

**UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON STANDARDS OF OFFICIAL CONDUCT**

**Hon. _____, M.C.
Complainant**

**Hon. Randy “Duke” Cunningham, M.C.
Respondent**

COMPLAINT

Parties

1. _____ is a duly elected member of the 109th Congress from the ____ District of _____.

2. Randy “Duke” Cunningham is a duly elected member of the 109th Congress from the 50th District of California.

Jurisdiction

3. This complaint is brought pursuant to House Rule X, cl. 1(p), which assigns to the House Committee on Standards of Official Conduct (“Ethics Committee”) jurisdiction over all matters pertaining to the House *Code of Official Conduct*, which is codified at House Rule XXIII. In addition, House Rule XI, cl. 3(b)(2)(A) provides that the Ethics Committee may “undertake an investigation relating to the official conduct of an individual Member . . . or employee of the House only . . . upon receipt of information offered as a complaint in writing and under oath, from a Member . . .”

Background

Rep. Cunningham and Mitchell Wade

4. In late 2003, defense contractor Mitchell Wade purchased Rep. Cunningham’s Del Mar, California home for \$1.675 million. Property sales records show that the average sales price for similar-size homes in the same area was at least \$500,000 less than the price Wade paid for Rep. Cunningham’s home. William Finn Bennett,

Cunningham, defense contractor have more ties, *North County Times*, June 18, 2005

(attached as Exhibit A). Wade resold the property in October 2004 for \$975,000, taking a \$700,000 loss on the property. Id.

5. Real estate professionals in San Diego have questioned the sale's circumstances, stating that a review of the comparable sales do not support the price Mr. Wade paid Rep. Cunningham for the property. Marcus Stern and Joe Cantlupe, FBI looking at sale of Cunningham home: Ties between contractor, congressman questioned, *Copley News Service*, appearing in *The San Diego Union Tribune*, June 17, 2005 (attached as Exhibit B). Realtors and appraisers have claimed that the house was worth less than \$1 million at the time that Mr. Wade paid Rep. Cunningham \$1.675 million for it. Id.

6. After reviewing Multiple Listing Service records of houses for sale in the San Diego area at the time Rep. Cunningham sold his house to Mr. Wade, San Diego real estate appraiser Todd Lackner said “[t]here is no logical explanation of comps that could have supported a value of \$1, 675,000 in November 2003 . . . the true comps in November 2003 would have been closer to the lower \$900,000 range. Id. Similarly, realtor Jacque Baker of Prudential Cal Realty valued the home at “less than \$1 million,” citing two properties of roughly the same size that sold for about that price even though they had qualities that Rep. Cunningham’s house lacked. Id.

7. The realtor who set the sale price for Rep. Cunningham’s house was Elizabeth Todd, who had been one of Rep. Cunningham’s longtime political contributors, as her husband and her husband’s late father had been. Stern and Cantlupe, *Copley News Service*, June 17, 2005. Although Ms. Todd set the price of the house, she was not officially a party to the transaction, which was a private deal without realtor representation

on either side. Id. Immediately after the sale of the Del Mar house, however, Rep. Cunningham hired Ms. Todd to help him buy the \$2.55 million estate in Rancho Santa Fe. Id.

8. While in Washington, Rep. Cunningham resides on a 42-foot yacht, owned by Mitchell Wade, anchored at a marina on the Potomac River. The boat is called the “Duke Stir.” Id. Rep. Cunningham told reporters that rather than paying rent for the yacht, he paid berthing fees and maintenance costs. Tony Perry, Cunningham Breaks Silence Over Real Estate Deal, *Los Angeles Times*, June 24, 2005 (attached as Exhibit C). Based on current market rates, however, Rep. Cunningham should have been paying about \$600 a month more than he has been paying to live on the yacht. William Finn Bennett, Duke Stir rent would add \$600 monthly, analyst says, *North County Times*, June 28, 2005 (attached as Exhibit D). Although Rep. Cunningham has stated that he paid Mr. Wade more than \$8,000 in docking fees and more than \$5,000 in maintenance fees over the past 15 months, a yacht sales broker recently estimated that the rental market value of the yacht would require the tenant to pay approximately \$600 more per month. Id.

