**NEVADA REPUBLICAN PARTY**

Mr. Omar Ashmawy, Esq.
Acting Staff Director and Chief Counsel
Office of Congressional Ethics
1017 Longworth HOB
Washington, D.C. 20515

September 20, 2011

BY FEDERAL EXPRESS

Re: Request for Investigation into Congresswoman Shelley Berkley's Conduct.

Dear Mr. Ashmawy:

The Nevada State Republican Party writes, based upon information and belief, to respectfully request the Office of Congressional Ethics open an investigation into Congresswoman Shelley Berkley's (D-NV) conduct. Congresswoman Berkley has used her office to enrich herself. Congresswoman Berkley violated House Rule 23 and House standards governing conflicts of interest by intervening on behalf of a federally funded kidney transplant program in which she had, and continues to have, a direct financial stake. Further, she has repeatedly taken direct action on behalf of her husband's financial interests while accepting campaign contributions from her husband's industry's PAC, which was chaired by her husband.

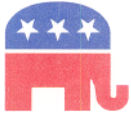
BACKGROUND

Congresswoman Berkley's Intervention on Behalf of University Medical Center's Kidney Transplant Program.

Congresswoman Berkley is married to Doctor Larry Lehrner, a nephrologist¹ and a managing partner of Kidney Specialists of Southern Nevada ("KSSN").

Before 2008, Nevada's University Medical Center ("UMC"), Clark County's only publicly funded hospital, had contracted with KSSN to provide nephrology services. Under the terms of this contract, USM paid KSSN \$588,200 per year. Marshall Allen, *Focus Shifts to Fixing Kidney Program's Faults*, LAS VEGAS SUN, Nov. 4, 2008 (Att. A).

¹ A nephrologist is a physician who has been educated and trained in kidney diseases, kidney transplantation, and dialysis therapy. Nephrology is classified as an internal medicine subspecialty.



In October 2008, the federal Centers for Medicare and Medicaid Services (“CMS”) issued an order revoking UMC’s kidney transplant program’s certification and ending Medicare financing for the program. This order was issued following the death of five transplant patients within one year of their surgery and ten transplant failures – a death and failure rate of “more than twice the expected level.” Eric Lipton, *A Congresswoman’s Cause is Often her Husband’s Gain*, THE NEW YORK TIMES, September 5, 2011 (Att. B).

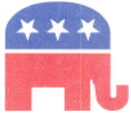
Congresswoman Berkley acted. First, she wrote a letter to federal officials at CMS protesting against the decertification and defunding of UMC’s kidney program. Second, she arranged for conference calls between UMC officials and federal officials at CMS. Third, she placed calls to then-Senate Majority Leader Harry Reid (D-NV) as well as Clark County Commissioners about the revocation. Finally, she spoke directly to Dr. Donald Berwick, the Head of the CMS and argued against the decertification and defunding of the kidney transplant program. Lipton, *supra* (Att. B); Annette Wells, *Officials: Transplant Center Talks Go Well, Suggest Hope*, LAS VEGAS REVIEW-JOURNAL, October 31, 2008 (Att C). Congresswoman Berkley herself stated that this conversation had led to a “compromise” that would keep the program open. Lipton, *supra* (Att. B); Wells, *supra* (Att. C).

As a result of this intervention and advocacy on UMC’s behalf, CMS reversed its order, and a deal was struck to save the kidney transplant program. As part of this deal, the hospital was required to “significantly expand” its staff of kidney specialists. UMC hired KSSN, Congresswoman Berkley’s husband’s company, to fill this need. KSSN was the sole bidder on the contract despite federal regulators’ concerns about the qualifications of the physician KSSN had originally assigned to the troubled kidney transplant program. (The specific concern was that KSSN had assigned a physician to oversee the kidney transplant program who had no formal training in transplantation. Lipton, *supra* (Att. B).) As a direct result of this contract, required by the terms of the deal pushed personally by Congresswoman Berkley, KSSN’s annual fees from University Hospital increased 25% to \$738,000 per year. Lipton, *supra* (Att. B).

