



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
) MUR 6509
Friends of Herman Cain, Inc. and Mark J. Block,)
in his official capacity as treasurer;)
Prosperity USA, Inc.)

**STATEMENT OF REASONS OF
CHAIRMAN MATTHEW S. PETERSEN AND
COMMISSIONERS CAROLINE C. HUNTER AND LEE E. GOODMAN**

In this complaint-generated matter,¹ the Commission authorized its Office of General Counsel (“OGC”) to investigate potential violations of the Federal Election Campaign Act of 1971, as amended (“the Act”), by respondents Prosperity USA, Inc., a non-profit corporation claiming its tax exemption under Section 501(c)(3) of the Internal Revenue Code, and Friends of Herman Cain, Inc. and its treasurer Mark J. Block (“the Cain Committee”), the authorized committee of 2012 presidential candidate Herman Cain. At issue were disbursements made by Prosperity USA for Cain’s travel to attend and speak at events in the summer and fall of 2010, nearly a year before he declared his candidacy for president. OGC’s investigation sought to determine whether Prosperity USA’s travel disbursements were “testing the waters” expenses for a potential presidential run and, thus, constituted prohibited in-kind corporate contributions to the Cain Committee.

Following OGC’s investigation, the question before the Commission was whether the factual record justified further enforcement and conciliation with the respondents. We concluded it did not because most, if not all, of the disbursements at issue appeared unrelated to testing-the-waters activities, and even those that arguably were either had already been reimbursed and reported by the Cain Committee or were *de minimis* in amount. We, therefore, voted to close the file.²

¹ MUR 6509 (Friends of Herman Cain), Compl. (Nov. 3, 2011).

² See Certification (Oct. 1, 2015). Our vote differed from OGC’s recommendation to proceed to probable cause conciliation with Prosperity USA and the Cain Committee with respect to most of the disbursements at issue. See MUR 6509 (Friends of Herman Cain), Second General Counsel’s Rpt. at 21 (July 20, 2015). As discussed in note 20, *infra*, in addition to the travel-related expenses, two other disbursements made by Prosperity USA – for approximately \$3,000 in iPads and \$300 in office furniture used by employees of the Cain Committee – were also at issue, but OGC recommended they be excluded from any Commission conciliation effort given their *de minimis* amount and because the Cain Committee reimbursed and reported them.

11/10/2015 10:11:00 AM

I. FACTUAL OVERVIEW

Over the course of its three-year investigation – which entailed the use of compulsory process, witness interviews, and depositions – OGC developed an extensive record. Our review of the record established the following relevant facts.

A. Prosperity USA, the Hermanator PAC, and the Cain Committee.

In April 2010, Mark Block founded Prosperity USA, a Wisconsin non-profit corporation organized under section 501(c)(3) of the Internal Revenue Code,³ to “further . . . the taxpayers’ Tea Party movement”⁴ and “to raise funds for other 501(c)(3) organizations and to support Tea Parties throughout the United States”⁵ by hosting and “support[ing] Tea Party rallies, speeches and events.”⁶ Block served as president and a board member of Prosperity USA until he resigned to work for the Cain Committee on December 31, 2010.⁷ Cindy Haeger served as the bookkeeper for Prosperity USA from approximately September 2010 to February 2011.⁸

On May 5, 2010, Cain registered with the Commission a non-connected committee named the Hermanator PAC, whose treasurer was Scott Toomey.⁹ The Hermanator PAC sought “to support conservative candidates and causes,” particularly in the lead up to the November 2010 general election.¹⁰ During the summer and fall of 2010, Cain traveled regularly to raise money to support the Hermanator PAC’s objectives, including speaking at many Tea Party events as well as rallies for conservative candidates engaged in 2010 “state, local, [and] federal campaigns.”¹¹

³ Compl., Ex. 1.

⁴ Deposition of Mark Block at 10 (Oct. 1, 2014) (“Block Dep.”).

