B_____

IMMEDIATE STAY REQUESTED
[Statement of decision authorizing immediate sale of Clippers NBA Franchise issued August 7, 2014]

In the Court of Appeal of the State of California

SECOND APPELLATE DISTRICT, DIVISION _____

DONALD T. STERLING

Petitioner,

v.

SUPERIOR COURT FOR THE STATE OF CALIFORNIA, FOR THE COUNTY OF LOS ANGELES

Respondent,

ROCHELLE H. STERLING AND STEVEN A. BALLMER,

Real Parties-in-Interest.

LOS ANGELES COUNTY SUPERIOR COURT, CASE NO. BP 152858
HON. MICHAEL LEVANAS, DEPT. 5, TEL: 213-974-5594

Petition for Writ of Mandate and/or Prohibition or Other Appropriate Relief and REQUEST FOR IMMEDIATE STAY; Memorandum of Points and Authorities; Supporting Exhibits (filed under separate cover); Request for Judicial Notice (filed under separate cover)

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INTRODUCTION: WHY A WRIT AND STAY SHOULD ISSUE

This is a quintessential case for writ relief, including an immediate temporary stay. The trial court has issued a tentative decision determining that Rochelle Sterling ("Rochelle")[1] acted properly under the Sterling Family Trust ("Trust") in removing her husband Donald T. Sterling ("Donald") as co-trustee, and directing her to sell one of the Trust's assets, the Los Angeles Clippers NBA Franchise, to Steve Ballmer, with whom Rochelle had entered into a "Binding Term Sheet" ("BTS") on behalf of the Trust. The court also determined that Donald's revocation of the Trust (a revocation the parties stipulated Donald had the capacity to make) did not preclude Rochelle from disposing of these Trust assets, because doing so fell within her powers to "wind up" the Trust under Probate Code section 15407.

The court also concluded that an exception to the ordinary automatic stay pending appeal in probate matters should not apply here, because such a stay would result in an imminent risk to Trust property; namely, if the Clippers were not sold to Mr. Ballmer for his proposed $2 billion price, they might not be sold to anyone else for more than $1.6 billion. Finally, on the afternoon of August 7 – six days before the time to file objections to the proposed statement of decision had lapsed, and in violation of the California Rules of Court – the trial court finalized its

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[1] We refer to the Sterlings by their first names, not out of disrespect, but for ease of understanding.

statement of decision, clearing the way for the immediate sale of the Clippers.

Absent a stay from this court, the sale to Mr. Ballmer, by the modified terms of the Binding Term Sheet, is slated to occur no later than August 15, but could occur as soon as today; now that the final statement of decision has been issued by the trial court, the final order could soon issue as well. Once that sale goes through, Donald will have lost a unique and irretrievable asset: a "trophy asset" coveted by high net worth individuals around the world – one of thirty NBA franchises in the country, and one that under Donald's thirty-year ownership has recently become one of the most successful.

The nature of the trial court's order all but guarantees that this Court will never review this matter by appeal. If the sale of the Clippers is not stayed, the team is likely to be sold before any appeal could be brought or decided, rendering Donald's appeal rights hollow. This is a textbook example of irreparable harm, and cries out for writ relief.

Moreover, as legal commentators have already observed, this case raises cutting-edge issues in probate law, on which judges and litigants would benefit from appellate guidance. (See, e.g., Rainey, *Sterling case is a novel legal obstacle course* (July 27, 2014) http://www.latimes.com/ sports/ la-sp-sterling-legal-analysis-20140728 [as of Aug. 7, 2014].) These issues are of "widespread interest" (*Brandt v. Superior Court* (1985) 37 Cal.3d 813, 816) and of "first impression" and "general interest to the

bench and bar." (*Valley Bank v. Superior Court* (1975) 15 Cal.3d 652, 655.) This is also a case "where general guidelines can be laid down for future cases," making writ review proper. (*Oceanside Union School District v. Superior Court* (1962) 58 Cal.2d 180, 185-186, fn. 4.)

