



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

NOV 14 2001

Benjamin L. Ginsberg, Esq.
William J. McGinley, Esq.
Patton Boggs, LLP
2550 M Street, N.W.
Washington, D.C. 20037

RE: MUR 4736
Brian Babin
Brian Babin for Congress and
Thomas E. Freeman, as treasurer

Dear Messrs. Ginsberg and McGinley:

On November 9, 2001, the Federal Election Commission accepted the signed conciliation agreement submitted on your clients' behalf in settlement of violations of 2 U.S.C. §§ 434, 441a(a)(8), 441a(f) and 441b(a), provisions of the Federal Election Campaign Act of 1971, as amended. Accordingly, the file has been closed in this matter as it pertains to Brian Babin and Brian Babin for Congress and Thomas E. Freeman, as treasurer.

This matter will become public within 30 days after it has been closed with respect to all other respondents involved. Information derived in connection with any conciliation attempt will not become public without the written consent of the respondents and the Commission. See 2 U.S.C. § 437g(a)(4)(B). The enclosed conciliation agreement, however, will become a part of the public record.

You are advised that the confidentiality provisions of 2 U.S.C. § 437g(a)(12)(A) still apply with respect to all respondents still involved in this matter. The Commission will notify you when the entire file has been closed.

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Enclosed you will find a copy of the fully executed conciliation agreement for your files, as well as a copy of a waiver letter signed on behalf of Peter Cloeren, which requests that the Babin Committee disgorge excessive contributions from Mr. Cloeren to the United States Treasury. This waiver applies to the \$5,000 excessive contribution referenced in Sections V.1 and VI.2 of the agreement. Please note that the first installment of the civil penalty and the \$5,000 disgorgement are to be made within 30 days. If you have any questions, please contact me or Mark Shonkwiler at (202) 694-1650.

Sincerely,

Thomas J. Andersen

Thomas J. Andersen
Attorney

Enclosure
Conciliation Agreement
Waiver letter

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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

9 **CONCILIATION AGREEMENT**
10

11 This matter was initiated by a signed, sworn, and notarized complaint filed by
12 Peter Cloeren and Cloeren, Inc. that was designated as MUR 4783. The allegations that are the
13 subject of this agreement were severed from MUR 4783 and incorporated into an ongoing
14 investigation in MUR 4736. After the investigation was conducted, the Federal Election
15 Commission ("Commission") found probable cause to believe that Brian Babin violated 2 U.S.C.
16 §§ 441a(f) and 441b, and that Brian Babin for Congress and Thomas E. Freeman, as treasurer
17 (collectively, "Respondents"), violated 2 U.S.C. §§ 434, 441a(a)(8), 441a(f) and 441b.

18 NOW, THEREFORE, the Commission and Respondents, having duly entered into
19 conciliation pursuant to 2 U.S.C. § 437g(a)(4)(A)(i), do hereby agree as follows:

20 I. The Commission has jurisdiction over Respondents and the subject matter of this
21 proceeding.

22 II. Respondents have had a reasonable opportunity to demonstrate that no action
23 should be taken in this matter.

24 III. Respondents enter voluntarily into this agreement with the Commission.

25 IV. The pertinent facts in this matter are as follows:

26 1. Dr. Brian Babin was a candidate for U.S. Representative in Texas' Second
27 District during the 1996 Primary, Run-Off and General Elections.

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1 2. Brian Babin for Congress is the principal campaign committee of
2 Brian Babin, and a political committee within the meaning of 2 U.S.C. § 431(4).

3 3. Thomas E. Freeman is the treasurer of Brian Babin for Congress.

4 4. Carolyn Malenick d/b/a Triad Management Services existed as a sole
5 proprietorship operated by Carolyn Malenick from approximately January 1995 through
6 September 1996. Triad Management Services, Inc., incorporated on May 28, 1996, was
7 established and controlled by Carolyn Malenick, who served as its president and sole director.
8 As used in this conciliation agreement, "Triad" may refer to either the sole proprietorship or the
9 corporation.

