

1 Case No. 12 OC 03981B
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6 IN THE FIRST JUDICIAL DISTRICT COURT OF
7 THE STATE OF NEVADA IN AND FOR CARSON CITY

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9 STATE OF NEVADA,
10 Plaintiff,

11 vs.

12 ORDER GRANTING
13 DEFENDANT'S MOTION
14 TO DISMISS

15 AMERICANS FOR PROSPERITY, INC.
16 Defendant.

17 Plaintiff, State of Nevada filed a complaint against Americans for Prosperity
18 (AFP) alleging five causes of action, all resulting from AFP's mailed "flyers" to residents in
19 North Las Vegas.

20 The five claims allege AFP, as either a non-profit corporation or as a political
21 Action committee, spent more than One Hundred Dollars (\$100.00), as "expenditures", in
22 "express advocacy" and failed to register with the Secretary of State as either a political
23 action committee or a non-profit corporation. Additionally, that AFP was required to – and
24 failed – to report contributions to AFP and "expenditures".

25 The State also asks for an injunction requiring registration and reporting as
26 well as statutory penalties, attorney fees and costs.

27 The Defendant has moved for Dismissal pursuant to NRCP 12(b)(5).
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I

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2 NRCP 8 requires a plan statement "showing that the pleader is entitled to

3 relief." Courts must accept the plaintiff's factual allegation as true and then determine

4 whether the allegations are legally sufficient to support the claims asserted. Parker v

5 LaTourette, 128 Nev. Adv.Op. 25 (2012). The court must also draw all inferences from the

6 facts in favor of the non-moving party. State ex.rel. Johnson v Reliquit Energy, 128 Nev. Adv.

7 Op. 46 (2012). However, a legal conclusion is not assumed to be either factual or true.

8 Papasan v Allain, 478 U.S. 265, 286 (1986).

9 An NRCP 12(b)(5) motion, asserts that on the facts as plead by the plaintiff,

10 no recovery may be had by any legal theory. Buzzstew v City of N. Las Vegas, 124 Nev. 224

11 (2008).

12 The complaint against AFP is completely based on the affirmative

13 requirements of political action committees and non-profits to register and report to the

14 Secretary of State if they are engaged in certain political activity. NRS Chapter 294A. This

15 chapter also defines the operative terms of the statutes. In the case at bar, there are no

16 substantive questions of fact, but there is disagreement of the meaning of relevant parts of

17 NRS Chapter 294A. "Questions of statutory construction, including the meaning and scope

18 of a statute, are questions of law . . ." City of Reno v Reno Gazette-Journal, 119 Nev. 55, 58

19 (2003) and; "when a statute is clear and unambiguous, we give effect to the plain and

20 ordinary meaning of the words . . ." Seput v Lacayo, 122 Nev. 499, 502 (2006).

II

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22 A. The "First Claim for Relief" against AFP alleges (pursuant to NRS 294A.230):

- 23 1. That AFP is a Non-profit corporation.
- 24 2. That AFP solicits and has received contributions; and
- 25 3. Has mailed "flyers" and therefore "engaged in political activity" and failed to
- 26 register with the Secretary of State.

27 B. The Second Claim for Relief alleges (pursuant to NRS 294A.230):

- 28 1. That AFP is a political action committee; that
2. solicits and receives contributions from Nevada residents; and

1 3. mailed "flyers" and thus engaged in political activity, and failed to register with
2 the Secretary of State.

3 C. The Third and Fourth Claim for Relief alleges (pursuant to NRS 294A.140 (4)(b)
4 and 294A.210(3)(b):

5 1. That AFP paid to create and distribute the "Flyers" during the 2012 election
6 cycle; and

7 2. Made expenditures in excess of One Hundred Dollars (\$100.00); and

8 3. Failed to file Contribution and Expense reports with the Secretary of State.