Indeed, because of the high profile nature of this case, probate attorneys are already aware of, and have vowed to use, both the court's novel application of the stay exception under Probate Code section 1310, subdivision b, and its determination that selling such a significant Trust asset amounts to "winding up" of a defunct trust under Probate Code section 15407. (See Bronstad, *Clippers Trust Precedents Leave Probate Attorneys Buzzing* (July 30, 2014) <http://www.nationallawjournal.com/home/id=1202665258209/Clippers-Trust-Precedents-Leave-Probate-Attorneys-Buzzing> [as of August 1, 2014]; see also Rainey, *supra, Sterling case is a novel legal obstacle course* [quoting probate law professor: "This is not the kind of extraordinary loss" section 1310 was designed to protect against.].) The National Law Journal credits "[a]ttorneys who specialize in trusts and estates" as saying that "the precedents that resulted would prove useful even when billions of dollars aren't at stake." (*Id.*) One senior counsel, who was not previously aware of Section 1310(b), stated that the precedent could impact cases involving music copyright licenses. (*Id.*) Other attorneys cited the precedent as useful in cases involving sales of real estate and unique assets. (*Id.*)

Thus, under the trial court's reasoning here, a Section 1310(b) exception could be made anytime a delay in disposing of a trust asset during an appeal could result in a sizeable loss of money. A widow, for example, could be deprived of her longtime home because a trustee decides, and a court agrees, that a delay in selling the property, due to fluctuations in the real estate market and other offers he has received, could result in a reduced sale price. Absent a stay challenging an order confirming that decision, the widow would be deprived of both an appeal and her home. Indeed, Section 1310(b) is particularly potent because it immunizes the fiduciary from liability for any acts taken under the statute. (See generally O'Sullivan, *Sterling Saga's Silver Lining,* L.A. Daily J. (August 1, 2014) pp. 1, 8 ["the danger of invoking Section 1310(b) where it is not absolutely necessary and proper is that it in effect deprives the appellate court of the jurisdiction to review, and allows enforcement of an order that may ultimately be reversed such that a Court of Appeal's decision is effectively meaningless."].)

Admittedly, in light of recent events, Donald Sterling does not cut a sympathetic figure. But the issues raised by the trial court's decision here impact more than just him, and involve core issues of probate law and the right to appellate review which, given the publicity surrounding the trial court's determinations in this case, require immediate review.

Stay Requested Immediately. The sale of the Los Angeles Clippers is set to proceed no later than August 15, 2014,

but could occur even sooner now that the trial court has finalized its statement of decision. Petitioner therefore requests that this Court stay the consummation of the sale, and all orders of the trial court, until the finality of these writ proceedings. Without such a stay, any appellate review would be rendered meaningless.

PETITION FOR WRIT OF MANDATE OR OTHER APPROPRIATE RELIEF AND FOR AN IMMEDIATE STAY

To the Honorable Presiding Justice and the Honorable Associate Justices of the Court of Appeal, Second Appellate District:

Donald Sterling petitions this Court for a writ of mandate or other appropriate relief directed to the respondent Superior Court of the State of California for the Los Angeles to set aside its July 28 tentative decision, July 29 proposed statement of decision, and August 7 statement of decision, and to forestall any order or judgment based on these, in Los Angeles Superior Court case No. BP 152858.

Authentication of Exhibits

1. All exhibits accompanying this petition are true copies of original documents on file with the respondent Superior Court, except the exhibit at Tabs 8, 18, 22, 24, 26, 31, 32, 34, 36, 38, 41, 42 and 43, which are true copies of the reporter's transcripts of pretrial hearings and trial, the exhibits at Tabs 7, 17, 21, 23, 25, 30, 33, 35, and 37, which are true and correct

copies of the Superior Court's minute orders, the exhibit at Tab 84, which is the declaration of attorney Bobby Samini regarding the accuracy of the trial transcripts, the exhibit at Tab 85, which is the trial docket, the exhibit at Tab 86, which are several signed reporter's certificates, and the exhibit at Tab 87, which is the trial court's final statement of decision. The exhibits are paginated consecutively, and page references in this petition are to the consecutive pagination.