10 5. Citizens United Political Victory Fund ("CUPVF") is a multicandidate
11 political committee registered with the Commission pursuant to 2 U.S.C. § 433.

12 6. Citizens for Reform ("CR") is a Virginia corporation. During 1996, all of
13 CR's activities were managed by Triad.

14 7. The Federal Election Campaign Act of 1971, as amended ("the Act"), defines
15 a "contribution" as "any gift, subscription, loan, advance, or deposit of money or anything of
16 value made by any person for the purpose of influencing any election for Federal office."
17 2 U.S.C. § 431(8)(A)(i). An "expenditure" is defined as "any purchase, payment, distribution,
18 loan, advance, deposit, or gift of money or anything of value made by any person for the purpose
19 of influencing any election for Federal office." 2 U.S.C. § 431(9)(A)(i). The Commission has
20 defined "anything of value" to include all in-kind contributions, i.e., "the provision of any goods
21 or services without charge or at a charge which is less than the usual and normal charge for such
22 goods and services" 11 C.F.R. §§ 100.7(a)(1)(iii) and 100.8(a)(1)(iv).

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1 8. Under the Act, no person, including a political committee, may contribute
2 more than \$1,000 per election to any candidate for federal office or his authorized committee.
3 2 U.S.C. § 441a(a)(1).

4 9. A Federal Election Commission regulation codified at 11 C.F.R. § 110.1(h),
5 and entitled "Contributions to committees supporting the same candidate," provides that:

6 A person may contribute to a candidate or his or her authorized
7 committee with respect to a particular election and also contribute
8 to a political committee which has supported, or anticipates
9 supporting the same candidate in the same election, as long as -

10
11 (1) The political committee is not the candidate's principal
12 campaign committee or other authorized political committee or a
13 single candidate committee;

14
15 (2) The contributor does not give with the knowledge that
16 a substantial portion will be contributed to, or expended on behalf
17 of, that candidate for the same election; and

18
19 (3) The contributor does not retain control over the funds.

20 10. The Act further provides that a candidate or political committee shall not
21 knowingly accept a contribution in violation of section 441a(a)(1). 2 U.S.C. § 441a(f).

22 11. With certain narrow exceptions, the Act prohibits corporations from making
23 contributions or expenditures in connection with any election, and also provides that no
24 candidate or political committee may knowingly accept or receive a contribution from a
25 corporation. 2 U.S.C. § 441b.

26 12. An "independent expenditure" is defined in the Act as "an expenditure by a
27 person expressly advocating the election or defeat of a clearly identified candidate which is made
28 without cooperation or consultation with any candidate, or any authorized committee or agent of
29 such candidate, and which is not made in concert with, or at the request or suggestion of, any

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1 candidate or agent of such candidate.” 2 U.S.C. § 431(17). Conversely, expenditures made by
2 any person “in cooperation, consultation or concert, with, or at the request or suggestion of, a
3 candidate, his authorized political committees, or their agents, shall be considered to be a
4 contribution to such candidate.” 2 U.S.C. § 441a(a)(7)(B)(i).

5 13. Under the Act, any person, including a political committee, which acts as an
6 intermediary or conduit for contributions which are earmarked or otherwise directed through a
7 conduit or intermediary must report the original source and the intended recipient of such
8 contribution to the Commission and to the intended recipient. 2 U.S.C. § 441a(a)(8); 11 C.F.R.
9 § 110.6(c)(1). The recipient candidate or authorized committee shall report each conduit or
10 intermediary who forwards earmarked contributions. 11 C.F.R. § 110.6(c)(2).

