

1 **BEFORE THE FEDERAL ELECTION COMMISSION**

2
3 In the Matter of)
4) MUR 4736
5 Brian Babin)
6 Brian Babin for Congress)
7 and Thomas E. Freeman, as treasurer)
8 Peter Cloeren)
9 Patricia Cloeren)
10 Citizens United Political Victory Fund)
11 and Kevin Allen, as treasurer)

12 **GENERAL COUNSEL'S REPORT**

13
14 **I. ACTIONS RECOMMENDED**

15 Find probable cause to believe that Brian Babin and Brian Babin for Congress and
16 Thomas E. Freeman, as treasurer ("Babin Committee"), violated 2 U.S.C. § 441a(f) by
17 accepting a \$5,000 excessive contribution that Peter Cloeren made through Citizens
18 United Political Victory Fund ("CUPVF") and also by accepting \$20,000 in excessive in-
19 kind contributions that Peter and Patricia Cloeren made through Citizens for Reform
20 ("CR"), and that the Babin Committee violated 2 U.S.C. §§ 434 and 441a(a)(8) by not
21 accurately reporting these contributions; find probable cause to believe that Brian Babin
22 and the Babin Committee violated 2 U.S.C. § 441a(f) by accepting excessive in-kind
23 contributions in the form of coordinated advertising expenditures made by CR, or,
24 alternatively, 2 U.S.C. § 441b by accepting corporate contributions, and that the Babin
25 Committee violated 2 U.S.C. § 434 by failing to report them

26 take no further action

27 against Peter and Patricia Cloeren, send an admonishment letter and close the file as to

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1 them; take no further action against CUPVF and Kevin Allen, as treasurer, and close the
2 file as to them.¹

3 **II. BACKGROUND AND SUMMARY**

4 The investigation conducted in this matter has corroborated Complainant
5 Peter Cloeren's sworn allegations that Brian Babin and the Babin Committee ("the Babin
6 Respondents") solicited him to make a contribution to CUPVF with the knowledge that
7 this PAC would in turn make a contribution to the Babin Committee, and also solicited
8 contributions from him and his wife to CR to assist in the financing of advertising that
9 was coordinated with, and favorable to, the Babin campaign. On August 8, 2001, this
10 Office delivered a General Counsel's Brief ("GC Brief") to the Babin Respondents
11 recommending that the Commission find probable cause to believe that they each violated
12 2 U.S.C. § 441a(f), and that the Babin Committee additionally violated 2 U.S.C. §§ 434
13 and 441a(a)(8). For the CR contributions, the GC Brief included alternative
14 recommendations that Commission find probable cause to believe that the Babin
15 Respondents violated 2 U.S.C. § 441b, and that the Babin Committee additionally
16 violated 2 U.S.C. § 434.²

17 On August 22, 2001, the Babin Respondents submitted a response (the
18 "Response") to the GC Brief containing the following general arguments: the evidence in
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¹ The liability of CR and Triad (which managed CR), each of which has tolled the applicable statute of limitations in connection with this and other related matters, will be dealt with in a forthcoming report.

² The GC Brief is incorporated in this Report in its entirety. Copies of documents referenced in the GC Brief have been placed in the Commission Secretary's office for the Commission's convenience. Electronic versions of the deposition transcripts cited to in the GC Brief are available in the shared drawer, Ntsrv1/ogcproj/Commissioners/MURs 4568, 4633, 4634 and 4736. Copies of the exhibits used in each of the depositions are also available in the Commission Secretary's office.

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1 the GC Brief rests only on “inferences and assumptions,” rather than the factual record;
2 the GC Brief omitted exculpatory evidence; the GC Brief wrongly uses the allegations in
3 closed MUR 4783 to mislead the Commission; Peter Cloeren’s complaint was motivated
4 by revenge; and the GC Brief has not presented sufficient evidence to satisfy the
5 appropriate coordination standard.

