

APPENDIX C

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COMMITTEE ON ETHICS

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February 29, 2012

Dan Schwager
Chief Counsel / Staff Director
Committee on Ethics
1015 Longworth House Office Building
Washington, DC 20515-6328

Re: The Honorable Shelley Berkley

Dear Mr. Schwager:

We are counsel to Representative Shelley Berkley. We write to respond to the Report and Findings that the Office of Congressional Ethics (OCE) sent to the Committee on Ethics on February 9, 2012.

OCE has recommended that the Committee on Ethics further review the question of whether Representative Berkley has violated House Rule 23 by advocating on behalf of the state of Nevada's only kidney transplant program, at a time when her husband's company had a small role in that program. The Committee should decline that recommendation and dismiss this matter. Representative Berkley's actions were wholly within both the letter and the spirit of Rule 23 and the Committee's conflict of interest precedents. And OCE's actions in this matter should eliminate its jurisdiction in this matter.

First, Representative Berkley's financial interest in the outcome of this matter was *de minimis*. Her husband does not work for the kidney transplant program. While a small number of other doctors at his practice do have a role in that program, OCE's Findings indicates that this work was only marginally profitable, and was engaged in as a community benefit, not a profit center. There is no evidence that her husband's income would have declined at all if the transplant program were terminated, as his company's contract was for a fixed fee. And because her husband's own work – and the majority of his practice's work – is focused on non-transplant related kidney care, it is likely that the kidney transplant program actually reduced her husband's overall compensation.

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Committee on Ethics
February 29, 2012

Second, the facts make clear that Representative Berkley's involvement in this matter was not motivated in the least by any financial interests; her response was entirely motivated by, and consistent with, a brewing public health crisis. When she did act, she acted publicly, with the rest of her delegation; and OCE's Findings indicate that her actions were entirely consistent with congressional action on similar matters.

Third, OCE has repeatedly violated its own rules, and of House Resolution 895. OCE's transmittal of its Report and Findings to the Committee was significantly delayed for no apparent cause, considerably lengthening the time in which Representative Berkley is subject to scrutiny; this delay is in direct contravention of H. Res. 895, which requires OCE to act quickly so as not to subject Members to a drawn out process. Worse, OCE took advantage of this delay to continue its investigation long after its investigatory authority under H. Res. 895 was complete. And finally, OCE withheld all exculpatory evidence from Representative Berkley, despite repeated requests, even though OCE's Findings are replete with exculpatory material. These violations have not only rendered its process flawed and its conclusions suspect; they have resulted in a loss of OCE's right to recommend further review of this matter.

A. Background

1. Factual Background

Nephrology is the branch of medicine that focuses on kidney care. It includes the ongoing treatment of kidney problems through therapies such as dialysis; it also includes kidney transplants. The University Medical Center of Southern Nevada (UMC) hosts the only kidney transplant program in the state of Nevada.¹ It also provides other nephrology services to both inpatients and outpatients.²

On May 28, 2008, the Centers for Medicare and Medicaid Services (CMS) notified UMC that its kidney transplant program was in jeopardy of being terminated by the Medicare program.³ CMS and UMC continued their correspondence over this issue through August, September, and October.⁴ On October 16, CMS informed UMC that it would revoke Medicare approval.⁵ In the

¹ OCE Exhibit 31.

² OCE Exhibit 5.

³ OCE Exhibit 6.

⁴ OCE Exhibit 11.

⁵ OCE Exhibits 13 & 15.

Committee on Ethics
February 29, 2012

meantime, on September 9, 2008, UMC voluntarily shut down its program on a temporary basis.⁶ There were, at the time, 200 Nevadans awaiting kidney transplants through the program.⁷

Throughout this period, Representative Berkley's office was uninvolved in this matter. It only became involved when UMC decided, on its own accord, to reach out to the Nevada delegation.⁸ The evidence is clear that her husband had no role in this decision; he was contacted by UMC only after the decision was made, and then only to provide Representative Berkley's phone number.⁹ UMC representatives contacted the staffs of Representatives Berkley, Porter, and Heller, and Senators Reid and Ensign, on October 22.¹⁰ UMC's former CEO also spoke with Representative Berkley on or about that same day.¹¹ According to her, Representative Berkley "did not know what she could do, but that she would make some inquiries."¹² Nor did she seem to have spoken to her husband about the substance of the matter.¹³

A day later, a staff member in Representative Berkley's office began to draft a letter regarding the matter.¹⁴ A staff person from Representative Porter's office suggested that the Nevada delegation sign a joint letter.¹⁵ Representative Berkley's office circulated a letter that same day;¹⁶ the other two Members of the Delegation signed on;¹⁷ and the letter was sent the next day, on October 24.¹⁸ Representative Berkley spoke with CMS representatives as well,¹⁹ but only after Representative Porter did the same.²⁰

⁶ OCE Exhibit 20.