Beneficial Interest of Petitioners; Capacities of Respondent and Real Party-in-Interest

2. Petitioner Donald T. Sterling is the named respondent in an action now pending in Los Angeles Superior Court entitled *In the Matter of the Sterling Family Trust* (Los Angeles Superior Court Case No. BP 152858).

3. Respondent is the Superior Court of the State of California for the County of Los Angeles, which on July 28, 2014, through its Department 5, the Hon. Michael Levanas presiding, announced its decision ordering Rochelle Sterling, as sole Trustee of the Trust, to consummate the sale of the Los Angeles Clippers. (6 Ex. Tab 43, pp. 1486-1489.)

4. The Respondent court invoked Probate Code § 1310(b) to supersede the automatic stay provided by Code of Civil Procedure § 916 and §1310(a), finding that the sale would "prevent injury or loss to the Trust." (Id. at p. 1489; 6 Ex. Tab 45, p. 1511; 10 Ex. Tab 87, pp. 2434-2437.)

5. Real party-in-interest, Rochelle H. Sterling, is the Petitioner in the superior court action. (1 Ex. Tab 1, p. 1.)

6. Real party-in-interest, Steven A. Ballmer, is an interested party in the superior court action. (1 Ex. Tab 1, pp. 1-2.)

Summary of Facts and Procedural History

A. Parties

7. Donald Sterling is a businessman and was, until purportedly removed as co-trustee and his revocation of the trust on June 9, 2014, a co-Trustee of the Sterling Family Trust. (1 Ex. Tab 1, pp. 1-2; 3 Ex. Tab 26, p. 650; 4 Ex. Tab 39, p. 1072.)

8. Rochelle Sterling is the wife of Donald Sterling and was, until the trust was revoked on June 9, the only other co-Trustee of the Sterling Family Trust. (1 Ex. Tab 1, pp. 1-2; 3 Ex. Tab 26, p. 650; 4 Ex. Tab 39, p. 1072.)

9. Steven Ballmer is a potential buyer of certain former Trust assets – namely the Los Angeles Clippers NBA Franchise. (1 Ex. Tab 1, pp. 2, 20)

B. The Sterling Family Trust

10. The Sterling Family Trust was established on August 12, 1998 by Donald and Rochelle Sterling, as Settlors and Trustees. (1 Ex. Tab 1, p. 2, 38.)

11. At the time the petition was filed, Donald and Rochelle were the sole vested beneficiaries of the Trust. (Id.)

12. The Trust was restated by Donald and Rochelle on December 18, 2013. (Id.) Rochelle admitted that there was no concern about Donald's mental health at the time of this restatement. (3 Ex. Tab 31, p. 751.)

13. Since its creation, the Trust was always a revocable trust. (1 Ex. Tab 1, p. 40; 4 Ex. Tab 39, p. 1063.)

14. On June 9, 2014, Donald revoked the Trust. (3 Ex. Tab 26, p. 650) Both parties stipulate that Donald had sufficient capacity to revoke the Trust. (2 Ex. Tab 18, p. 306; 4 Ex. Tab 39, p. 1072.)

C. Rochelle's Attempt to Remove Donald as Co-Trustee

15. The Trust provided that an individual would no longer serve as Trustee if he is deemed incapacitated as defined in the Trust document. (1 Ex. Tab 1, p. 49.) Paragraph 10.24 of the Trust document states that "[i]ncapacity and derivations thereof mean incapable of managing an individual's affairs under the criteria set forth in California Probate Code §810 et seq." (Id. at p. 67.)

16. A Trustee could be deemed incapacitated if "two licensed physicians who, as a regular part of their practice are called upon to determine the capacity of others . . . examine the individual and certify in writing that the individual is incapacitated." (Id.)