6 The Response, however, does not dispute much of the extensive evidence
7 presented in the GC Brief which corroborates Mr. Cloeren’s allegations pertaining to both
8 the CUPVF contribution and the CR coordinated expenditures, including the following
9 facts:

- 10 • Peter Cloeren and his wife had never made any federal or other political
11 contributions until they started making contributions to the Babin Committee in
12 the 1996 election cycle.
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14 • After soliciting contributions to the Babin campaign from his employees and
15 illegally reimbursing them from corporate or personal funds (see MUR 4783,
16 GCR #5, dated November 8, 2000), Mr. Cloeren expressed his desire to the Babin
17 Respondents to do more for the campaign and invited them to contact him.
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19 • Mr. Cloeren and his wife had reached their 1996 general election contribution
20 limit to the Babin Committee at the time that Mr. Cloeren made a \$5,000
21 contribution to CUPVF in October 1996.
- 22
23 • Dr. Babin had met with CUPVF president Floyd Brown and repeatedly solicited
24 him for contributions.
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26 • Several telephone conversations between the Babin Committee and Mr. Cloeren
27 occurred just prior to the CUPVF contribution.
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29 • Mr. Cloeren’s \$5,000 contribution to CUPVF was followed by a \$5,000 CUPVF
30 contribution to the Babin campaign just ten days later.
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32 • Jason Oliver, an employee of Triad consultant Carlos Rodriguez, called the Babin
33 Committee at least twice in 1996, including a call during which he asked the
34 Babin Committee what issues it would like to see raised in a third-party issue ad.
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- 1 • The information conveyed to Jason Oliver, as set forth in his chart, was strikingly
2 similar to the content of a television advertisement criticizing Dr. Babin's
3 opponent, which was funded by Triad-managed CR.
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- 5 • Triad consultant Carlos Rodriguez had conducted an in-person "political audit" of
6 the Babin campaign and stressed in his audit report the same issues that appeared
7 in the CR advertisement in question.
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- 9 • Peter Cloeren and his wife made \$20,000 in contributions to CR while the CR
10 advertisement was running in Dr. Babin's congressional district.
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12 There is no rational alternative explanation – and the Response does not offer one
13 – for why Peter Cloeren, whose political activities in 1995-96 were focused solely on the
14 Babin campaign, would have made contributions to entities he would not have otherwise
15 known about, without assurances from the Babin Respondents that his funds would be
16 used to benefit the Babin campaign. The Response's legal and factual arguments are
17 discussed in more detail below.

18 **III. DISCUSSION**

19 **A. The Babin Respondents**

20 The Response attacks Peter Cloeren's motives for filing the complaint and relies
21 on the Commission's decision to take no further action against the Babin Respondents in
22 closed MUR 4783 (involving an employee reimbursement scheme at Cloeren, Inc.) in
23 arguing that the "findings in MUR 4783 contradict the OGC contention here that [the
24 Babin Respondents] had any knowledge or involvement with Mr. Cloeren's alleged
25 activities at issue in this matter." Response at 10. However, Mr. Cloeren's sworn
26 Complaint is consistent with a good-faith belief that the Babin Respondents were
27 involved in all the activities alleged, including the employee reimbursement scheme that
28 was the subject of MUR 4783. Mr. Cloeren's stated desire that the Babin Respondents

1 share responsibility with him for specific violations of the Act does not make his
2 allegations any less credible. Indeed, Mr. Cloeren's allegations are contrary to his own
3 interests in that they expose him to additional potential civil liability for violations of the
4 Act.³

5 Moreover, this Office recommended that the Commission take no further action
6 against the Babin Respondents in MUR 4783 because the investigation did not uncover
7 sufficient evidence to corroborate the allegations of their complicity in the employee
8 reimbursement scheme, rather than due to any supposed lack of credibility on the part of
9 Mr. Cloeren. See MUR 4783 GCR #5, at 23.