⁷ OCE Exhibit 32.

⁸ OCE Exhibit 16.

⁹ *Id.*

¹⁰ OCE Exhibit 19.

¹¹ OCE Exhibit 16.

¹² *Id.*

¹³ *Id.*

¹⁴ OCE Exhibit 21.

¹⁵ OCE Exhibit 22.

¹⁶ OCE Exhibit 25.

¹⁷ OCE Exhibit 26.

¹⁸ OCE Exhibit 28.

Committee on Ethics
February 29, 2012

On October 30, CMS and UMC agreed to delay the decertification while they negotiated a more permanent solution.²¹ And on May 27, 2009, UMC received approval from CMS for its program. Representative Berkley had no involvement in this matter after October 30.²²

2. Legal Background

House Rule 23 bars Members from accruing "compensation . . . to the [Member's] beneficial interest . . . by virtue of influence improperly exerted."²³ The question is whether a Member has a "direct personal or pecuniary interest" in the matter.²⁴ When a Member has only a small interest in a particular transaction, the Committee on Ethics has approved participation in the issue.²⁵ For instance, the Committee has found that ownership of a small amount of stock in a company "was not, under House precedents, sufficient to disqualify [a Member] from voting" on an appropriations bill for a project that would have been served by that company.²⁶

Moreover, when a Member and her constituency have a mere "mutual concern," House rules do not require her to disqualify herself from acting.²⁷ Instead, "public disclosure of assets, financial interests, and investments has been required as the preferred method of regulating possible conflicts of interest."²⁸ Representative Berkley has fully complied with these requirements by disclosing her and her husband's interest in kidney care. As the Committee on Ethics recently explained, the purpose of the financial disclosure system is so that "the public has the information to make such judgments" about whether a conflict of interest exists.²⁹ So long as a Member fully discloses any financial interests through financial disclosure statements, "Review

¹⁹ OCE Exhibit 37.

²⁰ OCE Exhibits 35 & 45.

²¹ OCE Exhibit 48.

²² OCE Exhibit 53.

²³ House Rule XXIII, cl. 3.

²⁴ House Rule III, cl. 1.

²⁵ See, e.g., *In the Matter of a Complaint Against Rep. Robert L.F. Sikes*, H. Rep. 94-1364, 94th Cong., 2d Sess. 14-16 (1976), quoted in House Ethics Manual, Committee on Standards of Official Conduct, 110th Congress, 2nd Sess. (2008 ed.) (House Ethics Manual) at 236-37.

²⁶ H. Rep. 94-1364 at 15.

²⁷ See House Ethics Manual at 250.

²⁸ See *id.* at 251.

²⁹ *In the Matter of Rep. Sam Graves*, H. Rep. 111-320, 111th Cong., 1st Sess. v (2009).

Committee on Ethics
February 29, 2012

of a Member's financial conduct occurs in the context of the political process."³⁰ And the alternative – failing to act on an important issue – would result in "well over half a million people [] denied a voice."³¹

B. Representative Berkley's Interest in the UMC Kidney Transplant Center Was *De Minimis* at Most

Representative Berkley is married to Dr. Lawrence Lehrner, who is president of the Kidney Specialists of Southern Nevada (KSSN).³² During the time of the CMS decertification issue, KSSN was under contract with UMC to provide medical directorship services to its nephrology department (for \$50,000 a year), and to provide medical services to the hospital (for \$538,200 a year).³³ A KSSN physician interviewed by OCE described this contract as "marginally profitable" and that there were "pro bono reasons for staying in it."³⁴ He estimated that the UMC contract represented less than fifteen percent of KSSN's overall revenue.³⁵

OCE therefore concludes, correctly, that the contract includes providing "transplant nephrology services."³⁶ It does not provide any explanation or context. And indeed, the contract does include providing "training and support of the Hospital's Kidney Transplant Program" to "provide medical examination and clearance for all prospective transplant patients."³⁷ What OCE does not mention in its Findings is that the services to UMC's kidney transplant program were only a very small part of this contract.