9. Mitchell Wade and his defense contracting firm MZM, Inc. have contributed more than \$50,000 to Rep. Cunningham since 2000. Ben Pershing, MZM 527 Gave to Just One Lawmaker, *Roll Call*, July 13, 2005 (attached as Exhibit E). The financial relationship between Rep. Cunningham and MZM appears to have commenced in 2000 when MZM made a \$5,000 corporate contribution to the American Prosperity PAC State Fund, a non-federal account created by Rep. Cunningham under section 527 of the Internal Revenue Code. Id. In 2001, MZM donated an additional \$10,000 to the PAC. Id.

10. Also in 2001, MZM established the MZM PAC, a federal committee registered with the Federal Election Commission, and the Eagle Group, a 527 organization. Pershing, *Roll Call*, July 13, 2005. Both committees are registered at 1523 New Hampshire Ave., N.W., the address of MZM's corporate headquarters. *Id.* Since it was formed, the Eagle Group has received only one contribution of \$10,000 from MZM in 2002. *Id.* The Eagle Group has made only three contributions: \$5,000 to Rep. Cunningham's 527, \$1,000 to the D.C. Republican Committee and \$1,000 to D.C. Councilman David Catania's campaign committee. *Id.*

11. In addition, since 2001, MZM Pac has donated \$10,000 to Rep. Cunningham's federal leadership committee, the American Prosperity PAC, and another \$12,000 to Rep. Cunningham's campaign committee, Friends of Duke Cunningham. Additionally, Wade and his wife have personally given \$10,000 to the campaign committee. Pershing, *Roll Call*, July 13, 2005.

12. According to three former senior officials of MZM, Mitchell Wade forced employees to make political contributions that benefitted Rep. Cunningham. Marcus Stern, Contractor who bought Cunningham's house made employees give political contributions, *Copley News Service*, appearing in, *The San Diego Union-Tribune*, June 20, 2005 (attached as Exhibit F). One former employee explained that employees were told "either donate to the MZM PAC or . . . be fired." *Id.* Another employee recalled being rounded up with other MZM employees in the Washington headquarters and told to write a check with the political recipient standing by. *Id.*

13. Rep. Cunningham is also listed on the web site of the Sure Foundation, a charitable group with ties to MZM and Wade, as a member of the "honorary committee"

for the Foxfield Races, a twice yearly horse race in Charlottesville, Virginia that raises money for the foundation. Jeffrey Birnbaum and Renae Merle, California lawmaker's deals with donors questioned, *The Washington Post*, June 20, 2005 (attached as Exhibit G). Nancy and April Cunningham, Rep. Cunningham's wife and daughter, respectively, are among four people listed on the foundation's website as members of the foundation's "advisory council." *Id.* Last year, a congressional subcommittee on District of Columbia operations, on which Rep. Cunningham sits, allocated \$100,000 to the foundation. Perry, *Los Angeles Times*, June 24, 2005.

Rep. Cunningham and Thomas Kontogiannis

14. In 1997 Rep. Cunningham purchased a yacht named the Kelly C from then-Rep. Sonny Callahan (R-AL) for \$200,000. Jerry Kammer and Marcus Stern, Boat sale by "Duke" made him \$400,000: Buyer's kin were lenders of Cunningham mortgage, *Copley News Service*, appearing in *The San Diego Union-Tribune*, July 5, 2005 (attached as Exhibit H). Five years later, in 2002, Rep. Cunningham sold the yacht for \$600,000 to Thomas Kontogiannis, a businessman convicted in a bid-rigging scheme. *Id.* U.S. Coast Guard records do not reflect the sale of the Kelly C, which still shows Cunningham as the boat's owner. *Id.*