17. In addition, if one of the two co-Trustees was deemed incapacitated, the other would serve as the sole Trustee. (Id. at p. 44.)

18. At Rochelle's request, Donald underwent CT and PET scans of his brain on May 16, 2014. (4 Ex. Tab 39, p. 1068; 6 Ex. Tab 48, pp. 1522-23; 6 Ex. Tab 49, pp. 1524-1525.)

19. At Rochelle's request, Dr. Platzer arrived at Donald's home unannounced to perform an 80-minute exam of Donald on May 19, 2014. (6 Ex. Tab 46, pp. 1514-18; 2 Ex. Tab 24, p. 540; 4 Ex. Tab 39, p. 1068.) Dr. Platzer diagnosed Donald with Alzheimer's immediately after the examination. (2 Ex. Tab 22, pp. 441-42.) At the time of the examination, neither Donald nor Dr. Platzer was aware that this neurological examination would be used to remove Donald from the Trust. (2 Ex. Tab 24, 483; 4 Ex. Tab 39, 1075.) Nonetheless, after coordinating closely with Rochelle's attorneys and receiving a sample certificate from them, Dr. Platzer signed a "physician's certification of trustee's incapacity." (1 Ex. Tab. 1, p. 80; 2 Ex. Tab 24, p. 486; 4 Ex. Tab 39, p. 1075; 9 Ex. Tab. 71-76, pp. 2276-84.)

20. At the insistence of Rochelle's attorney that there was "time pressure," Dr. Spar arrived at Donald's home unannounced to perform a 50-minute exam of Donald on May 22, 2014. (2 Ex. Tab 24, pp. 494, 512, 534-35; 4 Ex. Tab 39, p. 1075.) Dr. Spar knew that he had been hired for the objective of removing Donald as co-Trustee of the Trust. (2 Ex. Tab 24, pp. 493-94.) Dr. Spar conceded that Donald was distracted and

preoccupied by a meeting with his attorneys in the other room. (6 Ex. Tab 50, pp. 1526-27.) Donald stated that he needed to get back to his meeting and did not finish the exam. (Id.) Despite the truncated session, Dr. Spar called Rochelle's attorneys immediately after the session to let them know that he would find Donald incapacitated. (Id.; 2 Ex. Tab 24, pp. 520-21.) The next week, he sent over his findings. (1 Ex. Tab 1, pp. 82-83.)

21. During this same period of time, Donald was preoccupied by the risk of losing ownership of the Clippers as a result of actions by the NBA. (4 Ex. Tab 39, pp. 1086-87; 7 Ex. Tab 60, pp. 1880-1909.) Both examining doctors acknowledged that "anxiety" could negatively affect his test performance. (2 Ex. Tab 22, p. 444; 2 Ex. Tab 24, p. 499; 4 Ex. Tab 39, p. 1069.)

22. Donald had authorized Rochelle to negotiate with the NBA concerning a sale of the Clippers. (2 Ex. Tab 24, pp. 534-35; 4 Ex. Tab 39, p. 1070) She reached a tentative agreement with Steve Ballmer. (1 Ex. Tab 1, pp. 20-32.) Shortly after Donald refused to accept the terms Rochelle had negotiated with Ballmer, Rochelle's attorney notified her that Donald had been deemed incapacitated and removed as a trustee of the Trust. (3 Ex. Tab 31, p. 739-41; Ex. Tab 39, pp. 1070-71.)

23. Later that evening, Rochelle and Ballmer signed the BTS, which memorialized the terms of the Clippers sale. (1 Ex. Tab 1, pp. 20-32.) Under the BTS, Ballmer would purchase the Clippers for $2 Billion. (Id.) On June 9, Donald, under the Trust terms, unilaterally revoked the Trust. (3 Ex. Tab 26, p. 650.)

D. Rochelle Sterling's Ex Parte Petition

24. On June 10, 2014, Rochelle filed an ex parte petition ("the Petition")(1) for confirmation of trustee's acts and instructing trustee; and (2) for order directing trustee under probate code § 1310(b) to prevent injury or loss to trust. (1 Ex. Tab 1, p. 1.)