⁵ Response of Mark J. Block to Questions and Document Requests (July 18, 2013) (“Block Subpoena Resp.”) at 6.

⁶ *Id.* at 4. In April 2010, Block also founded the Wisconsin Prosperity Network (“WPN”), another non-profit corporation organized under 501(c)(3), which was created to support the same objectives as Prosperity USA but within the state of Wisconsin. *Id.* at 6-7.

⁷ Block Subpoena Resp. at 7.

⁸ Declaration of Cynthia Haeger ¶ 4 (Feb. 4, 2014) (“Haeger Decl.”). Haeger also was the bookkeeper for WPN during this timeframe.

⁹ See Statement of Organization of the Hermanator PAC (May 1, 2010).

¹⁰ Deposition of Scott Toomey at 15-16 (July 9, 2014) (“Toomey Dep.”).

¹¹ *Id.* at 64-66 (testifying that “majority of” costs relating to coordinated travel involving Cain and individuals from Prosperity USA in the fall of 2010 was for “Tea Party and advocacy” event, in addition to “candidate stumping events”).

Given their similar issue agendas and Cain's prominent role with both organizations, representatives from Prosperity USA and the Hermanator PAC often communicated their travel plans and attended the same events.¹² However, it was understood that Prosperity USA, as a 501(c)(3) organization, was "not supposed to advocate for or against [candidates]."¹³ The two organizations, consequently, aimed to "differentia[te] between . . . doing something on a political side and . . . doing something on a voter education piece."¹⁴ Accordingly, until Cain decided to begin exploring a presidential run, all "political activities, supporting candidates, doing campaign political-related events [were supposed to be] coordinated through the [Hermanator] PAC," and any "conservative causes [were] through . . . Prosperity USA."¹⁵

On December 29, 2010, Cain formed an exploratory committee to assess the viability of a presidential run in 2012, and the Hermanator PAC began unwinding and transitioning into the Cain Committee.¹⁶ The Cain Committee subsequently reported that Cain's first testing-the-waters activity occurred on December 27, 2010.¹⁷ Four months later, on May 2, 2011, Cain declared his presidential candidacy, and the Cain Committee filed its Statement of Organization with the Commission, designating Block as treasurer.

B. Prosperity USA's disbursements for travel costs.

As noted above, OGC's investigation focused on travel-related disbursements Prosperity USA made in the summer and fall of 2010 that allegedly were for the purpose of determining Cain's viability as a 2012 presidential candidate. The Complaint relied on Prosperity USA's internal ledgers from 2011 that reflected nearly \$40,000 in "accounts receivable" owed from the Cain Committee.¹⁸ The ledgers indicated that Prosperity USA had submitted three invoices to the Cain Committee with the following descriptions and for the following amounts:¹⁹

- (i) "Hill Aircraft Invoice 002" – \$16,669.94;

¹² *Id.* at 38-41; *see also* Block Dep. at 38-39, 41-42 (testifying that during the time he was at Prosperity USA, Block spoke to Toomey about travel with the Hermanator PAC and the groups traveled together to events, with costs allocated between the groups based on "legal advice").

¹³ Toomey Dep. at 19.

¹⁴ *Id.*

¹⁵ *Id.* at 18.

¹⁶ *Id.* at 17-18.

¹⁷ Quarterly Report (July 20, 2011).

¹⁸ Compl. Ex. 4; *see also id.* ¶ 10.

¹⁹ *See id.*, Ex. 4.