15. Moreover, according to the U.S. Coast Guard, in May 2005, Rep. Cunningham requested and received a reissuance of the certificate of documentation, a document that shows Rep. Cunningham as the registered owner. William Finn Bennett, Second boat deal surfaces, *North County Times*, July 6, 2005 (attached as Exhibit I); *see also* U.S. Coast Guard Application for Initial Issue, Exchange, or Replacement of Certificate of Documentation; Redocumentation, filed May 23, 2005 and Letter from

Randy “Duke” Cunningham to Pat Williams, National Vessel Documentation Center, May 26, 2005 (attached as Exhibit J). Although Mr. Kontogiannis’ company, Axxiom, had applied for a certificate of documentation in 2003, the certificate was not issued because the company failed to present a bill of sale or other documentation demonstrating that it owned the boat. William Finn Bennett, *North County Times*, July 6, 2005. Coast Guard officials decided to reissue the certificate to Rep. Cunningham in May after Axxiom failed to respond to a letter asking for documentation that it owned the boat. Id.

16. According to Mr. Kontogiannis, at the time he purchased the boat, Rep. Cunningham offered to help him seek a pardon from President Bush and put him in touch with lawyers who might have been able to assist him. Kammer and Stern, *Copley News Service*, July 5, 2005.

17. In addition, in 2003 when Rep. Cunningham bought a \$2.55 million home in Rancho Santa Fe, the congressman asked if a mortgage company owned by Mr. Kontogiannis’s nephew and daughter, Coastal Capital, could finance the mortgage at its wholesale price, which had a slightly lower interest rate than retail mortgage lenders. Charles R. Babcock, Developer Helped Congressman By Buying Boat, Arranging Loan, *The Washington Post*, July 5, 2005 (attached as Exhibit K). The mortgage company agreed to do so. Id.

18. Mr. Kontogiannis also reported that – at the congressman’s request – he recently paid off Rep. Cunningham’s second \$500,000 mortgage, mostly with money he owed Rep. Cunningham for the Kelly C. Id.

19. In 2002, Coastal Capital also helped Rep. Cunningham finance a \$150,000 mortgage on a Virginia condominium Rep. Cunningham purchased at a cost of \$350,000.

Seth Hettena, Condo Financing Probed, *Associated Press*, appearing in Monterey County Herald, July 9, 2005 (attached as Exhibit L). Rep. Cunningham sold the condominium in 2004. Id.

Top Gun Enterprises, Inc.

20. In 1987, Rep. Cunningham established Top Gun Enterprises, Inc. The company's web site, www.topguninc.com, sells knives, including the "Randy 'Duke' Cunningham Fighter Ace Kalinga Style Buck Knife." Mark Walker, Use of congressional seal on knife questioned, *North County Times*, June 29, 2005 (attached as Exhibit M). According to the web site, the knife includes the emblem of the American Fighter Aces Association and the "Official Seal of the United States Congress." Id. Notably, shortly after stories appeared in the media regarding the use of the congressional seal on the knife, the products listed on the site were removed and the site stated only that it was "under construction." Mark Walker, 'Top Gun' Web site missing in action, *North County Times*, July 1, 2005 (attached as Exhibit N).

COUNT I

BRIBERY

21. Federal law prohibits public officials from directly or indirectly demanding, seeking, receiving, accepting or agreeing to receive or accept anything of value in return for being influenced in the performance of an official act. 18 U.S.C. §201(b)(2)(A).

22. It appears that Rep. Cunningham accepted the equivalent of a \$700,000 gift from Mitchell Wade when he sold his house to Wade for \$1.675 million, despite the fact that houses comparable to Rep. Cunningham's were being sold for substantially less than that. The problem arises in that at the same time Rep. Cunningham received the \$700,000

from Mr. Wade, Rep. Cunningham has acknowledged that he was supporting MZM's efforts to receive tens of millions of dollars in defense contracts. *See Stern and Cantlupe, Copley News Service*, June 17, 2005. In fact, records show that MZM has more than \$66 million in at least 93 government contracts. Perry, *Los Angeles Times*, June 23, 2005.