Employees of KSSN have contributed almost \$17,000 to Congresswoman Berkley’s campaign committee since 2009.

Congresswoman Berkley’s Other Interventions Benefiting Her Husband and Her Own Financial Position.

In addition to being a managing partner at KSSN, Congresswoman Berkley’s husband is also heavily involved in the Renal Physicians Group and is on the board of directors of



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(and single largest contributor to) the Renal Physician's PAC, "Renal PAC." *See* Att. D. Renal PAC's single largest beneficiary is Congresswoman Berkley, who has accepted over \$10,000 from the PAC and over \$140,000 from the kidney doctor industry into her campaign accounts. Lipton, *supra* (Att. B); Att. E. Congresswoman Berkley has repeatedly "pushed legislation and twisted the arms of federal regulators" on behalf of her husband's financial interests. Lipton, *supra* (Att. B).

She has co-sponsored multiple House bills specifically to expand reimbursements and other federal assistance for kidney care. They are:

- H.R. 1458 – Introduced March 12, 2009 - Comprehensive Immunosuppressive Drug Coverage for Kidney Transplant Patients Act of 2009. To amend title XVIII of the Social Security Act to provide continued entitlement to coverage for immunosuppressive drugs furnished to beneficiaries under the Medicare Program that have received a kidney transplant and whose entitlement to coverage would otherwise expire, and for other purposes;
- H.R. 1245 – Introduced February 28, 2007 - Kidney Disease Educational Benefits Act of 2007. To amend title XVIII of the Social Security Act to provide coverage for kidney disease education services under the Medicare Program, and for other purposes;
- H.R. 1193 – Introduced February 27, 2007 - Kidney Care Quality and Education Act of 2007. To amend title XVIII of the Social Security Act to improve the benefits under the Medicare Program for beneficiaries with kidney disease, and for other purposes;
- H.R. 1298 – Introduced March 15, 2005 – Kidney Care Quality and Improvement Act of 2005. To amend title XVIII of the Social Security Act to improve the benefits under the Medicare Program for beneficiaries with kidney disease, and for other purposes;
- H.R. 1004 – Introduced February 27, 2003 – Kidney Patient Daily Dialysis Quality Act of 2003. To amend title XVIII of the Social Security Act to provide for payment under the Medicare Program for more frequent hemodialysis treatments; and

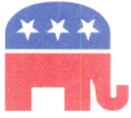
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- H.R. 1784 – Introduced April 11, 2003 – Medicare Renal Dialysis Payment Fairness Act of 2003. To amend title XVIII of the Social Security Act to update the renal dialysis composite rate.

See Att. F.

In February 2008, Congresswoman Berkley received \$7,000 in campaign contributions from the kidney industry – the Renal Physicians PAC, the Kidney Care Partners PAC, Amgen, and DaVita. *The same day as some of these contributions were received*, Congresswoman Berkley authored a letter to Representative Peter Stark (D-CA) Chairman of the House Ways and Means subcommittee with jurisdiction over Medicare “warning him to move carefully” in considering cutbacks. Lipton, *supra* (Att. B).

This year, Congresswoman Berkley spearheaded an effort to reverse funding cuts of 3.1% of Medicare funding for kidney dialysis. This cut would have reportedly saved \$250 million in taxpayer dollars. The cut was reversed. The kidney industry thanked Congresswoman Berkley directly in public press releases and less conspicuously through new donations to her campaign committee. Lipton, *supra* (Att. B).

In April 2009, Congresswoman Berkley wrote and circulated a letter to then-Speaker Nancy Pelosi and current Speaker John Boehner to protect specialty physicians’ Medicare reimbursement. *Specialty, Primary Care Debate Resurfaces with Members’ Letter*, INSIDE CMS, April 30, 2009 (Att. G).

