JOSEPH H. HART
Senior District Judge

1403 West 9th Street
Austin, Texas 78703
512.481.0831
512.473.0831 (fax)
joe@joehartlaw.com

August 24, 2007

Joe K. Crews
Crews & Elliott, PC
Building 3, Suite 200
4601 Spicewood Springs Road
Austin, Texas 78759

Andy Taylor
Amanda Peterson
Andy Taylor & Associates, PC
405 Main Street
Houston, Texas 77002

Jeffrey S. Boyd
Thompson & Knight, LLP
98 San Jacinto Blvd., Suite 1900
Austin, Texas 78701-4238

Larry F. York
Scott King Field
York, Keller & Field, LLP
816 Congress Avenue, Suite 1670
Austin, Texas 78701

Terry L. Scarborough
Matthew T. Slimp
Hance Scarborough Wright Woodward & Weisbart
111 Congress Avenue, Suite 500
Austin, Texas 78701

Greg Waller
Andrews Kurth LLP
600 Travis, Suite 4200
Houston, Texas 77002

James J. (Jody) Scheske
Akin Gump Strauss Hauer & Feld, LLP
300 West 6th Street, Suite 2100
Austin, Texas 78701

Jeff D. Otto
Matthew B. Kutac
Thompson, Coe, Cousins & Irons, LLP
701 Brazos, Suite 1500 Austin Centre

Gene L. Locke
Georgia L. Adams
Andrews Kurth LLP
600 Travis Street, Suite 4200
Houston, Texas

John K. Schwartz
James E. Davis
Locke Liddell & Sapp LLP
100 Congress Ave., Suite 300
Austin, Texas 78701

J. Randolph Evans
W. Ryan Teague
McKenna, Long & Aldridge, LLP
303 Peachtree Street, NE, Suite 5300
Atlanta, Georgia 30308

William C. Davidson
Chamberlain McHaney
301 Congress, Suite 2100
Austin, Texas 78701

Re: No. GN-204224; *Kitchen, et al. v. Texas Association of Business, et al.,* In the District Court of Travis County, Texas, 53rd Judicial District

Dear counsel:

I have reached a decision on the defendants' motions for summary judgment. As to the corporate defendants, the motions will be granted. As to the TAB defendants and defendant Toomey, the motions are denied.

All defendants urge that for the Texas Election Code to regulate their contributions or expenditures the Code must comply with the free speech provision of the First Amendment of the United States Constitution. They urge that the funds they contributed or expended must have been used for "express advocacy," that is, for communications that expressly advocate the election or defeat of a clearly identified candidate. Among the primary authorities cited are the United States Supreme Court case, *Buckley v. Valeo,* 424 U.S. 1 (1976), and the Texas Supreme Court case, *Osterberg v. Peca,* 12 S.W. 3d 31 (Tex. 2000) (applying the holding in *Buckley* to the Texas Election Code). Specifically, defendants urge that case law requires that "magic words" such as "vote for," "vote against," "defeat," or "reject" must be found in the communication for it to qualify as express advocacy. Defendants argue that the funds in question were not used for communications that contain the magic words and that, therefore, when applied to them, the Code does not pass constitutional muster.

1. TAB defendants and Toomey

"Express advocacy" is a constitutionally imposed protection for individuals and groups other than political committees; its application, when dealing with individuals and non-political committees, ensures that a reporting statute is not impermissibly broad. *Buckley,* 424 U. S. at 80. Such protection is not necessary for political committees, i.e., organizations, "the major purpose of which is the nomination or election of a candidate." Expenditures of such organizations "are…by definition, campaign related." *Buckley*, 424 U. S. at 79. *Osterberg* recognizes the same distinction between individuals and political committees in determining whether the "express advocacy" test should be applied. 31 S.W. 3d at 50-51.

I find that there is a fact question as to whether or not the TAB defendants and Toomey constitute a political committee. Because both the United States Supreme Court, in *Buckley,* and the Texas Supreme Court, in *Osterberg,* expressly distinguished between individuals and political committees in applying the express advocacy test, and because there is a fact question about whether these defendants constitute a political committee, the summary judgment motions filed by the TAB defendants and Toomey are in all respects denied.

2. Corporate defendants

I do not find, however, that the corporate defendants are part of a political committee. Therefore, I must look to the current state of the case law to determine if the magic words test as expressed in *Buckley* must be applied to the corporate defendants' involvement.