(ii) "Travel & Meetings IA, LA, Las Vegas, Houston-Dallas" Invoice #001" – \$5,900.32;

(iii) "Atlanta Invoice 002" – \$14,779.25.²⁰

These invoices arose from a December 2010 meeting at which Block, Toomey, and Haeger "discuss[ed] various expenses that had been incurred by Prosperity USA" and whether the Hermanator PAC should be billed for any of these costs previously paid by Prosperity USA.²¹ Block and Toomey agreed that some of these expenses should be reimbursed by the Hermanator PAC, and Block thus directed Haeger to prepare the invoices.²² Each invoice was dated December 22, 2010.²³

The \$16,669.94 invoice for "Hill Aircraft" reflected disbursements relating to fourteen trips aboard Hill Aircraft charter planes. Thirteen of the flights occurred between June 11, 2010, and October 30, 2010, and the other on December 2, 2010.²⁴ Block stated that this invoice related to air travel to "various Tea Party rallies, speeches and events" at which Cain spoke.²⁵ Toomey similarly remembered the costs as being associated with "Tea Party events," as well as "coalition building [and] get-out-the-vote efforts" in the run up to the 2010 election.²⁶ Toomey believed the costs were invoiced to the Cain Committee because "some of

²⁰ As mentioned in note 2, *supra*, two other amounts allegedly owed to Prosperity USA by the Cain Committee – relating to disbursements for certain "office equipment" – also were at issue in this matter. We need not address them at great length because OGC recommended they not be included in any conciliation effort; they were *de minimis* and had been reimbursed and reported by the Cain Committee after the filing of the Complaint. See MUR 6509 (Friends of Herman Cain), Second General Counsel's Rpt. at 19 n.103 ("Given the low dollar amount of [the disbursements], both of which were refunded to WPN by the Cain Committee, we do not believe these violations warrant further pursuit."). The first of these amounts related to \$3,764.14 invoiced to the Cain Committee in February 2011 for the undepreciated book value of seven Apple iPads, which in September 2010 had been provided to employees of WPN who subsequently left to join the Cain Committee in January 2011 and took the iPads with them. See Compl. ¶ 10, Ex.4; see also MUR 6509 (Friends of Herman Cain), Cain Committee Resp. at 3 (Jan. 12, 2012). The Cain Committee asserted that these individuals understood that these iPads were theirs to keep. See Resp. at 3. Record evidence supported this understanding (see, e.g., Block Dep. 94), casting doubt over whether the costs even constituted "contributions" under the Act, as they were not likely provided to the former WPN employees for the "purpose of influencing" a federal election. 52 U.S.C. § 30101(8)(A). The second amount, which the Cain Committee identified after the filing of the Complaint in this matter, related to merely \$300 in office furniture passed from Prosperity USA to the Cain Committee through common employees.

²¹ See Haeger Decl. ¶¶ 4, 7.

²² *Id.* ¶ 7.

²³ *Id.*, Exs. B, C, D.

²⁴ *Id.*, Ex. D (supporting schedule for "Hill Aircraft" invoice).

²⁵ Block Subpoena Resp. at 4.

²⁶ Toomey Dep. at 64.

[the activities] looked to be political” and because Cain was involved in “stumping with [2010] candidate[s] for elective office.”²⁷

Similarly, the \$5,900.32 invoice for “Travel & Meetings IA, LA, Las Vegas, Houston-Dallas” related to Prosperity USA’s disbursements for travel to meetings Cain and members of Prosperity USA attended in Iowa, Louisiana, Nevada, Texas, and New York between November 29, 2010 and December 20, 2010. Block identified these costs as being “for travel and accommodations for various Tea Party rallies, speeches and events” at which Cain spoke and which individuals from the Hermanator PAC and Prosperity USA attended.²⁸ As with the Hill aircraft, Toomey testified that he believed Prosperity USA billed Cain because “this was political travel.”²⁹

Lastly, the “Atlanta Invoice” related to Prosperity USA’s disbursement of \$14,779.25 for costs associated with travel to a Tea Party event hosted by Prosperity USA at which Cain spoke “that occurred from December 3-4 in Atlanta, Georgia, shortly after the November 2010 elections.”³⁰ “The purpose of [the] meeting was to discuss the results of the 2010 elections” and the potential direction of public policy that might result.³¹ Cain, in turn, discussed policy issues,³² such as “educating people and less government . . . [and] the China debt.”³³

The Cain Committee, however, stated in its Response that “upon reviewing the events that took place at [the Atlanta] meeting, it might be argued that this meeting morphed into the sort of meeting that . . . might be considered a ‘testing-the-waters’ event” for a Cain presidential candidacy.³⁴ The Cain Committee said it would thus “be amending [its] reports . . . to include the[] [Atlanta travel] expenses,”³⁵ and in January 2012, it reimbursed Prosperity

²⁷ *Id.* at 65-67.