While the services in the contract are not separately priced, the contract requires KSSN physicians to perform eleven clinical responsibilities and fifteen administrative responsibilities; only one of these contractual obligations specifically mentions support of the transplant program, and it is not given priority in any way.³⁸ The other portions of the contract require KSSN to provide either unrelated nephrology services, or services to UMC's nephrology department as a

³⁰ House Ethics Manual at 251.

³¹ *Id.* at 237.

³² OCE Exhibit 2.

³³ OCE Exhibit 5.

³⁴ OCE Exhibit 60.

³⁵ *Id.*

³⁶ OCE Findings at 7.

³⁷ OCE Exhibit 5 § 2.4(j).

³⁸ OCE Exhibit 5 §§ 2.4 & 2.5.

Committee on Ethics
February 29, 2012

whole. Counsel for KSSN told OCE that "the current income from the transplant nephrology portion of the KSSN agreement with UMC is a small fraction of KSSN's annual revenue and Dr. Lehrner's annual income."³⁹

These were not services that KSSN initially wished to provide; UMC demanded that KSSN provide these services as part of its overall contract with UMC.⁴⁰ And after the contract was signed, it took KSSN "some two years" to find a doctor to provide these services, which upset UMC's former CEO.⁴¹ This is strongly supportive of the notion that these were not profitable services.

The transplant practice may have had a negative effect on KSSN's overall revenue. Out of more than twenty physicians practicing with KSSN,⁴² only two⁴³ – neither one Dr. Lehrner – are involved in the UMC transplant program. The other physicians provide kidney care services, including dialysis, for which transplants tend to reduce demand. It is likely that the kidney transplant program at UMC acted to reduce KSSN's income rather than increase it, since transplant recipients no longer need the dialysis services KSSN provides.

Finally, even if UMC's transplant program were decertified, nothing in OCE's Findings indicates that it would have any impact on KSSN's revenue whatsoever, because UMC would have continued to pay KSSN under the contract.⁴⁴ The contract contains no clause that would permit UMC to alter or terminate the agreement under these circumstances. It did contain a clause permitting UMC to renegotiate if patient volume changed by more than 25%;⁴⁵ however, that is unlikely, given the testimony of a KSSN physician working on transplant services that he had "plenty to do without transplants."⁴⁶ Indeed, when asked whether he was disappointed when the transplant program was suspended, he responded to OCE: "not so much."⁴⁷

³⁹ OCE Findings at 17.

⁴⁰ OCE Exhibit 16.

⁴¹ *Id.*

⁴² OCE Exhibit 1.

⁴³ OCE Exhibit 60.

⁴⁴ OCE Exhibit 5.

⁴⁵ *Id.* § 6.5.

⁴⁶ OCE Exhibit 60.

⁴⁷ *Id.*

Committee on Ethics
February 29, 2012

In sum, Representative Berkley's husband had at most a *de minimis* interest in the UMC kidney transplant program. KSSN's income from its contract with UMC would not have decreased as a result of the decertification of the UMC program; and it may have increased due to additional patients for dialysis and other kidney care services. This marginal financial interest does not rise to the level of a "direct personal or pecuniary interest" that would result in a conflict of interest violation under House Rule 23.

C. Representative Berkley's Intervention Was not Related to any Financial Interest

OCE has not alleged that Representative Berkley's actions to intervene to save the UMC kidney transplant center were motivated by any financial interest. On the contrary, the evidence gathered by OCE indicates that her actions, and the actions of her staff, were consistent with similar public health issues; that she acted only alongside other members of her delegation; and that her office's role was consistent with other, similar matters. There is no basis to find that Representative Berkley's actions were outside of the public interest.

1. Representative Berkley Did Not Intervene except as Requested by UMC

Representative Berkley did not take any action when UMC was notified by CMS that the kidney transplant program was in jeopardy of being terminated, in May 2008. She did not act when the program temporarily closed its doors in September. And she did not act even when UMC was notified that the program's Medicare approval would be revoked. Indeed, there is no indication that she or her office was even aware of the issue; nor did her husband take any action to influence the outcome. It was not until UMC decided to reach out to the Nevada delegation that Representative Berkley became involved.