11 14. The Act requires each treasurer of a political committee to file reports of
12 receipts and disbursements with the Commission. 2 U.S.C. § 434(a). Each report must disclose
13 the identification of each political committee which has made a contribution to the reporting
14 committee, together with the date and amount of any such contribution. 2 U.S.C. § 434(b)(3)(B).
15 All contributions, including contributions in-kind, must be reported by the candidate’s authorized
16 committee according to the terms of 2 U.S.C. § 434.

17 15. As disclosed by Brian Babin for Congress, on September 9, 1996, Peter and
18 Patricia Cloeren each made a \$1,000 contribution to Brian Babin for the 1996 general election,
19 the contribution limit under 2 U.S.C. § 441a(a)(1).

20 16. In sworn statements provided by Peter Cloeren, he stated that in a series of
21 telephone conversations with Brian Babin in late September or early October 1996, Brian Babin
22 asked him asked to make a \$5,000 contribution to CUPVF. Brian Babin for Congress telephone
23 records confirm that calls were made from the campaign to Cloeren, Inc. on numerous

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1 dates in late September and early October 1996. Mr. Cloeren has stated that, as a result of these
2 telephone conversations, he had knowledge that CUPVF would contribute \$5,000 to Brian Babin
3 for Congress upon the receipt of his \$5,000 contribution check.

4 17. On or about October 7, 1996, Peter Cloeren wrote a \$5,000 check to CUPVF.
5 In his sworn statements, Mr. Cloeren stated that he gave the check to Brian Babin so that it could
6 be transmitted to CUPVF. CUPVF reported receiving Mr. Cloeren's \$5,000 contribution on
7 October 14, 1996, and reported making a \$5,000 contribution to the Babin Committee on
8 October 24, 1996. The Babin Committee reported receiving a \$5,000 from CUPVF on
9 October 26, 1996.

10 18. Peter Cloeren stated in his sworn statements that, in telephone conversations
11 with Brian Babin, Babin campaign staff and Triad president Carolyn Malenick, he was asked to
12 make a \$20,000 contribution to CR. In addition to telephone calls from the campaign to
13 Mr. Cloeren in late September and early October 1996, Brian Babin for Congress telephone
14 records confirm that calls were made from the campaign to Triad on numerous dates in
15 September, October and early November 1996.

16 19. Mr. Cloeren has stated that, as a result of these telephone conversations, he
17 had knowledge that CR would use any contributions from him and his wife to support the Babin
18 campaign.

19 20. On or about November 1, 1996, Peter and Patricia Cloeren each contributed
20 \$10,000 to CR for a total of \$20,000.

21 21. Jason Oliver, an employee of Triad consultant Carlos Rodriguez, testified
22 that, sometime in 1996, following general instructions from Mr. Rodriguez and Triad president
23 Carolyn Malenick, he contacted Republican candidates' campaigns, including the Babin

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1 campaign, in the congressional districts Triad was considering for "education ads" to find out
2 what issues the campaigns would like to see addressed. Mr. Oliver further testified that he could
3 not recall whom he spoke to at the Babin campaign.

4 22. Mr. Oliver testified that he prepared a chart of the issues suggested by the
5 campaigns and provided this information to Ms. Malenick and Mr. Rodriguez. Mr. Oliver
6 identified a document produced by one of the advertising vendors as being a subsequent version
7 of the chart on which he recorded the campaigns' advertising preferences. The entry on his chart
8 for the congressional race in which Brian Babin was facing Democrat Jim Turner states: "Turner:
9 State jails[,] Homo rights[,] Taxes on sm. Bus[.], Auto probation to serious offenders."

10 23. On September 4, 1996, Triad consultant Carlos Rodriguez visited Babin
11 campaign headquarters in Woodville, Texas to conduct one of many "political audits" of
12 Republican congressional campaigns. The Triad political audit report from the meeting with the
13 Babin campaign states that "Jim Turner is a career politician who has been in elected office for
14 the last 14 years and who has a number of votes that could be used effectively against him in the
15 general election this year. [State] Senator Turner sponsored legislation that grants automatic
16 probation to first time felony offenders for such crimes as grand theft, burglary and even drug
17 dealing. In addition, he has voted for homosexual rights" Mr. Rodriguez has stated that his
18 audit reports were dictated immediately after his visits with the campaigns, while the
19 conversations were still fresh in his mind.

