin, Ex Kano Sams II, Jason T.
Baker
Milberg Weiss Bershad Hynes & Lerach LLP
100 Pine Street, Suite 2600
San Francisco, CA 94111-5238

Michael Jenkins
West Hollywood City Attorney
Sayre Weaver, Special Counsel
Educational Fund To Stop Gun Violence
1023 15th Street, NW, Suite 600
Washington, DC 20005

Lloyd W. Pellman, Los Angeles County
Counsel
Lawrence Lee Hafetz, Judy W. Whitehurst
Senior Deputy County Counsel
500 West Temple Street, Suite 648
Los Angeles, CA 90012

Manuela Albuquerque, Berkeley City Attorney
Matthew J. Orebic, Deputy City Attorney
2180 Milvia Street, 4th Floor
Berkeley, CA 94704

Richard E. Winnie, Alameda County Counsel
Rose Kwiatkowski, Assistant County Counsel
Office of Alameda County Counsel
1221 Oak Street, Suite 450
Oakland, CA 94612

Michael S. Lawson
Thompson, Lawson LLP
East Palo Alto City Attorney
1600 Broadway, Suite 250
Oakland, CA 94612

Legrand H. Clegg II, Compton City Attorney
Celia Francisco, Deputy City Attorney
P. O. Box 5118
205 South Willowbrook Avenue
Compton, CA 90220

Robert N. Tafoya
Akin, Gump, Strauss, Hauer & Feld, LLP
2029 Century Park E., Suite 2600
Los Angeles, CA 90067

Denis J. Moriarity, Eugenie Baumann
Haight Brown & Bonesteel LLP
6080: Center Drive, Suite 800
Los Angeles, CA 90045-1574

Timothy Gorry
Frank Sandelmann
Gory & Meyer LLP
2029 Century Park East, Suite 400
Los Angeles, CA 90067

Roy Koletsky
Susan L. Caldwell
Koletsky, Mancini, Feldman & Morrow
3460 Wilshire Boulevard, 8th Floor
Los Angeles, CA 90010-2228

Friedrich W. Seitz
Murchison & Cumming, LLP
801 South Grand Avenue, 9th Floor
Los Angeles, CA 90017

Steven A. Silver
Law Offices of Steven A. Silver
83 E. Harrison Avenue
Porterville, CA 93257-3700

John F. Renzulli
Renzulli Pisciotto & Renzulli, LLP
300 East 42nd Street, 17th Floor
New York, NY 10017-5947

Emmerline Foote
Inglewood Interim City Attorney
One Manchester Boulevard, Suite 860
Inglewood, CA 90301

Bradley T. Beckman
Beckman & Associates
Two Penn Center Plaza, Suite 910
Philadelphia, PA 19102

George John Berger, Edwin W. Green,
Kimberly A. Donlon
Allen, Matkins, Leck, Gamble & Mallory, LLP
1901 Avenue of the Stars, Suite 1800
Los Angeles, CA 90067-6019

Charles L. Coleman, III, Lauren Terk
Holland & Knight
50 California Street, 28th Floor
San Francisco, CA 94111-4624

Craig A. Livingston
Livingston Law Firm
1600 South Main Street, Suite 380
Walnut Creek, CA 94596

Wayne A. Wolff
Sedgwick, Detert, Moran & Arnold
One Embarcadero Center, 16th Floor
San Francisco, CA 94111-3765

Lawrence J. Kouns
Christopher J. Healey
Luce, Forward, Hamilton & Scripps, LLP
600 West Broadway, Suite 2600
San Diego, CA 92101-3391

John J. McCarthy, III
The McCarthy Law Firm, PLLC
The Hippodrome Center
1120 Avenue of the Americas, Suite 4006
New York, NY 10036

Raymond J. Liddy
Selman & Breitman LLP
402 West Broadway, Suite 400
San Diego, CA 92101

C.D. Michel, Timothy Lignoul
Trutanich - Michel, LLP
Port of Los Angeles
407 N. Harbor Boulevard
San Pedro, CA 90731