Moreover, after the end of her involvement on October 30, UMC and CMS spent seven months negotiating a permanent solution; while the immediate public health crisis was forestalled, a positive outcome for the kidney transplant center was far from guaranteed. And yet she and her office took no role in that negotiation.

In short, the facts demonstrate that Representative Berkley's involvement was motivated entirely in response to UMC's specific request for help sent to the entire Nevada delegation, and not by a desire to protect any financial interest.

2. Representative Berkley Acted only Publicly, and alongside the Congressional Delegation

When Representative Berkley did act, she took no substantive action except that taken by other members of her delegation. Her staff wrote, and she signed, a letter along with Representatives

Committee on Ethics
February 29, 2012

Heller and Porter.⁴⁸ Representative Berkley spoke with CMS representatives⁴⁹ as did Representative Porter.⁵⁰

OCE's Findings on this issue are drafted to mislead the Committee into believing that Representative Berkley was leading this campaign; OCE's own evidence does not support that assertion. OCE's Findings accurately cites the one witness who believed Representative Berkley was the most involved; it then states, "One of the UMC attorneys agreed, telling the OCE that Representative Berkley's office was particularly engaged in this matter."⁵¹ That is false; that attorney's statement as recorded by OCE gives Representatives Berkley and Porter equal weight. The OCE Memorandum of Interview states: "Rep. Berkley's office, along with Rep. Porter's office, was particularly 'hot to trot' on the issue."⁵²

In fact, the witnesses interviewed by OCE give Representatives Porter and Berkley roughly equal credit for responding. UMC's outside counsel stated that Representative Porter and his staff were "in front" of this issue, and that Representative Berkley's role was "peripheral."⁵³ The former acting director of the Office of Legislation for CMS recalls that it was Representative Porter who first brought up the issue, and that he "appeared to be in the lead on this matter."⁵⁴ A CMS health insurance specialist testified that he was first contacted by Representative Porter.⁵⁵ The former acting administrator of CMS believed that Representative Porter was leading the congressional effort.⁵⁶ By contrast, as noted above, one person interviewed believed the Representative Berkley was at the forefront;⁵⁷ another believed the two were about even.⁵⁸ It is clear, in any case, that CMS treated Representative Porter as leading this issue, because it vowed

⁴⁸ OCE Exhibit 28.

⁴⁹ OCE Exhibit 37.

⁵⁰ OCE Exhibit 35 & 45.

⁵¹ OCE Findings at 14.

⁵² OCE Exhibit 19.

⁵³ OCE Exhibit 12.

⁵⁴ OCE Exhibit 38.

⁵⁵ OCE Exhibit 39.

⁵⁶ OCE Exhibit 44.

⁵⁷ OCE Exhibit 16.

⁵⁸ OCE Exhibit 19.

Committee on Ethics
February 29, 2012

to contact him first – and specifically not Representative Berkley – when the issue was resolved.⁵⁹

OCE's Findings also insinuate that Representative Porter was privately supportive of CMS's decision to revoke the kidney transplant program's certification.⁶⁰ This may be so, but his public position – and that of his staff – were squarely in support of UMC. His staff suggested a delegation letter in support of UMC; he signed the letter along with the rest of the delegation; and when he spoke to staff at CMS, his staff described it as "an effort to put the breaks [*sic*] on their recent action."⁶¹

Note that all of Representative Berkley's actions were taken publicly, via official releases or explanations to the press. The delegation letter was publicly released; she spoke about her conversation with CMS to the press.⁶² If her goal was to protect any private interests, her actions would have taken place behind the scenes. Instead, she and her staff acted as they would in any other circumstance: squarely in the public eye.

OCE's Findings also entirely omit the evidence it collected that Representative Berkley's involvement in this matter was in no way unusual; yet it is clear from OCE's own exhibits that her involvement, along with the rest of the Nevada delegation, was standard for such matters. The Director of the Survey and Certification Group for CMS testified that the level of congressional interest was "somewhere in the middle" as compared to similar situations.⁶³ A CMS health insurance specialist testified that the level of congressional interest was "about the same" as other issues.⁶⁴

3. Representative Berkley's Husband's Role was Appropriate, and Irrelevant

By all accounts, Dr. Lehrner took only two actions in this matter: when the UMC's then-CEO asked for Representative Berkley's phone number, he provided it;⁶⁵ and he reached out to Senator Reid's office.⁶⁶ He did tell UMC's CEO that he would let his wife know she would be

⁵⁹ OCE Exhibit 63.