²⁸ Block Subpoena Resp. 4.

²⁹ Toomey Dep. at 47-48.

³⁰ Cain Committee Resp. at 3; Block Subpoena Resp. at 3. Block testified that among those who attended the event were Cain and Toomey from the Hermanator PAC and Block, Haeger, and others from Prosperity USA. Block Subpoena Resp. at 3.

³¹ See Report of Investigation of Cindy Haeger at 15 (Mar. 14, 2014) (“Haeger ROI”) (stating that the meeting’s “theme was something to do with the way the country was headed”).

³² See, e.g., Block Dep. at 68; Haeger ROI at 15.

³³ Haeger ROI at 15.

³⁴ Cain Committee Resp. at 3-4. Scott Toomey also testified that he “believed that Cain or his exploratory committee should have paid the cost of the Atlanta meeting because it . . . pertain[ed] to Mr. Cain and his potential endeavors.” Toomey Dep. at 55.

³⁵ *Id.* at 4.

USA for those expenses and subsequently reported the disbursement as relating to "Lodging/Transportation/Meals" in its 2012 April Quarterly report.

It was not evident from the investigative record why the Cain Committee concluded that the Atlanta event might have turned into a Cain testing-the-waters activity. Toomey testified that, while in Atlanta, Cain told a small group of "confidantes" that he was thinking of running and was contemplating "whether or not he wanted to take the next step . . . and put an exploratory committee together."³⁶ This statement was the sole evidence in the record characterizing the event or the extent of discussion of a potential presidential candidacy at the Atlanta meeting.

II. LEGAL ANALYSIS

The Act prohibits (1) corporations from making contributions to federal candidates and (2) federal candidates from knowingly accepting or receiving such corporate "contributions."³⁷ A "contribution" under the Act includes "any gift, subscription, loan, advance, or deposit of . . . anything of value made by any person for the purpose of influencing any election for federal office."³⁸ "[A]nything of value" includes in-kind contributions, such as the provision of goods or services without charge or at a charge that is less than the usual and normal charge for such goods or services.³⁹

The concept of pre-candidacy exploratory activity or "testing the waters" is not addressed in the Act. Rather, the Commission has fashioned a regulatory scheme in its regulations,⁴⁰ which provide that an individual who has not yet decided to become a federal candidate may raise and spend funds for the purpose of determining whether to become a candidate (i.e., "testing the waters") without such funds being deemed "contributions."⁴¹ This rule abides by clear limitations on the Commission's jurisdiction, and "courts have repeatedly held that political activity in support of persons who are not candidates for federal office is outside of the FEC's jurisdiction, even if the aim of the activity is to convince a specific individual to become a candidate for office."⁴²

³⁶ Toomey Dep. at 54-55; *see also id.* at 52-53.

³⁷ 52 U.S.C. § 30118(a).

³⁸ *Id.* § 30101(8)(A)(i).

³⁹ 11 C.F.R. § 100.52(d)(1).

⁴⁰ *See Explanation and Justification for Regulations on Payments Received for Testing the Waters Activities*, 50 Fed. Reg. 9992, 9993 (Mar. 13, 1985).

⁴¹ 11 C.F.R. §§ 100.72, 100.131.

⁴² MUR 6462 (Trump), Statement of Reasons of Commissioners Caroline C. Hunter and Donald F. McGahn at 8 (citing *Unity08 v. FEC*, 596 F.3d 861 (D.C. Cir. 2010); *FEC v. Fla. for Kennedy*, 681 F.2d 1281 (11th Cir. 1982); *FEC v. Citizens for Democratic Alternatives in 1980*, 655 F.2d 397 (D.C. Cir. 1981); *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380 (D.C. Cir. 1981)).