Robert Wright
Wright & L'Estrange
701 B Street, Suite 1550
San Diego, CA 92101-8103

James P. Dorr, James B. Vogts
Wildman, Harrold, Allen & Dixon
225 West Wacker Drive, Suite 3000
Chicago, IL 60606-1229

Alan M. Caplan, Philip Neumark, Paul R.
Hoerber
Bushnell, Caplan & Fielding, LLP
221 Pine Street, Suite 600
San Francisco, CA 94104-2715

Rockard J. Delgadillo
Don Kass
City Attorneys Office
200 N. Main Street, 16 City Hall East
Los Angeles, CA 90012

David Kairys
Law Office of David Kairys
1719 North Broad Street
Philadelphia, PA 19122

Charles T. McCue
Law Offices of Charles T. McCue
2985 Reynard Way
San Diego, CA 92103

Jeffrey S. Nelson
Shook Hardy & Bacon, LLP
2555 Grand Boulevard
Kansas City, MO 64108

Robert L. Joyce
Wilson, Elser, Moskowitz, Edelman & Dicker,
LLP
150 East 42nd Street
New York, NY 10017

Robert C. Tarics, Michael Branisa, Michael J.
Zomcik
Tarics & Branisa, P.C.
5005 Riverway Drive, Suite 500
Houston, TX 77056

Robert M. Anderson
Wilson Elser Moskowitz Edelman & Dicker,
LLP
1055 West 7th Street, Suite 2700
Los Angeles, CA 90017

D. Cameron Baker
City and County of San Francisco
One Dr. Carlton B. Goodlett Plaza
San Francisco, CA 94102

Richard S. Lewis
Joseph M. Sellers
Cohen, Milstein, Hausfeld & Toll, PLLC
1100 New York Avenue, NW, Suite 500
Washington, DC 20005-3964

Jonathan Selbin
Paulina do Amaral
Lieff, Cabraser, Heimann & Bernstein, LLP
780 Third Avenue, 48th Floor
New York, NY 10017-2024

Michael J. Dowd
Jonah H. Goldstein
Milberg Weiss Bershad Hynes & Lerach LLP
401 B Street, Suite 1700
San Diego, CA 92101-4297

Mark Thomas Palin
Arte & Haden
5 Park Plaza, Suite 1000
Irvine, CA 92614

Timothy A. Bumann
Budd Lamer
127 Peachtree Street, N.E.
Suite 636
Atlanta, GA 30303-1601

Stephen Zell
Madory, Zell & Pleiss
Meredith Financial Centre, Suite 205
17822 East 17th Street
Tustin, CA 92780-2183

Timothy G. Atwood
273 Canal Street
Shelton, CT 06484

William M. Griffin
Jonann E. Coniglio
Friday, Eldredge & Clark
400 West Capitol, 200 Regions Center
Little Rock, AR 72201-3493

Steve Cooley
Los Angeles County District Attorney
18-709 Criminal Courts Building
210 West Temple Street
Los Angeles, CA 90012

Bonnie M. Dumanis
San Diego County District Attorney
Hall of Justice
330 W. Broadway
San Diego, CA 92101

Superior Court of San Diego
Hon. Vincent P. DiFiglia
330 W. Broadway
San Diego, CA 92101

Thomas E. Fennell
Jones Day
2727 North Harwood Street
Dallas, TX 75201-1515

John A. Gladych
Gladych & Associates
450 Newport Center Drive
Suite 530
Newport Beach, CA 92660

Harold R. Mayberry, Jr.
Martin Bacon & Martin, PC
2010 Corporate Ridge, 7th Floor
McLean, VA 22101

Douglas Kliever
101 D Street, S.E., Second Floor
Washington, DC 20003

Bill Lockyer
Attorney General - State of California
Department of Justice
1300 I Street, 17th Floor
Sacramento, CA 95814

Kamala Harris
San Francisco County District Attorney
Hall of Justice
880 Bryant Street, Room 325
San Francisco, CA 94103

California Supreme Court
350 McAllister Street
San Francisco, CA 94102
(5 copies)