⁶⁰ OCE Findings at 14.

⁶¹ OCE Exhibit 45.

⁶² OCE Exhibit 42.

⁶³ OCE Exhibit 7.

⁶⁴ OCE Exhibit 39.

⁶⁵ OCE Exhibit 16.

⁶⁶ OCE Exhibit 29.

Committee on Ethics
February 29, 2012

calling;⁶⁷ according to UMC's CEO, she did not appear to have been briefed by her husband on the substance of the issue.⁶⁸

OCE's Findings make much of the fact that two years later, in its response to a UMC Request for Proposal, KSSN's submission includes a note regarding Dr. Lehrner's role in preserving the kidney transplant program. It is notable, however, that this submission does not tout Dr. Lehrner's role in contacting Representative Berkley; it does not mention her by name or title. Instead, it touts the one proactive step he did take in this matter: contacting the office of Senator Reid. That contact was both appropriate, and well within his rights as a constituent.

More importantly, KSSN's submission in response to a Request for Proposal two years after the UMC kidney transplant center's decertification crisis is absolutely irrelevant. While the 2010 contract itself may have some small relevance to this matter, KSSN's pre-contractual proposal has no bearing on whether Representative Berkley had more than a *de minimis* interest in the UMC kidney transplant center, or whether she acted inappropriately to defend the program's Medicare certification. Instead, OCE has included it for sensationalistic purposes only, to attempt to embarrass Representative Berkley and her husband.

D. OCE's Investigation Violated H. Res. 895 and its own Rules

Since this investigation began, OCE has repeatedly drawn out this process, in violation of H. Res. 895's clear directive to provide a rapid conclusion so that Members are not subjected to lengthy investigations. It has taken advantage of that process to continue investigating after its jurisdiction to do so has ended, and even after it had voted to refer this matter, to shore up an inadequate case. At the same time, it has denied Representative Berkley access to exculpatory evidence. The result has been a process highly prejudicial to Representative Berkley, who is now faced with the public release of OCE's Report and Findings during the political season.

These violations of the House resolution creating OCE, and of OCE's own rules, amount to a fundamental failure of due process of law. The Committee should find that these failings eliminate OCE's jurisdiction in this matter.

1. OCE Has Repeatedly Delayed this Investigation

OCE's preliminary review process began on September 29, 2011. However, it did not notify Representative Berkley until four days later, and it did not provide her with a request for information until October 5. While Representative Berkley and her staff did provide hundreds of pages of responsive material, OCE's delay in beginning this investigation meant that it did not

⁶⁷ OCE Exhibit 16.

⁶⁸ *Id.*

Committee on Ethics
February 29, 2012

have sufficient time to consider the evidence before finding that there was probable cause to believe the alleged violation occurred.⁶⁹

The second-phase review ended on December 26, 2011. H. Res. 895 requires that OC must transmit its written report to the Committee "[u]pon the completion" of this review.⁷⁰ This must be done promptly; "the timeline requirements instituted by the new process are critical: matters will spend at most three months under consideration by the board of the OCE before being referred to the [Committee on Ethics] for resolution."⁷¹ And yet OCE took almost seven weeks to transmit its Report and Findings. What was meant to be a three-month period has become almost five. OCE has been repeatedly warned by the Committee of the importance of acting quickly,⁷² and it has continued to ignore its clear directive to transmit its report immediately.

2. OCE Continued to Investigate After the Second-Phase Review Period and After the OCE Board's Vote

OCE took advantage of its own delay to keep investigating long after its authority had ended. It kept investigating even after its board voted to refer the matter to the Committee.

The Committee has found that after the "second-phase review concludes, OCE's legal authority to conduct further interviews or investigation is suspect."⁷³ OCE not only continued to investigate after this period ended; it also continued to investigate after OCE's Board voted to refer the matter to the Committee on January 27, 2012. As of February 1, 2012, an OCE staff attorney was continuing to correspond to counsel to Dr. Lehrner and KSSN seeking further information.⁷⁴ Not only was this activity conducted "outside of OCE's legal authority,"⁷⁵ it also served no legitimate purpose, as OCE's board had already made its decision.

OCE was likely attempting to correct its complete lack of evidence that Representative Berkley's financial interest in the UMC kidney transplant program was more than *de minimis*. OCE was repeatedly informed by both counsel to Representative Berkley and counsel to KSSN that

⁶⁹ See OCE Rule 8(A).