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14 The Commission's actions in MUR 4783 in no way exonerated the
15 Babin Respondents, particularly with regard to activities in the present matter, which do
16 not involve corporate reimbursements of employee campaign contributions. This
17 Office's recommendations in the present matter, in contrast to MUR 4783, are based on

³ As referenced in the Response, Mr. Cloeren told Babin campaign consultant Walter Whetsell, during a 1998 telephone call recorded by the FBI in Mr. Cloeren's presence, that he did not "want to be the only one hanging on the tree." The Response characterizes Mr. Cloeren's statement as "a veiled threat of reprisal" against the Babin Respondents, suggesting that the complaint is "the product of . . . revenge" and should not be given "unfettered credibility." Response at 10. While Mr. Cloeren may have hoped to elicit an incriminating response from a perceived co-conspirator in the reimbursement scheme, his failure to do so does not make his further attempt to bring allegations of illegality before the Commission, a civil agency with jurisdiction over the matter, an exercise in revenge.

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1 evidence corroborating Mr. Cloeren's sworn allegations, as well as on evidence
2 contradicting the Babin Respondents' and others' credibility or claimed lack of recall.

3 For example, Mr. Cloeren alleged that Dr. Babin initially solicited the CUPVF
4 contribution in "late September or early October, 1996," and that "Dr. Babin pressed
5 Mr. Cloeren for this contribution for several days in phone calls to Mr. Cloeren's office."
6 As set forth in the GC Brief, these allegations are corroborated by a series of at least
7 twelve phone calls being placed from Babin campaign headquarters to Mr. Cloeren at
8 Cloeren, Inc. between September 13 and October 8, 1996. GC Brief at 19.

9 While the Response provides another reason that the calls may have been made –
10 fundraising events involving Mr. Cloeren – that does not undermine the possibility that
11 such phone conversations also included solicitations by the Babin Respondents for
12 Mr. Cloeren to contribute to CUPVF. Although Dr. Babin testified that he did not recall
13 soliciting the contribution to CUPVF, he also testified that he had not heard of CUPVF or
14 its president Floyd Brown until after the complaint was filed in 1998. Dr. Babin's
15 testimony, however, is refuted in part by Mr. Brown, who testified that he met Dr. Babin
16 during the 1996 election cycle and that Dr. Babin repeatedly solicited him for
17 contributions. GC Brief at 20. Rather than admit that Dr. Babin's credibility was
18 damaged by his efforts to distance himself from CUPVF, the Response asserts that "[t]he
19 Act and the Commission's regulations permit a federal candidate to solicit a contribution

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1 from a federal candidate,” a proposition not in contention here. Response at 6.⁴

2 With respect to the CR contribution, Mr. Cloeren alleged that he was solicited by
3 Triad president Carolyn Malenick, as well as Dr. Babin and Mr. Whetsell. Contrary to
4 the Response’s assertion that Triad finance director Meredith O’Rourke confined her
5 testimony to a statement that no one at Triad ever spoke to Mr. Cloeren, she went on to
6 clarify that “Carolyn never told me that she did.” O’Rourke Dep. Tr. at 385. This is not
7 surprising, as Ms. O’ Rourke also testified that CR was “Carolyn’s business.”⁵ Since
8 Ms. Malenick has asserted her Fifth Amendment privilege in this matter, the best
9 evidence of whether she and Mr. Cloeren discussed the CR contribution is Mr. Cloeren’s
10 sworn Complaint.

11 Mr. Cloeren’s allegations that both the Babin Committee and Triad were involved
12 in soliciting the CR contribution is corroborated by evidence of at least 32 phone calls
13 made from the campaign to Triad between September 13 and November 7, 1996.
14 GC Brief at 24-25. Although Dr. Babin testified that he was unaware of any contacts
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⁴ Similarly, Mr. Cloeren’s suggestion that Triad may have played a role in the CUPVF contribution, while not essential to the case, is also corroborated by the evidence set forth in the GC Brief regarding the contacts and interrelationships between Triad and CUPVF, including evidence that Triad had specifically requested that CUPVF support U.S. Senate candidate Sam Brownback, that CUPVF vice-president Michael Boos called Triad for recommendations, and that in October 1996, Triad specifically recommended to him contributions to the Babin Committee. GC Brief at 7-9, 20-21. This evidence undercuts Mr. Brown’s testimony (Response at fn.7) that the PAC did not receive communications from Triad regarding contributions to specific candidates.