23. Similarly, it appears that for the past 15 months, Rep. Cunningham has been living on Mr. Wade's yacht, the Duke Stir, without paying adequate rent. Again, this raises the question of whether or not there was some sort of *quid pro quo*: what, if anything, did Rep. Cunningham do for Mr. Wade in return for the use of Mr. Wade's yacht?

COUNT II

ILLEGAL GRATUITY

24. Rep. Cunningham may also have violated the illegal gratuity statute by soliciting or allowing Mitchell Wade to purchase his home. The illegal gratuity statute prohibits a public official from directly or indirectly, demanding, seeking, receiving, accepting or agreeing to accept anything of value personally for or because of any official act performed or to be performed by such official. 18 U.S.C. §201(c)(1)(B).

25. In United States v. Sun-Diamond Growers of Cal., 526 U.S. 398, 414, 119 S.Ct. 1402, 1411 (1999), the Supreme Court considered this statute and held that a link must be established between the gratuity and a specific action taken by or to be taken by the government official. There may well be a link between Rep. Cunningham's sale of his house to Mr. Wade for \$700,000 more than it was worth and Rep. Cunningham's efforts to

assist MZM in securing contracts with the Department of Defense and the Department of Homeland Security.¹

26. The Committee on Standards of Official Conduct has used as a basis for disciplinary proceedings and punishment of Members the acceptance of bribes and gratuities under these statutes. *In the Matter of Representative Mario Biaggi*, H.R. Rep. No. 100-506, 100th Cong., 2d Sess. (1988) (recommending expulsion of the Member from the House); *In the Matter of Representative Daniel J. Flood*, H.R. Rep. No. 96-856, 96th Cong. 2d Sess. (1980).

COUNT III

HOUSE RULE XXIII

27. In addition to being illegal, the conduct of Rep. Cunningham also may have violated clause 3 of House Rule XXIII which provides:

A Member, Delegate, Resident Commissioner, officer, or employee of the House may not receive compensation and may not permit compensation to accrue to his beneficial interest from any source, the receipt of which would occur by virtue of influence improperly exerted from his position in the Congress.

28. An April 25, 1997, “Memorandum For All Members, Officers and Employees” issued by the Committee on Standards of Official Conduct clarified this rule, providing:

1. Citizens for Responsibility and Ethics in Washington and various media organizations have filed Freedom of Information Act requests with the Department of Defense and the Department of Homeland Security seeking information regarding contacts Rep. Cunningham may have had with those agencies regarding MZM, but the agencies have yet to respond to those requests. According to press reports, the U.S. Attorney’s Office for the District of Columbia has asked the Defense Department to stay all such requests until the conclusion of the investigation. Seth Hettena, Four from Washington yacht club subpoenaed in Cunningham probe, *Associated Press*, appearing in *The San Diego Union Tribune*, July 14, 2005 (attached as Exhibit O).

House Members, officers and employees are generally *prohibited* from asking for anything of value from a broad range of persons: specifically, anyone who seeks official action from the House, does business with the House, or has interests which may be substantially affected by the performance of official duties.

(Memo attached as Exhibit P). By accepting \$700,000 more than his house was worth and by living rent-free on Mr. Wade's boat, the Duke-Stir, while assisting MZM to obtain defense contracts, Rep. Cunningham likely violated Rule XXIII.

29. Moreover, even if the Committee is not convinced that Rep. Cunningham solicited a bribe in violation of federal law, a May 11, 1999, "Memorandum For All Members, Officers and Employees" gives the Committee on Standards of Official Conduct authority to take action. In that memorandum, the Committee approvingly quoted the *Code of Ethics for Government Service*, which provides that government officials should "[n]ever discriminate unfairly by the dispensing of special favors or privileges to anyone, whether for remuneration or not." (Memo attached as Exhibit Q). The Committee specifically stated that the provisions in the *Code of Ethics for Government Service* are applicable to House Members, and that formal charges may be brought against a Member for violating that code. *Id.*

30. As a result, even without finding that Rep. Cunningham accepted a bribe in violation of 18 U.S.C. §201(b)(2)(A), that he solicited a gratuity in violation of 18 U.S.C. §201(c)(1)(B), or violated clause 3 of House Rule XXIII of the *Standards of Official Conduct*, the Committee on Standards of Official Conduct Committee could still find that Rep. Cunningham was "dispensing special favors" in violation of the House Rules.