25. The Petition requested that the trial court confirm Rochelle's sale of the Los Angeles Clippers as the Trust's sole Trustee. (Id. at pp. 1-2.) The confirmation was required to satisfy the conditions of the BTS memorializing the terms of the sale of the Clippers to a new limited liability company wholly-owned by the Steve Ballmer. (Id. at pp. 2, 26-27.)

26. On May 29, 2014, the date on which Rochelle purportedly entered into the BTS on behalf of the Trust, the Trust held stock in LAC Basketball Club, Inc., which held the right to the Clippers. (4 Ex. Tab 39, pp. 1086-87.) Before transfer to the Trust, the stock of LAC Basketball Club, Inc. was held by Donald Sterling. (Id.)

27. Rochelle also requested an order under Probate Code § 1310(b), asking the trial court to (1) find that there would be a significant loss to the Trust and its beneficiaries if the Clippers were not promptly sold; and (2) direct Rochelle to consummate the sale of the Clippers. (10 Ex. Tab 87, p. 2464.)

28. Under the BTS, as a condition of sale to Mr. Ballmer, Rochelle was required to obtain a final non-appealable court

order confirming her authority to unilaterally bind the Trust. (1 Ex. Tab 1, pp. 13, 26-27.)

29. Rochelle contended that if the sale to Ballmer under the BTS did not close on or before September 15, 2014, the NBA could begin the process to seize and sell the Clippers for a lower price. (Id. at p. 7.)

30. Because the appellate process rendered it impractical to hear the matter before the September 15, 2014 deadline imposed by the NBA (id. at pp. 13-14), Rochelle contended that the court could bypass the appellate process by invoking Probate Code § 1310(b) to allow the sale notwithstanding any appeal. (Id. at p. 14.)

31. Even though the Trust had been revoked, Rochelle contended that she had authority under Probate Code § 15407(b) because she as trustee retained certain powers "reasonably necessary under the circumstances to wind up the affairs of the trust." (Id. at p. 15.)

E. Donald's Opposition to Rochelle's Ex Parte Petition

32. Donald opposed the petition, arguing, inter alia, that he was fraudulently induced into the medical examinations, which wrongly concluded that he lacked capacity to manage the Trust. (1 Ex. Tab 5, pp. 157-59.)

F. Court Trial on Rochelle's Ex Parte Petition.

33. On July 7, 8, 9, 10, 21, 22, and 23, 2014, the Respondent Court conducted an evidentiary hearing on the ex parte petition. (2 Ex. Tab 22, pp. 398-452; 2 Ex. Tab 24, pp. 460-569; 2 Ex. Tab 26, pp. 577-686; 2 Ex. Tab 31, pp. 715-820; 2 Ex. Tab 34, pp. 860-889; 2 Ex. Tab 36, pp. 894-1002; 2 Ex. Tab 38, pp. 1007-1055.) The trial focused on three issues: (1) Whether Rochelle followed the terms of the Trust in removing Donald as co-trustee, including whether the submissions of the two medical doctors conformed to the Trust's requirements; (2) whether the revocation of the Trust by Donald precluded the court from directing the sale to Mr. Ballmer; and (3) whether the order directing the sale should be subject to the automatic stay exception under Probate Code section 1310(b). (6 Ex. Tab 42, pp. 1348-49, 1378; 6 Ex. Tab 43, p. 1410.)

34. Counsel made their closing argument on July 28, 2014, after which the court issued its oral tentative decision. (6 Ex. Tab 42, pp. 1348-1409; 6 Ex. Tab 43, pp. 1410-90.)

G. Trial Court's Proposed Order Granting Ex Parte Petition

35. On July 28, 2014, the trial court announced a tentative order granting Rochelle's ex parte petition (1) for confirmation of trustee's acts and instructing trustee (6 Ex. Tab 43, p. 1483); and (2) for order directing trustee under probate code § 1310(b) to prevent injury or loss to trust. (Id. at p. 1489.)