⁵ It appears that there was much that Ms. Malenick failed to tell Ms. O’ Rourke. For example, even though she served as Triad’s finance director, Ms. O’Rourke testified that that she knew nothing about, or had any responsibility for, Triad’s fee structure or client billing as such matters were handled by Ms. Malenick. O’Rourke Dep. Tr. at 59-63.

1 between his campaign and Triad after the September 4, 1996 political audit, such calls,
2 given their timing, would be consistent with the campaign and Triad discussing the
3 content and financing of the CR ads. Unlike the Babin/Cloeren phone calls, the Response
4 does not attempt to provide an alternative explanation for the Babin/Triad calls.

5 To support its charge that the GC Brief omits "exculpatory evidence," the
6 Response asserts that the GC Brief failed to disclose that Mr. Cloeren contradicted his
7 own complaint by admitting that Rep. Tom DeLay and his aide solicited the CR
8 contributions during his telephone conversation. However, the
9 GC Brief explained that Mr. Cloeren's first conversations about finding "additional
10 vehicles" through which to make contributions to the Babin campaign were with
11 Rep. DeLay and his aide on August 29 and 30, 1996, and that they were thereafter
12 followed by solicitations from Dr. Babin, Babin campaign consultant Walter Whetsell
13 and Carolyn Malenick. GC Brief at 15-16, 21.

14 Moreover, the "omitted" portion includes the following statement by
15 Peter Cloeren, who was attempting to elicit incriminatory evidence: "I guess the other
16 thing that happened with DeLay was he set us up with - Citizen for Reform, was it?" to
17 which Mr. Whetsell responded, "Yes, it seems like it was." Response at 27 (emphasis
18 added). Far from being exculpatory, the "omitted" language further corroborates
19 Mr. Cloeren's allegations. Additionally, contrary to the Response's claims concerning
20 the GC Brief's "misleading" use of the allegations in MUR 4783, see Response at 8, this
21 Office included background from that matter to provide a context for contemporaneous

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1 and subsequent events and specifically acknowledged that purpose in the GC Brief. See
2 GC Brief at 12, fn. 6.

3 The Response’s discussion of the applicable law and related evidence is
4 unpersuasive. For example, the Response cites other enforcement matters involving
5 11 C.F.R. § 110.1(h), such as MURs 3313, 2898 and 2668, and attempts to distinguish
6 those matters in which this Office made reason-to-believe recommendations based on the
7 regulation. Response at 13-14. These matters, however, do not represent the exclusive
8 situations in which the regulation may be applicable. Recently, in the Triad-related
9 MURs (4568, 4633, 4634, and 4736), the Commission made probable-cause-to-believe
10 findings (against Robert Riley, Jr./Bob Riley for Congress Committee and against John
11 and Ruth Stauffer/Sam Brownback for U.S. Senate) based purely on circumstantial
12 evidence, even in the face of denials by the original contributor and the intermediaries. In
13 this instance, Mr. Cloeren, the contributor, has admitted that he knew the ultimate
14 destination of his CUPVF contribution as well as the use of his and his wife’s CR
15 contributions, presenting compelling evidence of the Babin Respondents’ improper
16 receipt of these excessive contributions.

17 With respect to the legal standards for coordination, the Response relies primarily
18 on the *Christian Coalition* case, as does the GC Brief. However, in arguing that the
19 coordinated communication must include express advocacy, the Response neglects to
20 mention that the *Christian Coalition* court explicitly rejected the assertion that “express
21 advocacy” is required for expenditures to be considered coordinated. 52 F. Supp.2d at
22 86-87. While in agreement with the legal standard, the Response asserts that the

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1 GC Brief fails to present sufficient evidence of coordination to find a violation under
2 *Christian Coalition*. Response at 14-18. Specifically, the Response contends that the GC
3 Brief fails to show that the Babin Committee had substantive input regarding the content,
4 timing, placement, or volume of the ads sponsored by CR. Response at 7.