⁷⁰ H. Res. 895, 110th Cong., 2nd Sess. § 1(c)(2)(C).

⁷¹ Report of Members of the Special Task Force on Ethics Enforcement at 17 (Dec. 2007).

⁷² See H. Rep. 111-320 at 32-33; *In the Matter of Rep. Fortney "Pete" Stark*, H. Rep. 111-409, 111th Cong., 2nd Sess. 3 n.8 (2010).

⁷³ H. Rep. 111-320 at 24.

⁷⁴ Berkley Exhibit 1.

⁷⁵ H. Rep. 111-320 at 26.

Committee on Ethics
February 29, 2012

KSSN's interest in this program was negligible. No evidence produced by OCE contradicts that assertion. Despite this fact, OCE voted to recommend that the Committee conduct further review of this matter; after that vote, its staff requested from KSSN further information about the compensation of its physicians. OCE's Board appears to have voted to recommend further review of this matter while knowing it did not have sufficient evidence to make that recommendation; otherwise there would have been no need to conduct an investigation outside the bounds of its jurisdiction.

3. OCE Refused to Recognize its Subject Matter Limits

To begin a preliminary review, OCE must find a reasonable basis to believe an "allegation" of a violation by a Member, and must disclose that allegation to the Member.⁷⁶ It may only authorize a second-phase review if it finds probable cause to believe that the alleged violation occurred, and it may only refer the matter to the Committee if there is substantial reason to believe that allegation.⁷⁷ OCE has no authority to review allegations that are not noticed through this process.

When OCE sought to interview Representative Berkley in connection with this matter, she sought assurances that OCE would limit its inquiry to the allegation properly before it. OCE states in its Findings that it "twice addressed counsel's concerns," but it did nothing of the kind. Instead, it repeatedly threatened to expand the investigation into "additional, potential violations."⁷⁸

4. OCE Withheld Exculpatory Evidence from Representative Berkley

Representative Berkley repeatedly requested that OCE turn over exculpatory information, as required by its rules.⁷⁹ That request was made once in writing,⁸⁰ and again by phone with OCE staff attorneys. And yet OCE refused to turn over any material whatsoever. It is now clear, upon review of OCE's Findings, that there was much that should have been provided.

Exculpatory information not provided to Representative Berkley includes:

⁷⁶ H. Res. 895 § 1(c)(1)(A); OCE Rule 7(A).

⁷⁷ H. Res. 895 § 1(c)(1)(C); OCE Rule 8(A), 9(A).

⁷⁸ OCE Findings at 5 n.4.

⁷⁹ OCE Rule 4(F).

⁸⁰ Berkley Exhibit 2.

Committee on Ethics
February 29, 2012

- Counsel for KSSN's statement that "the current income from the transplant nephrology portion of the KSSN agreement with UMC is a small fraction of KSSN's annual revenue and Dr. Lehrner's annual income."⁸¹
- The KSSN contract with UMC, and the fact that services to UMC's kidney transplant program were only a very small part of this contract.⁸²
- A KSSN physician's testimony that the overall contract with UMC was only "marginally profitable."⁸³
- That physician's testimony that working on transplant services that he had "plenty to do without transplants."⁸⁴
- When that KSSN physician was asked whether he was disappointed when the transplant program was suspended, he responded to OCE: "not so much."⁸⁵
- The testimony of UMC's former CEO that Representative Berkley did not mention having spoken to her husband about the substance of the decertification of the kidney transplant center.⁸⁶
- That a staff person from Representative Porter's office suggested that the Nevada delegation sign a joint letter.⁸⁷
- Representative Porter's conversation with CMS staff.⁸⁸
- UMC's outside counsel's statement that Representative Porter and his staff were "in front" of this issue, and that Representative Berkley's role was "peripheral."⁸⁹

⁸¹ OCE Findings at 17.

⁸² OCE Exhibit 5 §§ 2.4 & 2.5.

⁸³ OCE Exhibit 60.

⁸⁴ OCE Exhibit 60.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ OCE Exhibit 22.

⁸⁸ OCE Exhibits 35 & 45.

⁸⁹ OCE Exhibit 12.