36. In its tentative order, the trial court: (1) confirmed that Rochelle had authority to bind the Sterling Family Trust to an agreement to sell the Clippers; (2) authorized Rochelle to sell the Clippers based on the terms and conditions of her agreement with Steven Ballmer; and (3) invoked § 1310(b) to allow Rochelle to sell the Clippers without regard to any appeal. (6 Ex. Tab 45, pp. 1509-11.)

H. Trial Court's Proposed Statement of Decision

37. On July 29, 2014, Shelly's counsel submitted a proposed Statement of Decision for the Court's review, which tracked the tentative decision orally announced by the court. (6 Ex. Tab 44, pp. 1492-1506.)

38. On August 6, 2014, Donald filed a request for statement of decision. (10 Ex. Tab 83, pp. 2417-2440.) No formal written request for statement of decision had previously been made by any counsel. Therefore, to preserve his appellate rights, Donald submitted this request. Donald specifically noted in his request that he also planned to file objections to the proposed statement of decision. (Id. at p. 2418)

39. Objections to the proposed statement of decision were due August 13, under the California Rules of Court. The trial court did not hold off on issuing a final statement of decision until after that date, however. Instead, the court *sua sponte* issued a final statement of decision on the afternoon of August 7, 2014. (10 Ex. Tab 87, pp. 2454-68.)

Timeliness of Petition

40. Generally, a common law writ petition should be filed within 60 days of an order, unless there are extraordinary circumstances justifying the delay. (*Volkswagen of America, Inc. v. Superior Court* (2001) 94 Cal.App.4th 695, 701.) Here, the writ petition has been filed one day after the final statement of decision was issued, and within ten days of a tentative decision being announced. The petition is therefore timely.

Request for Temporary Stay

41. This Court has authority to stay proceedings or otherwise "make any order appropriate to preserve the status quo." (Code Civ. Proc. § 923; see also *Kernes v. Superior Court* (2000) 77 Cal.App.4th 525, 531 n.4 (explaining that a reviewing court "always has the power to issue a temporary stay"); *Mason v. Superior Court* (1972) 23 Cal.App.3d 913, 916.)

42. Here, ***a stay is necessary immediately,*** because Rochelle has been authorized to sell the Los Angeles Clippers, a unique asset. The sale is set to consummate by August 15, 2014, but, with a final statement of decision now in hand, could occur at any time.

43. The trial court explicitly invoked § 1310(b) to bypass the automatic stay triggered by an appeal. Counsel asked the trial court to stay this ruling to allow a writ petition to be filed. (6 Ex. Tab 43, pp. 1468-69.) The trial court refused to stay its ruling, observing that a writ petition could be filed between the time its tentative decision was announced and the order became

final. (Id. at pp. 1470-72.) Following its refusal to stay proceedings, the court then proceeded to issue a final statement of decision six days early, before the deadline for filing objections to the proposed statement of decision had run. (10 Ex. Tab 87, pp. 2454-68.)

44. This Court should, therefore, exercise its discretion to stay trial court proceedings pending finality of these writ proceedings, including any Supreme Court review.

Basis for Relief

45. The above-described action of the respondent superior court was unreasonable, arbitrary, a prejudicial abuse of discretion, and manifestly against the law.

Inadequacy of Other Remedies

46. Petitioner has no plain, speedy, and adequate remedy at law, other than the relief sought by this petition. As explained in the memorandum of points and authorities, an appeal from a judgment entered following a trial would not be an adequate remedy because the Clippers, a unique asset, will have been sold, and § 1310(b) protects Rochelle from any liability for actions taken under order of the court.

Prayer for Relief

Wherefore, Petitioner prays that this Court:

A. Issue an immediate stay of proceedings, including the Statement of Decision and any subsequent Order, including the Probate Code section 1310(b) directive.