9 4. And is subject to a civil penalty of Ten Thousand Dollars (\$10,000.00) total for,
10 respectively, the primary election and general election reporting periods.

11 D. The Fifth claim alleges:

12 1. That AFP is required to register and report contributions and expenditures
13 and having failed to do so should be enjoined to register and report.

14 As general allegations, Plaintiff has alleged that the message of the flyers constitutes
15 "express advocacy" and the "expenditures" made by AFP were "designed to influence the
16 outcome of an election."

17 III

18 Political action committees, express advocacy and expenditures are specifically
19 defined in NRS Chapter 294A.

20 "Committee for Political action" is any . . . group of natural
21 persons or entities that solicits or receives contributions from
22 any other person, group or entity and:

23 (a) makes or intends to make contributions to candidates or other
24 persons; or

25 (b) makes or intends to make expenditures designed to affect the
26 outcome of any primary election . . . general election
27 or question on the ballot.

28 NRS 294A.005.

Expenditures defined are:

1. Those expenditures made for advertising on television, radio,
Billboards, posters and in newspapers; and

2. All other expenditures made, to advocate expressly the election
or defeat of a clearly identified candidate or group of candidates

1 or the passage or defeat of a clearly identified question or group
2 of questions on the ballot, including any payments made to a
3 candidate or any person who is related to the candidate
4 within the second degree of consanguinity or affinity.

4 NRS 294A.0075.

5 and Express Advocacy's definition:

6 . . . means that a communication, taken as a whole, is
7 susceptible to no other reasonable interpretation other
8 than as an appeal to vote for or against a clearly identified
9 candidate or group or candidates or an election, general
10 election, general city election or special election. A
11 communication does not have to include the words "vote
12 for," "vote against," "elect," "support" or other similar
13 language to be considered a communication that expressly
14 advocates the passage or defeat of a candidate or a
15 question.

12 NRS 294A.0025.

13 **IV**

14 The following facts are undisputed:

- 15 1. Americans for Prosperity (AFP), paid for three (3) "flyers" to be created and
16 mailed to Nevada voters in North Las Vegas, in May and June, 2012.
- 17 2. The cost was over One Hundred Dollars (\$100.00).
- 18 3. AFP receives and solicits contributions.
- 19 4. AFP did not register or report to the Nevada Secretary of State.
- 20 5. Kelvin Atkinson was a Nevada State Assemblyman
- 21 6. Kelvin Atkinson was a candidate in both the 2012 primary and general election.
- 22 7. Kelvin Atkinson was a sponsor of AB416.
- 23 8. While not previously passed into law, the bill was still pending in the legislature.
- 24 9. The "flyers" contained the follow messages:

25
26 A. WHILE NORTH LAS VEGAS FAMILIES STRUGGLE TO MAKE
27 ENDS MEET . . . ATKINSON WAS BUSY SADDLING NORTH
28 LAS VEGAS FAMILIES WITH AB416 AND THE \$1BILLION OF
RATE HIKES THAT MAY HAVE COME WITH IT. [CITATIONS].

NV ENERGY LOBBYISTS CASH IN . . .

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YOU PAY HIGHER RATES.

A billion dollar increase is only a small amount to Kelvin, but Nevadans are struggling . . .
Call Assemblyman Atkinson at (702) 457-9995

Tell him it is time to represent Nevada working families.

B. GUESS WHO'S POLICIES ARE BENFITTING THE SPECIAL INTERESTS?

ASSEMBLYMAN KELVIN ATKINSON SPONSORED AND VOTED FOR LEGISLATION THAT WOULD HAVE RAISED ENERGY RATES ON STRUGGLING NEVADA FAMILIES.

POTENTIAL RATE INCREASE \$1,000,000.00

ATKINSON WAS THE PRIMARY SPONSOR OF AB416 [Citation]

The bill could have cost NV Energy rate payers a \$1BILLION increase which is only a small amount to Kelvin, but Nevadans are struggling . . .