In no instance in her direct actions in support of increased and continued funding for kidney related services has Congresswoman Berkley noted her personal financial stake in the federal reimbursements received for kidney transplant services. Nor has she apparently ever sought guidance from the House Ethics Committee.

VIOLATIONS

House ethical rules governing Member conduct, particularly conduct affecting Members’ personal financial interests are expansive.

Page 1 of the House Ethics Manual lays out the broad principles, and sets a baseline standard, governing Members’ conduct. The broad prescriptions for Members to “conduct themselves at all times in a manner that reflects credibility on the House,” and to “abide by the spirit as well as the letter of the House rules,” and to follow the Code of Ethics for Government Service, are accompanied by two specific prohibitions:

[Members] should not in any way use their office for private gain. Nor

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should they attempt to circumvent any House rule or standard of conduct.

Code of Conduct

House Rule 23 establishes a broad code of conduct for Members, and specifically prohibits Members from using their official position for personal pecuniary gain. Clause 1 states that Members “shall behave at all times in a manner that shall reflect credibility on the House.” Clause 2 states that Members “shall adhere to the spirit and letter of the Rules of the House.” Clause 3 states that Members “may not permit compensation to accrue to the beneficial interest of such individual from any source, the receipt of which would occur by virtue of influence improperly exerted from the position of such individual in Congress.”

Conflict of Interest

House Rule III of the Rules of the House of Representatives governs conflicts of interests. The House Ethics manual discusses this rule, stating:

It is a principle of ‘immemorial observance’ that a Member should withdraw when a question concerning [her]self arises; but it has been held that the disqualifying interest must be such as affects the Member directly, and not as of a class.

The Ethics Manual explains that even in instances where the Member is affected as a member of a class rather than as an individual the rule may apply “if legislation affects only one specific business or property, rather than a class or group of businesses or properties.” At 235. Further, the Manual makes clear that the expressed standards apply to **legislative action** taken by a Member, and that a **stricter standard** governs actions such as sponsoring legislation, advocating or participating in an action by a House Committee, or contacting an executive branch agency. Concerning such actions, the Manual states:

Such actions entail a degree of advocacy above and beyond that involved in voting, and thus a Member’s decision on whether to take any such action on a matter that *may affect* his or her personal financial interests requires added circumspection... ***Whenever a Member is considering taking any such action on a matter that may affect his or her personal financial interests, the Member should first contact the Standards Committee for guidance.*** At 237 (emphasis added).

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ANALYSIS

Congresswoman Berkley's Violation of House Ethical Standards

Congresswoman Berkley advocated, intervened, and sponsored legislation on behalf of matters in which she has a personal financial interest.

First, Congresswoman Berkley's husband was a managing partner of the company that was the sole bidder on a contract that was necessary as a result of her direct action to reverse an order by CMS. This direct action by Congresswoman Berkley included personally intervening with the Administrator of CMS; setting up conference calls between UMC officials and CMS officials; advocating reversing the CMS order with other House members; and writing CMS officials protesting their order.

At the time she took these actions, her husband's company had an existing contract with the hospital in question paying over half a million dollars -- \$588,200 -- per year. As a direct result of her actions, a "compromise" was reached which continued government funding for the hospital contingent in part on the hospital's hiring more kidney specialists -- a requirement that was filled *by a sole bidder -- her husband's company*. Altogether, Congresswoman Berkley's husband's company reaped a \$738,200 annual (and continuing) windfall as a direct result of her actions. Put differently, Representative Berkley fought to ensure the continuation of her husband's existing \$588,200 annual contract, and engineered a situation that resulted in an additional \$149,800 annual income to her husband's company.

Congresswoman Berkley did not disclose her conflict. She did not seek guidance from the House Ethics Committee. Her actions and the results speak for themselves, and clearly violate the House code of conduct and conflict of interest rules.