Committee on Ethics
February 29, 2012

- The former acting director of the Office of Legislation for CMS's recollection that it was Representative Porter who first brought up the issue, and that he "appeared to be in the lead on this matter."⁹⁰
- A CMS health insurance specialist's testimony that he was first contacted by Representative Porter.⁹¹
- The former acting administrator of CMS's testimony that Representative Porter was leading the congressional effort.⁹²
- That CMS instructed its staff to contact Representative Porter before Representative Berkley.⁹³
- The testimony of the Director of the Survey and Certification Group for CMS that the level of congressional interest was "somewhere in the middle" as compared to similar situations.⁹⁴
- The statement of a CMS health insurance specialist that the level of congressional interest was "about the same" as other issues.⁹⁵
- The fact that Dr. Lehrner had no role in this matter other than to provide Representative Berkley's phone number,⁹⁶ and to contact Senator Reid's staff.⁹⁷
- Finally, the Committee's precedent notes that OCE may be required to disclose to the subject of investigation if it continues to investigate after the second-phase review has

⁹⁰ OCE Exhibit 38.

⁹¹ OCE Exhibit 39.

⁹² OCE Exhibit 44.

⁹³ OCE Exhibit 63.

⁹⁴ OCE Exhibit 7.

⁹⁵ OCE Exhibit 39.

⁹⁶ OCE Exhibit 16.

⁹⁷ OCE Exhibit 29.

Committee on Ethics
February 29, 2012

ended.⁹⁸ Despite being specifically warned of this fact by counsel to Dr. Lehrner and KSSN,⁹⁹ OCE did not disclose this fact to Representative Berkley.

E. Conclusion

OCE's investigation makes clear that Representative Berkley had no "direct personal or pecuniary interest" in the UMC kidney transplant program. Her husband's company had only a *de minimis* interest in the program; its contractual payments would not have decreased had it terminated; and its overall revenue may have risen if kidney transplants in Nevada came to an end. Nor is there any evidence that Representative Berkley acted to protect any financial interest. She and her staff acted only with other members of her delegation; and they did so consistent with congressional action in similar matters.

Despite these clear facts, OCE's procedural missteps have subjected Representative Berkley to a long, drawn-out process, in direct violation of both the letter and the spirit of H. R. 895's clear and concise timelines. She has been denied exculpatory information helpful to her defense, while OCE continued to investigate beyond its jurisdictional authority.

We ask the Committee to quickly put an end to this already too-long ordeal; recognize that Representative Berkley's financial interest in the matter at hand was *de minimis* and that her actions were appropriate to the circumstances; and dismiss this matter.

Very truly yours,



Marc E. Elias
Ezra W. Reese

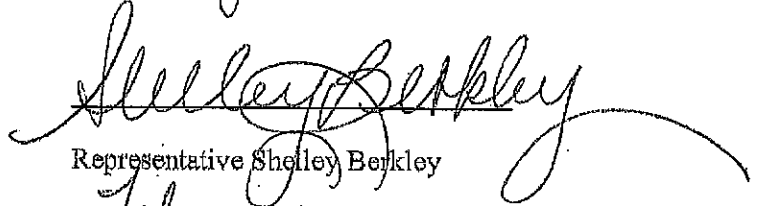
⁹⁸ H. Rep. 111-320, at 26 n.197.

⁹⁹ Berkley Exhibit 3.

Declaration

I, Representative Shelley Berkley, declare under penalty of perjury that the response and factual assertions contained in the attached letter dated February 23, 2012, relating to my response to the February 14, 2012, Committee on Ethics request for information, are true and correct.

Signature:

A handwritten signature in cursive script that reads "Shelley Berkley". The signature is written over a horizontal line.

Name:

Representative Shelley Berkley

Date:

February 23, 2012

BERKLEY EXHIBIT 1



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December 20, 2011

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Office of Congressional Ethics
U.S. House of Representatives
425 3rd Street SW, Suite 1110
Washington, DC 20024


Re: Review No. 11-0243

Dear Mr. Ashmawy:

We write on behalf of Representative Shelley Berkley. As the Office of Congressional Ethics second-phase review period is coming to a close, please promptly forward all exculpatory information received by you to us, as required by OCE Rule 4(F).

Thank you.