5 The Response, however, confuses a survey of Republican primary races that
6 Jason Oliver carried out in January/February 1996 with the project Mr. Oliver was
7 assigned two months prior to the general election, in which he specifically asked certain
8 committees, including the Babin Committee, what issues they would like to see addressed
9 in third-party advertisements. In addition, while the Response emphasizes Mr. Oliver's
10 statement that Triad was never "asked to run issue ads to [his] knowledge," it ignores the
11 fact that the Babin Committee provided Mr. Oliver with a list of issues to be featured in
12 advertisements, which was followed by a discussion of those same issues during the Triad
13 political audit. The numerous phone calls in the fall of 1996 between the Babin campaign
14 and Triad also presented further opportunities for discussion.

15 The Response claims that "[t]he information gathered by Triad through
16 Jason Oliver's telephone calls and Carlos Rodriguez's visits was in the public domain."
17 Response at 30. Regardless of what campaign issues were being debated or discussed in
18 a public context during the relevant period, the salient point is that the Babin Committee
19 was able to select which issues it wanted highlighted in third-party advertisements, and to
20 have an outside group sponsor ads portraying Dr. Babin's opponent in a decidedly

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1 negative light.⁶

2 Mr. Cloeren's allegations are best corroborated by the fact that his contribution to
3 CUPVF was in fact followed by CUPVF's contribution, in the same amount, to the Babin
4 Committee ten days later, and that the Cloerens' contributed to CR just as CR was
5 running ads attacking Dr. Babin's opponents. The only rational explanation as to why
6 Mr. Cloeren - who had made no political contributions prior to the 1996 election cycle
7 and whose sole purpose for engaging in these activities was to help elect Brian Babin -
8 would have chosen to make these contributions is that he received assurances from the
9 Babin Respondents that his contributions to these outside groups would directly benefit
10 the Babin campaign.⁷

11 For all of the reasons set forth in the GC Brief and above, this Office recommends
12 that the Commission find probable cause to believe that Brian Babin and Babin for
13 Congress, and Thomas E. Freeman, as treasurer, violated 2 U.S.C. § 441a(f) by accepting
14 excessive contributions from Peter and Patricia Cloeren made through Citizens United
15 Political Victory Fund and Citizens for Reform and that Brian Babin for Congress and
16 Thomas E. Freeman, as treasurer, violated 2 U.S.C. §§ 434 and 441a(a)(8) by not

⁶ In an apparent effort to minimize the role of Triad in the CR advertisements, the Response asserts that CR president Peter Flaherty retained some control over CR's advertising program. The totality of the evidence in this case, including Mr. Flaherty's deposition testimony, demonstrates that he did not actively participate in, or manage, the CR advertising effort. Triad has stipulated that, with the exception of one unrelated ad campaign, it was responsible for managing all of CR's 1996 activities, including selecting media markets, approving the scripts, and authorizing expenditures for the production and placement of advertising sponsored by CR during 1996.

⁷ As detailed in the MUR 4783 complaint, all of Mr. Cloeren's 1996 political contributions were intended to benefit Dr. Babin and the Babin Committee. In addition to his direct contributions and the contributions at issue here, Mr. Cloeren also made contributions to two other congressional candidates (Gill and Thurmond) based on the explicit understanding that his agreement to do so would result in reciprocal contributions from supporters of those candidates to the Babin Committee. See MUR 4783 First GCR.

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1 accurately reporting these contributions. This Office also recommends that the
2 Commission find probable cause to believe that Brian Babin and Babin for Congress and
3 Thomas E. Freeman, as treasurer, violated 2 U.S.C. § 441a(f) by accepting excessive
4 contributions from CR, or, alternatively, violated 2 U.S.C. § 441b by accepting corporate
5 contributions from CR, based on the coordination of certain CR advertising expenditures,
6 and that Brian Babin for Congress and Thomas E. Freeman, as treasurer, violated
7 2 U.S.C. § 434 by not reporting these CR expenditures as in-kind contributions.