Call Assemblyman Atkinson at: (703) 457-00053

Tell him it is time to represent Nevada working families.

C. For ASSEMBLYMAN ATKINSON its POLITICS as USUAL In CARSON CITY BACKROOM INFLUENCE PEDDLERS SPECIAL INTERESTS

ATKINSON WAS THE PRIMARY SPONSOR OF AB416 [Citation]

The bill could have cost NV Energy rate payers \$1BILLION

A billion dollar increase is only a small amount for Kelvin, but Nevadans are struggling . . .

Call Assemblyman Atkinson at (702) 457-0005

Tell him it is time to represent Nevada working families

The first flyer also contained an image of a hand holding an empty wallet, a brandy glass and a telephone over the statement "Call Assemblyman Atkinson at . . . Tell him it is time to represent Nevada working families"

1 The second flyer has an image of a question mark, a photo of Assemblyman
2 Atkinson, a mock NV Energy Company invoice and the telephone over the message to call
3 the Assemblyman.

4 The third flyer depicts the original Nevada Capitol building, a photo of Assemblyman
5 Atkinson, a mock bill to a generic Nevada Taxpayer, and the image of a telephone above the
6 telephone number to reach Assemblyman Atkinson, and tell him it's time to represent
7 Nevada working families.
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9 V

10 The question of whether AFP, as a non-profit corporation, is required to register with
11 the Secretary of State pursuant to NRS 294A.225 is whether AFP made "expenditures
12 designed to affect the outcome of any primary, general . . . election or question on the ballot."
13 Similarly, if AFP is a political action committee (PAC), it is required to register and report to
14 the Secretary of State if it ". . . makes or intends to make expenditures designed to affect the
15 outcome of any primary election . . . general election . . . or question on the ballot." (by
16 definition in NRS 294A.0055, an entity must either intend to or make expenditures to affect
17 the outcome of an election to actually be a PAC) NRS 294A.0055. If a PAC makes an
18 expenditure "on behalf" of a candidate it is also required to register and report.
19 NRS 294A.210.
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21 At the outset, NRS 294A.210 does not apply to this case. The statute addresses
22 those PACs and entities making expenditures "on behalf" of a candidate. There can be no
23 argument whatsoever that the flyers were sent on behalf of Assemblyman Atkinson. Plaintiff
24 makes a strained argument regarding "on behalf of." *ie.* "The statutes should be given their
25 plain meaning which is that reporting is required for independent expenditures made about a
26 candidate." Opposition to Motion to Dismiss, p. 17. The Plaintiff then attempts to cite to
27 legislative intent, however quotes a 1991 Deputy Secretary of State: "Section 13 requires
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1 these persons making independent expenditures (emphasis original) for or against a
2 candidate to report those expenditures." *Id.*

3 While there can be little doubt the 1991 Deputy Secretary may have intended that
4 meaning, it is certainly not a clear fact that the legislature did. The legislature could have
5 said specifically in the statute "for or against." "On behalf of" is defined "In the interest of; for
6 the benefit of . . . on the part of; speaking for . . ." American Heritage Dictionary. Similarly,
7 Black's Law Dictionary, defines "behalf" as "Benefit, support, defence, or advantage.
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9 The Plaintiff then argues that ". . . it is obvious that an attack against any candidate
10 with opposition benefits his opposition." Opposition to Motion to Dismiss, p. 18. As this court
11 writes this order, I have no idea whether Assemblyman Atkinson had an opponent or several,
12 much less who those opponents might have been. There was nothing in the complaint of
13 who benefitted or may have benefitted. Certainly many people benefitted by mailing flyers,
14 even the post office. Simply because an entity may benefit from a political activity, it is not a
15 given that the activity was done on the beneficiaries behalf. The plaintiff desires that anyone
16 scrutinizing their complaint make intuitive leaps to assume facts not alleged in the complaint.
17 Again, the legislature could have made the statute apply to expenditures made "for or
18 against" a candidate. NRS 294A.210 does not apply to AFP.
19

20 The next definition the court must consider is "expenditures." Expenditures, is defined
21 above, as money spent in express advocacy for the election or defeat of a clearly identified
22 candidate. An express advocacy, defined above, means a communication "taken as a
23 whole, is susceptible to no other reasonable interpretation other than as an appeal to vote for
24 or against a clearly identified candidate . . ."