20 24. CR has stipulated that, acting under Triad's management, it spent \$87,000 to
21 broadcast a 30-second television advertisement called "Left" in the congressional district where
22 Dr. Babin was a candidate. It was run during the last week in October and the first week in
23 November of 1996, identifies Rep. Turner by name, and criticizes his purported positions on the

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1 issues of prisoners' rights and gay rights, which were among the same issues cited in the reports
2 of Jason Oliver and Carlos Rodriguez after they had contacted the Babin campaign.

3 25. The Babin campaign's input in connection with the communications with
4 Jason Oliver and Carlos Rodriguez, as well as other possible communications evidenced by the
5 telephone records, constituted requests or suggestions from the campaign to run such an
6 advertisement and also substantial discussions regarding the content of the advertisement.

7 26. Based on the interactions between Triad and the Babin campaign, CR's
8 expenditure for the advertisement was made for the purpose of influencing a federal election.

9 27. If CR is a political committee, all but the first \$1,000 of CR's \$87,000
10 coordinated expenditure constituted an excessive in-kind contribution accepted by the Babin
11 campaign.

12 28. If CR is not a political committee, the entire \$87,000 coordinated expenditure
13 constituted a prohibited in-kind corporate contribution accepted by the Babin campaign.

14 29. Respondents dispute Peter Cloeren's version of events set forth above, and
15 Brian Babin has testified that either the events did not occur as described or that he did not recall
16 the events as Mr. Cloeren described. Dr. Babin testified that he did not recall ever soliciting any
17 funds from Mr. Cloeren except for Dr. Babin's own campaign. Respondents contend that there is
18 no evidence of how Mr. Cloeren's \$5,000 check to CUPVF was transmitted to, or received by,
19 CUPVF.

20 30. With respect to telephone records which show phone calls between Babin
21 campaign headquarters and Cloeren, Inc. and between Babin campaign headquarters and Triad,
22 Respondents contend that these records do not identify any of the specific person(s) who were on
23 any of these phone calls, nor do they indicate the substance of the conversations. Respondents

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1 contend that, during the relevant time period, phone calls were made for the purpose of arranging
2 a September 14, 1996 in-home fundraiser at Peter Cloeren's residence and an October 8, 1996
3 rally at Mr. Cloeren's company.

4 31. Brian Babin testified that he did not speak to Triad or CR about any potential
5 issue advertisements, and Jason Oliver testified that he has no recollection of discussing issue
6 education ads with Dr. Babin. Respondents contend that the Commission has no evidence of
7 who at the Babin campaign allegedly spoke to Triad representatives concerning potential issue
8 advertisements, and that the issues in the CR advertisements concerning Dr. Babin's opponent
9 were in the public domain, and had been widely disseminated by the Babin campaign in its own
10 political materials transmitted to voters. Respondents contend they have no knowledge of the
11 substance of any conversations between Peter Cloeren and Carolyn Malenick and that, during
12 Carlos Rodriguez' September 4, 1996 visit to Babin campaign headquarters, there was no
13 discussion of Triad or CR running issue advertisements favorable to the Babin campaign.

14 V. 1. Respondents Brian Babin and Brian Babin for Congress and Thomas E.
15 Freeman, as treasurer, accepted \$5,000 in excessive contributions from Peter Cloeren that were
16 made through Citizens United Political Victory Fund, in violation of 2 U.S.C. § 441a(f).

17 2. Respondents Brian Babin for Congress and Thomas E. Freeman, as treasurer,
18 failed to report the true sources of the Cloeren contribution received through Citizens United
19 Political Victory Fund, in violation of 2 U.S.C. §§ 434 and 441a(a)(8).