The Commission's regulation further provides that if the individual later decides to become a candidate, the "funds received [for testing-the-waters activities] are contributions subject to the reporting requirements of the Act" and are subject to the Act's amount limitations and source prohibitions.⁴³ And the regulation stipulates that funds used for any other purpose before the individual decides to become a federal candidate fall clearly outside the Act's reach.

Under the regulation, testing-the-waters activities may include travel that occurred before an individual decided to become a candidate.⁴⁴ An individual who becomes a candidate must report pre-candidacy expenditures on travel for the purpose of testing the waters that were more than "incidental."⁴⁵ However, if an individual traveling for purposes unrelated to testing the waters makes "incidental remarks" or "response[s] to questions" from the press or others about possible candidacy, such comments do not necessarily transform the travel into regulated activity.⁴⁶

Applying these general principles, the record did not support further enforcement or conciliation with the respondents with respect to the travel disbursements at issue.

A. Disbursements reflected in the "Hill Aircraft" and "Travel & Meetings IA, LA, Las Vegas, Houston-Dallas" invoices

We dismissed the allegations concerning the over \$22,000 in aggregate disbursements reflected in the "Hill Aircraft" and "Travel & Meetings IA, LA, Las Vegas, Houston-Dallas" invoices because the weight of the evidence indicated they were for travel undertaken for purposes unrelated to Cain testing-the-waters activities.⁴⁷ The record established that Cain traveled to these speaking engagements in the summer and fall of 2010 to discuss general policy topics or to promote the campaigns of candidates running in the 2010 mid-term election. With no evidence indicating otherwise, we could not conclude that, on the eve of the 2010 general election, Cain's speeches at these events were for the purpose of exploring the viability of a potential candidacy in an election over two years away.⁴⁸ Indeed, all reasonable

⁴³ *Id.* §§ 100.72, 100.131. Although the validity of the Commission's rule treating testing-the-waters funds as "contributions" retroactively if and when an individual decides to become a candidate may be debatable, we need not resolve that question here because of our decision to dismiss the matter on other grounds. It suffices to observe that because the Commission's testing-the-waters regulation is extra-statutory and addresses non-candidate activity, the Commission must apply the rule narrowly to only those activities that are clearly and unambiguously undertaken for the purpose of testing the waters.

⁴⁴ 11 C.F.R. §§ 100.72, 100.131.

⁴⁵ *See* Advisory Op. 1986-06 (Fund for America's Future), at 3-5.

⁴⁶ *See id.*

⁴⁷ *See, e.g.,* Block Dep. at 82; Block Subpoena Resp. 4; Toomey Dep. at 64.

⁴⁸ In reaching a different conclusion, OGC's Second General Counsel's Report to the Commission relied on inferences drawn from two record facts: (1) the invoices were addressed to the Cain Committee, and (2)

inferences would indicate that testing-the-waters activities would have been out of place in the midst of mid-term campaign season. Prominent citizens considered to be possible presidential candidates have traveled and spoken in mid-term campaign cycles for decades without triggering Commission scrutiny or treatment of their speeches as testing-the-waters activities for an election two years in the future.

B. Disbursement reflected in the "Atlanta" invoice

We also dismissed the allegations regarding the \$14,779.25 in disbursements Prosperity USA made for the trip to Atlanta in early-December 2010 because the record did not establish that the event's purpose was to test the waters and, moreover, indicated that any discussion about a potential Cain presidential candidacy was, at most, minor and incidental.