25 The Defendant argues that in determining whether a communication is express
26 advocacy, only the communication, in this case, the three (3) flyers, may be referred to. The
27 Defendant cites to Nevada's express advocacy definition that the communication " . . . taken
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1 as a whole is susceptible to no other reasonable interpretation . . ." for that proposition.

2 Defendant is incorrect.

3 The Plaintiff, citing to Fed. Election Comm'n v. Furgatch, 807 F.2d 857 (9th Cir.1987)

4 in an analysis of "express advocacy" reported:

5 A consideration of the context in which speech is uttered may
6 clarify ideas that are not perfectly articulated, or supply necessary
7 premises that are unexpressed but widely understood by readers
8 or viewers. We should not ignore external factors that contribute to
9 a complete understanding of speech, especially when they are factors
10 that the audience must consider in evaluating the words before it.

11 *Id.* at 863.

12 Also citing to 11 C.F.R. 100.22(b)(1985):

- 13 (b) When taken as a whole and with limited reference to external
- 14 events, such as the proximity to the election, could only be
- 15 interpreted by a reasonable person as containing advocacy of the
- 16 election or defeat of one or more clearly identified candidate(s)
- 17 because—
- 18 (1) The electoral portion of the communication is unmistakable,
- 19 unambiguous, and suggestive of only one meaning; and
- 20 (2) Reasonable minds could not differ as to whether it encourages
- 21 actions to elect or defeat one or more clearly identified
- 22 candidate(s) or encourages some other kind of action.

23 When FEC v Furgatch, 807 F.2d, *Supra*, is considered in conjunction with NRS
24 294A.0025 ("a communication does not have to include the words "vote for," "vote against,"
25 "elect" . . .) it is clear to this court that external facts may be considered in "a limited context"
26 to determine express advocacy.

27 Nevada has apparently adopted the test for "express advocacy" as articulated in
28 Furgatch, *Id.* at 427.

. . . speech need not include any of the words ["vote for",
"elect", "support" . . . "defeat", "reject", Buckley v Valeo,
424 U.S. 1, 80 (1976). to be express advocacy . . . but it
must, when read as a whole, and with limited reference to
external events, be susceptible of no other reasonable inter-
pretation but as an exhortation to vote for or against a specific
candidate. This standard can be broken into three main com-
ponents. First, even if it is not presented in the clearest, most
explicit language, speech is "express" for present purposes if its

1 message is unmistakable and unambiguous, suggestive of only
2 one plausible meaning. Second, speech may only be termed
3 "advocacy" if it presents a clear plea for action, and thus speech
4 that is merely informative is not covered by the Act. Finally, it
5 must be clear what action is advocated. Speech cannot be
6 "express advocacy of the election or defeat of a clearly
7 identified candidate" when reasonable minds could differ as to
8 whether it encourages a vote for or against a candidate or
9 encourages the reader to take some other kind of action.

We emphasize that if any reasonable alternative reading of speech can be suggested, it cannot be express advocacy subject to the Act's disclosure requirements.

8 Furgatch, *supra* at 427.

9 NRS 294A.0025 has, essentially, articulated the test in Furgatch, *supra*.

10 Turning to the campaign flyers in this case and taking the message in context, the
11 flyers were unquestionably mailed during the primary election of 2012. And there is no
12 question whatsoever that the flyers are uncomplimentary to Assemblyman Atkinson.
13

14 However, as the plaintiff acknowledged during the hearing on the motion to dismiss, simply
15 because a communication is uncomplimentary to a politician, it does not become express
16 advocacy. Clearly, AFP is not fond of lobbyists, AB416 and the assemblyman's sponsoring
17 of the bill.