COUNT IV

GIFT RULE

31. In the Gifts and Travel Booklet, published by the Committee on Standards of Official Conduct, the Committee approvingly cites the 1951 Senate report entitled *Ethical Standards in Government* issued by Senator Paul H. Douglas which states “expensive gifts, lavish or frequent entertainment, paying hotel or travel costs, valuable services, inside advice as to investments, discounts and allowances in purchasing are in an entirely different category. They are clearly improper . . .” Committee on Standards of Official Conduct, Gift and Travel Booklet. The booklet further provides that “there can be an improper gift to a Member, officer or employee where, for example, he or she is sold property at less than market value, or receives more than market value in selling property. There can also be an improper gift where a Member or staff person is given a loan at a below-market interest rate . . .” Id.; *see also* Rule 26, clauses 5(a)(3)(A) and 5(a)(3)(R)(v). An exception to the gift rule allows Members to accept gifts given on the basis of personal friendship, but even so, Members may not accept a gift, the value of which exceeds \$250 on the basis of the personal friendship exception unless the Committee on Standards of Official Conduct issues a written determination that the exception applies. Rule 26, clause 5(a)(5).

32. Rep. Cunningham’s financial transactions with Mr. Kontogiannis likely violate the gift rule. First, the circumstances surrounding Mr. Kontogiannis’s alleged purchase of the Kelly C, namely the vastly inflated price at which he claims to have purchased the boat and the lack of documentation demonstrating any change of title from Rep. Cuningham to Mr. Kontogiannis, suggest that the transaction was actually a sham,

designed to allow Mr. Kontogiannis to pay for the \$100,000 refitting of the boat. If this occurred, Rep. Cunningham accepted a gift valued at over \$250, thereby exceeding the personal gift exception and violating the gift rule. Rule 26, clause 5(a)(5). Moreover, even if there was an actual sale, the fact that the boat was sold for a price apparently substantially greater than its market value violates the gift rule as well. Rule 26, clause 5(a)(3)(A).

33. Second, Mr. Kontogiannis, at Rep. Cunningham's request, asked his daughter and nephew through their company Coastal Capitol, to finance the mortgages of Rep. Cunningham's San Diego home and Virginia condominium. According to Mr. Kontogiannis, Rep. Cunningham was given a mortgage at a discount not available to the general public. Therefore, the loans violate the gift rule. Rule 26, clause 5(a)(3)(R)(v).

COUNT V

USE OF SEAL

34. Federal law prohibits anyone, except as directed by the United States House of Representatives or the Clerk of the House, from knowingly using, manufacturing, reproducing, selling or purchasing for resale, either separately or appended to any article manufactured or sold, any likeness of the seal of the United States Congress, or any substantial part thereof. 18 U.S.C. §713(d). Violations of this title are punishable by fine or imprisonment of up to six months or both. Id.

35. In flagrant violation of this law, Rep. Cunningham's company, Top Gun Enterprises, Inc. has sold knives that -- according to the company's own web site -- include the "Official Seal of the United States Congress."

Conclusion

The United States Constitution gives the House of Representatives – and only the House of Representatives – the power to create its own rules and the power to police its Members. As a result, it is incumbent upon Members of the House of Representatives to protect the integrity of the House. In fact, the Committee on Standards of Official Conduct was created for this purpose. This complaint offers the House of Representatives, acting through the Committee on Standards of Official Conduct, the opportunity to uphold the integrity of the House by initiating an immediate, thorough and non-partisan investigation of Congressman Cunningham’s conduct.

Respectfully submitted,

Melanie Sloan
Executive Director
Citizens for Responsibility and
Ethics in Washington

I hereby certify that this complaint has a good faith basis and warrants consideration by the House Committee on Standards of Official Conduct.

Member of Congress
____ District of _____

Sworn to subscribed before me this ____th day of _____,
2005.

Notary Public