Very truly yours,


Marc E. Elias
Ezra W. Reese

BERKLEY EXHIBIT 2

Reese, Ezra (Perkins Cole)

From: Matthew Griffin [mgriffin@griffinrowenave.com]
Sent: Wednesday, February 01, 2012 5:58 PM
To: Reese, Ezra (Perkins Cole)
Subject: FW: Compensation Info

Matthew M. Griffin
Griffin, Rowe & Nave, LLP
1400 S. Virginia St., Ste A
Reno, NV 89502
Work: 775.323.1240
Cell: 775.722.3844
Web: thecapitolcompany.com

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From: Matthew Griffin
Sent: Wednesday, February 01, 2012 2:58 PM
To: Gast, Scott (Scott.Gast@mail.house.gov)
Subject: Compensation Info

Hey Scott

With respect to our conversation this morning related to Question 12, my client tells me that he can locate and/or create the salary ranges of the physicians, directors, etc. and provide that to you by tomorrow. Please advise if the salary range data is satisfactory and I will get it to you ASAP. Thanks.

Matthew M. Griffin
Griffin Rowe LLP
1400 S. Virginia St., Ste A
Reno, NV 89502
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BERKLEY EXHIBIT 3

Congress of the United States
House of Representatives
Office of Congressional Ethics
Attn: Omar Ashmawy
P.O. Box 895
Washington DC 20515-0895

**Re: Bernstein, Pokroy & Lehrner, Ltd dba Kidney Specialists of Southern Nevada –
REQUEST FOR INFORMATION**

Dear Mr. Ashmawy:

On October 11, 2011, the Office of Congressional Ethics ("OCE") sent a Request for Documents to my client, Dr. Lawrence Lehrner, President of the Kidney Specialists of Southern Nevada ("KSSN"). The request is presumably in connection with an investigation by OCE of Dr. Lehrner's wife, Congresswoman Shelley Berkley.

In response to this request, we have submitted over 300 pages of documents. We also made Dr. Marvin Bernstein, a physician at KSSN, available to be interviewed by your attorneys. Responding to these requests was extremely time-consuming and burdensome for my clients; Drs. Lehrner and Bernstein and the other physicians and staff at KSSN are already busy treating patients with a range of renal-related medical issues. OCE has threatened to list Dr. Lehrner as non-cooperative in OCE's publicly-released report, and to draw a negative inference against him and/or the medical clinic from any refusal to cooperate.

Your Request for Documents noted that the preliminary review was initiated on September 29, 2011, for a term of thirty days. It is my understanding that the OCE Board of Directors authorized a second-phase review on October 28 for a term of forty-five days; under OCE's rules, the Board may extend this period for another 14 days.¹ Thus, at its maximum, the second-phase review ended on December 26, 2011. OCE must "complete a second-phase review within" this time;² this period defines the boundaries of OCE's jurisdiction as granted by its authorizing resolution.³ Once this time has ended, the Committee on Ethics has stated that "OCE's legal authority to conduct further interviews or investigation is suspect."⁴

Over a month has passed since the second-phase review period has ended, and since OCE was required to complete its review. And yet OCE has continued to seek documents and information from my clients. As recently as February 1, 2012, your staff was requesting information from KSSN – including private financial records. We were informed that the production of these records could affect whether Dr. Lehrner would be labeled as a non-cooperating witness in the public document.

¹ H.R. Res. 895, §1(c)(2)(A), 110th Cong. (2008); OCE Rule 8(C).

² *Id.*

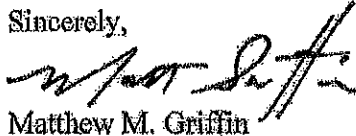
³ *In the Matter of Rep. Sam Graves*, H. Rep. 111-320, 111th Cong., 1st Sess. 21 (2009).

⁴ *Id.* at 24.

While my clients were initially willing to cooperate with these late requests, it is now clear to us that under the precedent of the Committee on Ethics, this investigation is being "conducted outside of OCE's legal authority."⁵ OCE can ask nothing further of my clients, and I am legally bound to advise my clients of the perils of our continued cooperation. It also appears that OCE may be required to disclose to the subject of its investigation the fact that it continued to investigate after the second-phase review had ended, as exculpatory information under OCE Rule 4(F).⁶

Because OCE's investigation is now complete, we do not expect to receive further demands for information from OCE. Moreover, I request that OCE refrain from identifying Drs. Lehrner or Bernstein, or KSSN, as non-cooperating witnesses.

Sincerely,



Matthew M. Griffin

⁵ *Id.* at 26.

⁶ *Id.* at 26 n.197.