In this regard, Congresswoman Berkley's conduct contrasts even with that of Congresswoman Maxine Waters's -- whose ethics case involving her intervention on behalf of a bank in which her husband held a financial interest OCE recently referred out to the House Committee on Standards and Conduct with a finding that there was "substantial reason to believe Congresswoman Waters' conduct may have violated House Rule 23, clause 3 and House precedent regarding conflict of interest." Congresswoman Waters at least acknowledged a potential conflict:

Representative Waters told Representative A that she was in a predicament because her husband had been involved in the bank, but "OneUnited people" were coming to her for help. According to Representative A, she knew she should say no, but it bothered her. It was

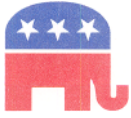
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clear to Representative A that this was a ‘conflict of interest problem.’

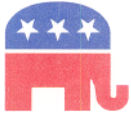
OFFICE OF CONGRESSIONAL ETHICS,
111th CONG., REV. No. 09-2121, Aug.
2009, at.23.

Despite her husband’s far more direct ties to UMC and the kidney transplant program, and far more direct financial benefit to herself that her actions would reap, Congresswoman Berkley failed to muster even Congresswoman Waters’s reticence before engaging in clear conflict of interest.

Congresswoman Berkley’s only reticence developed yesterday, over 10 days after the story concerning her unethical conduct became public. This post-hoc attempt to rationalize her unethical conduct is an admission that her actions created, at a minimum, the appearance of a conflict of interest. In an interview with the *Review Journal*, she claimed to have recognized “at the time there could be a perceived conflict of interest *but decided to act anyway...*” I recognized that it may not look great, but I would not have been able to live with myself” by not acting.” Steve Tetreault, *In Hindsight, Berkley Says She Should Have Disclosed*, REVIEW JOURNAL.COM, September 14, 2011, (Att. H) (emphasis added). Of course, this is *precisely* the sort of scenario that the House rules are designed to prevent – and require members at a minimum to seek guidance from the House Ethics Committee. Yet, despite now claiming to have recognized the conflict in her own mind at the time, Congresswoman Berkley still chose to act.

Second, Congresswoman Berkley advocated and intervened on behalf of, and sponsored legislation supporting, her husband’s financial interests. Her conflict and unethical conduct become even more pronounced considering that her husband serves on the board of directors of the Renal Physicians Association PAC whose greatest beneficiary is *his wife, Congresswoman Berkley*. In short, some of the very money Congresswoman Berkley has fought so hard to protect and win for her husband is then redirected – *with the help of her husband* – into her campaign accounts. (Some of the money even went directly back to Dr. Lehrner – he was paid \$5,000 by his wife’s campaign committee in 2006.) Lipton, *supra* (Att. B); Molly Ball, *Yucca Mountain Looms for Thompson*, LAS VEGAS REVIEW-JOURNAL, July 30, 2007 (Att. I). Indeed, Representative Berkley’s husband has publicly acknowledged as much, telling an audience at the 2008 Renal Physician Association meeting that one of the best ways to influence members of Congress is to “marry one.” Lipton, *supra* (Att. B).

Such behavior is in violation of House rules and standards of conduct. At best, her behavior creates the perception of a conflict and unethical conduct, itself a violation of the House standards of conduct.



CONCLUSION

Congresswoman Berkley's personal intervention, advocacy, and efforts on behalf of the UMC kidney transplant program resulted in direct financial benefit to herself. Congresswoman Berkley's long history of advocating, intervening, and sponsoring legislation for federal funding and support that benefits her husband, while her husband funnels her campaign contributions, also has resulted in direct pecuniary benefits to herself (indeed, a double-whammy).

Her actions discredit Congress. They violate clear House rules and standards of conduct. Congresswoman Berkley has now herself admitted to, at a minimum, creating an appearance of impropriety. The Office of Congressional Ethics must immediately open an investigation into her actions and forward this matter to the House Ethics Committee, and help restore the damage Representative Berkley has done to Congress in the eyes of the American people.

I am aware that the False Statements Act, 18 U.S.C. § 1001, applies to information submitted to the Office of Congressional Ethics.

Amy Tarkanian
Chairman
Nevada Republican Party

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