18 The defendant asserts that a reasonable interpretation of the flyers is that
19 Assemblyman Atkinson is sponsoring a bill that drastically increases energy costs for citizens
20 is North Las Vegas, and exhorts those citizens to call the assemblyman and voice their
21 objection to the bill. In an argument advanced by the Plaintiff regarding the defendant's
22 assertion, it was stated "... Defendant's explanation that the flyers can be reasonably
23 interpreted as merely urging Atkinson to change his policies should be rejected. AB419 was
24 long dead before the flyers were disseminated . . ." Opposition to Motion to Dismiss, p.13.

25 However, at oral argument the Plaintiff acknowledged that the bill was not dead and was still
26 viably in the legislature.
27
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1 Both the Plaintiff and Defendant have urged different standards in interpreting the
2 relevant statutes. The Defendant asserts that the statutes must be "strictly and narrowly
3 construed against the government and in favor of the Defendant . . .", Motion to Dismiss, p.5.

4 The Plaintiff on the other hand states that Nevada's campaign laws should be liberally
5 construed ". . . in a way that achieves the legislative intent." Opposition to Motion to Dismiss,
6 p.2., citing to Chateau Vegas Wine, Inc. v Southern Wine and Spirits of America, 265, P.3d,
7 680, 685 (Nev.2011). For example, in the Plaintiff's complaint, First and Second causes of
8 action, it is stated that AFP is required to register because AFP, "engaged in political activity
9 in Nevada . . ." This statement, in Plaintiff's complaint, alone could have been used by the
10 legislature in NRS 294A.

11 The legislature could have defined express advocacy as "any political activity or message
12 supporting a candidate for office or disparaging another." But both NRS 294A.0025 and the
13 Furgatch test, above state clearly that the communication must be susceptible to no other
14 reasonable interpretation." Furgatch, as reported above states that the communication is
15 "express" ". . . if its message is unmistakable and unambiguous, suggestive of only one
16 plausible meaning." *Id.* at 427.

17 As noted above, these flyers were uncomplimentary to Assemblyman Atkinson.
18 There can be little doubt that some citizens might have voted for someone else as a result of
19 the mailers – none – the – less the communications from the beginning to the end focus on
20 the energy bill AB416 and end with an exhortation to call Mr. Atkinson and "represent
21 Nevada working families." There is no mention of a political campaign, political party or
22 political opponent.

23 Additionally, the suggestion at the end of the flyers for citizens to call Assemblyman
24 Atkinson and tell him to represent Nevada working families is plausibly recognition that not
25 only is Mr. Atkinson an assemblyman, but he is expected to remain so.
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In short, reasonable minds could absolutely decide that the flyers are anti AB416, special interests and lobbyists. There is no unmistakable, unambiguous, suggestive of only one plausible meaning message to affect the outcome of an election, ie. defeat Mr. Atkinson or elect someone else.

VI

The Court finds that the flyers, for the reasons above, do not constitute express advocacy and therefore are not expenditures as defined by NRS 294A and Americans for Prosperity (AFP) are neither required to register with the Nevada Secretary of State nor report contributions and expenditures. Defendant's Motion to Dismiss is granted.

IT IS SO ORDERED.

DATED this 15th day of October, 2013.


ROBERT E. ESTES
SENIOR DISTRICT JUDGE

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CERTIFICATE OF SERVICE

Pursuant to NRCF 5(b), I certify that I am an employee of The First Judicial District Court of the State of Nevada, and I certify that on this 17 day of October 2013 I faxed and/or deposited for mailing at Carson City, Nevada, or caused to be delivered by messenger service, a true and correct copy of the foregoing **Order Granting Defendant's Motion to Dismiss** and addressed to the following:

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