20 3. If Citizens for Reform is a political committee, Respondents Brian Babin and
21 Brian Babin for Congress and Thomas E. Freeman, as treasurer, accepted a total of \$86,000 in
22 excessive in-kind contributions from Citizens for Reform in 1996 by coordinating certain
23 advertising expenditures made by Citizens for Reform, in violation of 2 U.S.C. § 441a(f).

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1 4. If Citizens for Reform is not a political committee, Respondents Brian Babin
2 and Brian Babin for Congress and Thomas E. Freeman, as treasurer, accepted a total of \$87,000
3 in prohibited in-kind corporate contributions from Citizens for Reform in 1996 by coordinating
4 certain advertising expenditures made by Citizens for Reform, in violation of 2 U.S.C. § 441b.

5 5. Respondents Brian Babin for Congress and Thomas E. Freeman, as treasurer,
6 failed to report the Citizens for Reform expenditures as in-kind contributions, in violation of
7 2 U.S.C. § 434.

8 VI. 1. Respondents will pay a civil penalty to the Federal Election Commission in
9 the amount of Twenty Thousand dollars (\$20,000), pursuant to 2 U.S.C. § 437g(a)(5)(A). The
10 civil penalty will be due as follows. Respondents will make an initial payment of Ten Thousand
11 dollars (\$10,000) within 30 days of being notified that the Commission has accepted this
12 agreement. Respondents will make a second payment of Five Thousand dollars (\$5,000) by no
13 later than February 1, 2002. Respondents will make a third payment of Five Thousand dollars
14 (\$5,000) by no later than April 1, 2002. In the event that any payment is not received by the
15 Commission on or before the date it becomes due, the Commission may, at its discretion,
16 accelerate the remaining payments and cause the entire unpaid balance of the civil penalty to
17 become due upon ten (10) days written notice to Respondents. Failure by the Commission to
18 accelerate the payments with regard to any overdue payments shall not be construed as a waiver
19 of its right to do so with regard to any other payments.

20 2. Respondents Brian Babin for Congress and Thomas E. Freeman, as treasurer,
21 will, upon receiving notice that Peter Cloeren has waived his right to any refund, disgorge to the
22 United States Treasury Five Thousand Dollars (\$5,000) in excessive contributions. Assuming
23 that the notice from Mr. Cloeren is received within 30 days of Respondents being notified that

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1 the Commission has accepted this agreement, the disgorgement will be due on the same date as
2 the initial payment of the civil penalty.

3 VII. The Commission, on request of anyone filing a complaint under 2 U.S.C.
4 § 437g(a)(1) concerning the matters at issue herein or on its own motion, may review compliance
5 with this agreement. If the Commission believes that this agreement or any requirement thereof
6 has been violated, it may institute a civil action for relief in the United States District Court for
7 the District of Columbia.

8 VIII. This agreement shall become effective as of the date that all parties hereto have
9 executed same and the Commission has approved the entire agreement.

10 IX. Respondents shall have no more than 30 days from the date this agreement
11 becomes effective to make the initial civil penalty payments and disgorgements required to
12 comply with and implement this agreement and to so notify the Commission. Subsequent civil
13 penalty installment payments required by this agreement, as well as notification that such
14 payments have been made, shall be due on the dates specified above.

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X. This Conciliation Agreement constitutes the entire agreement between the parties on the matters raised herein, and no other statement, promise, or agreement, either written or oral, made by either party or by agents of either party, that is not contained in this written agreement shall be enforceable.

FOR THE COMMISSION:

Lawrence H. Norton
General Counsel

BY: *Rhonda J. Vosdingh*
Rhonda J. Vosdingh
Acting Associate General Counsel

11/13/01
Date

FOR THE RESPONDENTS:

Benjamin L. Ginsberg
Benjamin L. Ginsberg, Esq.
William J. McGinley, Esq.
Counsel to Respondents

October 26, 2001
Date

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