B. Issue a peremptory writ of mandate in the first instance, without issuance of an alternative writ, requiring respondent Superior Court to vacate its statement of decision and any order or forthcoming order in accordance therewith granting Rochelle's ex parte petition.

C. Issue an alternative writ of mandate commanding respondent superior court to vacate its statement of decision and any order or forthcoming order in accordance therewith, or in the alternative, to show cause before this Court why a writ of mandate should not issue.

D. Award Petitioner costs in this proceeding.

E. Grant such other and further relief as it may deem just and proper.

Dated: August 8, 2014

SNELL & WILMER L.L.P.

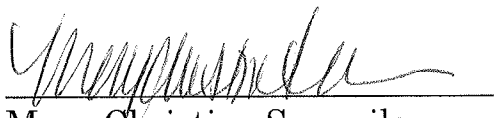
By: _____
Mary-Christine Sungaila
Attorneys for Donald T. Sterling

Verification of Mary-Christine Sungaila

I, Mary-Christine Sungaila, declare:

I am an attorney duly licensed to practice before all courts in the State of California and am a partner at Snell & Wilmer L.L.P., one of the law firms representing petitioner in this writ proceeding. I have read the foregoing petition for writ of mandate and know its contents. The facts stated in the petition are within my personal knowledge, and I know these facts to be true. Because the petition is based on pleadings and transcripts of hearings conducted in the respondent superior court, I, rather than Donald Sterling, verify this petition.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on August 8, 2014, in Costa Mesa, California.



Mary-Christine Sungaila

Memorandum of Points and Authorities in Support of the Petition

I

This is an Appropriate Matter to Hear by Writ Petition

The Supreme Court "has stated general criteria for determining the propriety of an extraordinary writ." (*Omaha Indemnity Co. v. Superior Court* (1989) 209 Cal.App.3d 1266, 1273.) Those criteria include circumstances where "the party seeking the writ lacks an adequate means, such as a direct appeal, by which to attain relief" or "the petitioner will suffer harm or prejudice in a manner that cannot be corrected on appeal." (*Id.* at 1274; see also Code of Civil Procedure, § 1086 ["The writ must be issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law"]; *County of San Diego v. State of California* (2008) 164 Cal.App.4th 580, 593 ["[W]here one has a substantial right to protect or enforce . . . and there is no other plain, speedy and adequate remedy in the ordinary course of law, [the petitioner] is entitled as a matter of right to the writ, or perhaps more correctly, in other words, it would be an abuse of discretion to refuse it." [quoting *Powers v. City of Richmond* (1995) 10 Cal.4th 85, 114].)

An appeal is a woefully deficient method to review the Respondent Superior Court's Order since the sale of the Clippers will be completed and Donald will be unable to recover his interest in the team. Donald does not have a plain, speedy, and adequate remedy at law (see Code Civ. Proc., §§ 1068, 1086, 1103) and will thus suffer irreparable injury that cannot be remedied

on appeal. The rush to judgment and approval of the sale, despite the stipulation that Donald revoked the Trust, further supports writ review. (See *Taylor v. Superior Court* (1979) 24 Cal.3d 890, 894; *Coulter v. Superior Court* (1978) 21 Cal.3d 144, 148; *Spielholz v. Superior Court* (2001) 86 Cal.App.4th 1366, 1370, fn. 4.)

In sum, absent this Court's immediate review of the trial court's ruling, irreparable harm could result. Writ review is, therefore, appropriate. (*City of Half Moon Bay v. Superior Court* (2003) 106 Cal.App.4th 795, 803.)

II

Standard of Review

A trial court's interpretation of a statute is reviewed de novo. (*Harustak v. Wilkins* (2000) 84 Cal.App.4th 208, 212.) Similarly, the application of a statutory standard to undisputed facts is reviewed de novo. (*Id.*) The de novo standard of review also applies to mixed questions of law and fact when legal issues predominate. (*Id.*) The application of the law to a set of facts is also subject to independent review when the issue, as it does here, "can have practical significance far beyond the confines of the case then before the court." (*Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 801 [applying de novo review to the question of whether a transaction was usurious].)