In *Osterberg,* the only cited opinion from our highest court dealing with the subject, the Texas Supreme Court did not adopt the magic word test. The Osterbergs, husband and wife, created and funded television advertisements about a judicial race in which Peca was a candidate. The first screen of the ad featured positive attributes of Peca and stated "IF THAT'S ENOUGH, VOTE FOR HIM." The second screen expressed the opposite view and highlighted what the Osterbergs considered negative attributes, concluding: "BRING THE COURTHOUSE BACK TO THE PEOPLE! VOTE FOR HIS OPPONENT." Peca brought suit alleging violations of the Election Code and seeking recovery under Texas Election Code § 253.131.

The Texas Supreme Court followed *Buckley* in requiring that a "'direct campaign expenditure' by an individual in a candidate election includes only those expenditures that 'expressly advocate' the election or defeat of an identified candidate." 12 S.W.3d at 51. Peca did not dispute the applicability of the express advocacy standard, but argued that since the ad asked viewers to "VOTE FOR HIS OPPONENT," it met the standard. The Osterbergs, on the other hand, contended that the ad was not express advocacy because it had contradictory pleas for action, i.e., that it was ambiguous and had several plausible meanings.

In discussing whether the ad did expressly advocate a candidate's election or defeat, the court acknowledged *Buckley's* magic words requirement. It recognized, however, that different federal courts of appeals have since disagreed over "whether communications that constitute 'express advocacy' must contain certain 'magic words' of advocacy akin to those listed in *Buckley,* or whether the communications should be judged as a whole and in context." *Id.* at 52. (Emphasis added). Because the ad did contain "Vote for" language, the court stated "this disagreement, however, has no bearing on our decision...." *Id.* (Emphasis added).

While the court by no means rejected a magic words requirement, at the same time it did not hold that magic words would be required.

Rather, the Texas Supreme Court, citing two federal cases, in essence applied a different test to resolve the ambiguity issue raised by the Osterbergs. *Fed. Election Comm'n v. Massachusetts Citizens for Life, Inc.,* 479 U.S. 238 (1986) and *Fed. Election Comm'n v. Furgatch,* 807 F.2d 857 (9th Cir.), *cert. denied,* 484 U.S. 850 (1987) (involving an ad that did not contain magic words). In discussing the former case, the Texas Supreme Court stated that the United States Supreme Court "clarified that a message can be 'marginally less direct' than the examples listed in *Buckley* so long as its essential nature 'goes beyond issue discussion to express electoral advocacy.'" 12 S.W. 3d at 52. (Emphasis added).

The Texas Supreme Court also cited the following language from *Furgatch* as a guide for determining whether a communication was express advocacy:

> [W]hen read as a whole, and with limited reference to external events, [a communication must] be susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate....Speech is

> "express" for present purposes if its message is unmistakable and unambiguous, suggestive of only one plausible meaning.[1]
>
> *Id.* at 53

The Fifth Circuit in *United States v. Moore*, 288 F.3d 187 (5th Cir. 2002) criticized F*urgatch* and acknowledged that Texas (citing *Osterberg's* use of the F*urgatch* approach) is one of several states to depart from the stricter bright line/magic words test,. 288 F. 3d at 193, n. 7.

While *Osterberg* does suggest an approach that would not require the strict magic words standard, subsequent federal cases, including *Moore,* are not so open. The Fifth Circuit has clearly held that where the statute is ambiguous or vague the bright line/magic words standard must be used. *Center for Individual Freedom v. Carmouche,* 499 F3d 655 (5th Cir. 2006). The United States Supreme Court recently confirmed this approach in *WRTL.* The Chief Justice noted that *WRTL's* "no reasonable interpretation" test would only be used in bright line situations; where a statute is vague, *Buckley's* magic words standard would be required. *WRTL* at 4510, n. 7.

As the Texas Election Code was declared to be vague in *Osterberg* (12 S.W.3d at 51), I must assume that, in line with current federal Fifth Circuit and Supreme Court case law, the magic words test must be applied to the ads in question. I find none of the magic words such as "vote for" or "vote against," in the ads in question. Therefore, I grant the summary judgment motions filed by the corporate defendants.

I ask that counsel confer with each other and prepare an order in line with this decision. After it has been approved as to form, please present the order to me for signature.

Thank you.

Very truly yours,

Joseph H. Hart
Senior District Judge

cc: District Clerk

---

[1] Note that the language in *Furgatch,* is almost identical to the test announced by Chief Justice Roberts in *FEC v. Wisconsin Right to Life, Inc.* 75 U.S.L.W. 4503, 4509 (U.S. June 25, 2007) (*WRTL)* in his opinion modifying the "functional equivalent" test of *McConnell v. Federal Election Comm'n,* 540 U.S. 93 (2003): "[A] court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." (Emphasis added).