8 **B. Peter and Patricia Cloeren**

9 Before filing the complaint in this matter, Peter Cloeren and Cloeren, Inc. pled
10 guilty in U.S. District Court for the Eastern District of Texas to misdemeanor violations
11 in connection with having made corporate contributions in the name of others to the
12 Babin Committee in 1995 and 1996. Mr. Cloeren and Cloeren, Inc. each were fined
13 \$200,000 and Mr. Cloeren was sentenced to 100 hours of community service and two
14 years probation. In 1999, the Commission found reason to believe that Mr. Cloeren and
15 Cloeren, Inc. knowing and willfully violated the Act in connection with both the
16 allegations that remained part of MUR 4783 and the allegations that were transferred to
17 MUR 4736.

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Accordingly, in view of

Mr. Cloeren's cooperation in this matter, this Office recommends that the Commission take no further action with regard to Peter and Patricia Cloeren and send them an admonishment letter that also asks them to waive any right to a refund of their excessive contributions to Babin for Congress and to direct that Babin for Congress disgorge such excessive contributions to the U.S. Treasury. Upon receipt of the Cloerens' waiver of their right to a refund of such excessive contributions, this Office intends to recommend that the Commission close the file as to them in this matter.⁸

C. CUPVF

Based on the totality of the evidence gathered in its investigation, this Office does not believe the Commission should pursue the reason-to-believe findings made against CUPVF concerning violations of 2 U.S.C. §§ 441f and 434. As analyzed above, the Cloeren contribution to the Babin Committee through CUPVF should be viewed as an

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1 excessive contribution made by Mr. Cloeren and accepted by the Babin Respondents,
2 rather than as a contribution in the name of another. Under the former theory, CUPVF
3 would have no liability under the Act. *See* 11 C.F.R. § 110.1(h). Further, although the
4 investigation has revealed that CUPVF may have incurred reporting obligations in its role
5 as an intermediary for the Cloeren contribution, *see* 2 U.S.C. § 441a(a)(8), this Office
6 believes that the Commission's limited resources should be focused on respondents who
7 played more substantial roles in these activities. Accordingly, this Office recommends
8 that the Commission take no further action against Citizens United Political Victory Fund
9 and Kevin Allen, as treasurer, with regard to the findings made in MUR 4736 in
10 connection with the \$5,000 contribution from Mr. Cloeren, and close the file as to them.⁹

11 IV.

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⁹ Probable cause recommendations against CR, based on the \$87,000 in CR advertising expenditures coordinated with the Babin Committee, were included in the General Counsel's Brief sent to Triad/CR.

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V. RECOMMENDATIONS

- 1. Find probable cause to believe that Brian Babin violated 2 U.S.C. § 441a(f), and that Brian Babin for Congress and Thomas E. Freeman, as treasurer, violated 2 U.S.C. §§ 434, 441a(a)(8) and 441a(f); or, in the alternative,
- 2. Find probable cause to believe that Brian Babin violated 2 U.S.C. §§ 441a(f) and 441b, and that Brian Babin for Congress and Thomas E. Freeman, as treasurer, violated 2 U.S.C. §§ 434, 441a(a)(8), 441a(f) and 441b.
- 3.
- 4. Take no further action as to Peter Cloeren and Patricia Cloeren and send them a letter of admonishment that also asks that they waive their right to any refund of excessive contributions, and instruct Brian Babin for Congress to disgorge these monies to the U.S. Treasury.
- 5. Take no further action as to Citizens United Political Victory Fund and Kevin Allen, as treasurer, and close the file as to them.
- 6. Approve the appropriate letters.

9/14/01
Date

Lois G. Lerner by AAS
Lois G. Lerner
Acting General Counsel

Staff Assigned:
Thomas J. Andersen