According to the record, the original purpose of the Atlanta trip was to discuss policy implications of the 2010 elections. Although the Cain Committee and Toomey stated that the event might have "morphed" into testing-the-waters activity,⁴⁹ the record offered no indication as to how or whether the event might have so "morphed." The only evidence was Toomey's testimony that, while in Atlanta, Cain discussed with a small group of friends that he was thinking of starting to explore candidacy. But such a discussion standing alone would not necessarily constitute a testing-the-waters activity. If this discussion arose from Cain responding to questions from the media or others, such incidental discussion of Cain's potential candidacy would not have "morphed" the event into a testing-the-waters activity.⁵⁰ The record does not establish what triggered this discussion or the extent of such discussion.

Even if the event did somehow "morph" into an exploratory effort for Cain, the \$14,779 in invoiced costs still would be allocable between the Cain Committee and Prosperity USA, depending on the extent to which such disbursements supported testing-the-waters activities.⁵¹ The record, however, provided no information on which to base such an

Toomey testified that the Cain Committee was billed for these costs because the trips were considered "political." If we had accepted this approach, we would have wrongly shifted the burden of proof at the post-investigatory stage from the Commission to the respondents. Furthermore, the reasonableness of such inferences diminished in the face of other record evidence, as it became clear that Prosperity USA likely billed Cain for these disbursements not because they related to his testing-the-waters activities, but because they were for activities that were, indeed, "political" in nature and thus might be perceived as inconsistent with Prosperity USA's exempt status under section 501(c)(3) of the Internal Revenue Code. See Toomey Dep. at 19 (explaining that "political activities," such as "supporting candidates, doing campaign political-related events [were supposed to be] coordinated through the [Hermanator] PAC"). And, the fact that the invoices were submitted to the Cain Committee is not surprising, considering that the Hermanator PAC was winding down and transitioning into the Cain Committee when the invoices were submitted.

⁴⁹ Cain Committee Resp. at 3.

⁵⁰ Advisory Op. 1986-06 (Fund for America's Future), at 3-5.

⁵¹ See MUR 5908 (Duncan Hunter), Statement of Reasons of Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter, Donald F. McGahn II, Steven T. Walther, and Ellen L. Weintraub at 3; cf. 11 C.F.R. § 106.3 (concerning "[a]llocation of expenses between campaign and non-campaign related travel").

allocation, and given that the event's primary purpose appeared unrelated to Cain's exploratory efforts, it was likely that any amount allocable toward testing-the-waters activities would have been *de minimis* and incidental – that is, insufficient to justify further enforcement.⁵²

Furthermore, even if the record showed that the Atlanta trip morphed into a full-fledged testing-the-waters event, dismissal was appropriate. The Cain Committee had reimbursed costs of the event and reported the expenditure. Reimbursement of the event costs would be an appropriate remedy in conciliation in any event.⁵³ Conciliation, consequently, would have been unnecessary to effect a remedy in this matter. The Commission, moreover, has dismissed similar allegations in the exercise of its prosecutorial discretion where the amount of alleged testing-the-waters expenses totaled \$21,700,⁵⁴ an amount exceeding what was in issue here.

In light of these considerations, we concluded that the allegations concerning Prosperity USA's disbursements for the December 2010 Atlanta trip should be dismissed based on the merits and as an appropriate exercise of prosecutorial discretion.⁵⁵

III. CONCLUSION

For the reasons explained above, we voted to dismiss the allegations against respondents Prosperity USA, Inc. and Friends of Herman Cain, Inc. and Mark J. Block, in his official capacity as treasurer, and to close this matter.

⁵² See, e.g., *id.*

⁵³ See MUR 2133 (George Bush for President, Inc.), Conciliation Agreement (July 20, 1988) (requiring that conciliating committee pay no civil penalty and only reimburse vendor for disbursements made by vendor on behalf of committee for polling constituting a testing-the-waters activity).

⁵⁴ See MUR 6216 (Coakley for Senate *et al.*) (dismissing allegations that Senate committee received in-kind contributions in the form of pre-candidacy consultant payments totaling \$21,700 because the consultant payments "would be minimal").

⁵⁵ See *Heckler v. Chaney*, 470 U.S. 821 (1985).