The court also applies a de novo standard of review when the meaning of a contract, such as the restatement of the Trust in

this case, may be determined without the aid of extrinsic evidence. (*Estate of Wilson* (2012) 211 Cal.App.4th 1284, 1290.) After this Court independently reviews the statutes and the governing contract, it may defer to the trial court's factual findings of disputed facts if the findings are supported by sufficient evidence. (*Cochran v. Rubens* (1996) 42 Cal.App.4th 481, 485.) "Where the ruling that is the subject of appeal turns on the trial court's determination of disputed facts, the appropriate standard of review on appeal is 'sufficiency of the evidence.' Evidence is sufficient if there is 'substantial' evidence to support the ruling. Such evidence 'must be reasonable in nature, credible, and of solid value....' [Citation.]" (*Id.* at p. 486 citing to *In re Robert L.* (1993) 21 Cal.App.4th 1057, 1065, 24 Cal.Rptr.2d 654.) Where the underlying facts are undisputed, the de novo standard of review applies. (*Swift v. Superior Court* (2009) 172 Cal.App.4th 878, 882.)

III

Relief Should Be Granted Because the Respondent Court Abused Its Discretion in Invoking Probate Code Section 1310(b).

A. This court can and should issue a writ directing the trial court to vacate its August 7 statement of decision.

The trial court erroneously granted Rochelle's request for an order under Probate Code Section 1310(b), finding that she had made an affirmative showing that the Sterling Family Trust ("the Trust") would suffer from "injury or loss." By invoking its powers under Section 1310(b), the court overrode the general rule

that an appeal in a probate proceeding automatically stays the operation and effect of the appealed order. (Probate Code § 1310(a).) But the trial court overestimated its discretion to invoke Section 1310(b), which applies only where immediate action is necessary "for the purpose of preventing injury or loss to a person." Such an order must be the exceedingly rare exception to the general rule, with the party attempting to invoke its remedy bearing the burden of establishing the imminent injury or loss to person or property. (*Gold v. Superior Court* (1970) 3 Cal.3d 275, 285.)

B. The legislative history of Probate Code section 1310(b)

The current incarnation of section 1310(b), as amended by the Legislature in July 2010 by Assembly Bill 2271, allows the trial court to direct the action of a fiduciary to prevent "loss or injury to person or property" even if the court's order has been appealed. The legislative history of this provision establishes that this power was to be used sparingly, and was not to be invoked where, as here, a party seeks to sell property over the wishes of its co-owner, and the risk of loss to the proponent of the section 1310(b) exception is only monetary, while the other party stands to lose a unique, irreplaceable asset in the absence of a stay.

In interpreting a statute, this Court follows the legislature's intent, as exhibited by the plain meaning of the actual words of the law. (*Hale v. Superior Court* (2014) 225 Cal.App.4th 268, 272.) If the statute is ambiguous on its face, this Court turns to the legislative history to determine the

legislature's intent. (*Rail-Transport Employees Assn. v. Union Pacific Motor Freight* (1996) 46 Cal.App.4th 469, 473.) But even language that appears unambiguous on its face may be shown to have a latent ambiguity. (*Quarterman v. Kefauver* (1997) 55 Cal.App.4th 1366, 1371.) In that case, a court may turn to customary rules of statutory construction or legislative history for guidance. (*Id.*)

When interpreting an ambiguous statute, "'consideration must be given to the consequences that will flow from a particular interpretation. [Citation.] In this regard, it is presumed the Legislature intended reasonable results consistent with its expressed purpose, not absurd consequences.'" (*Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 235.) But if neither the words of the statute nor its history expose a clear meaning, the Court must "apply reason and practicality, and interpret the statute in accord with common sense and justice, and to avoid an absurd result." (*In re Marriage of Campbell* (2006) 136 Cal.App.4th 502, 506.) Thus, the Court cannot sacrifice the legislative purpose to a literal construction of a statute. (*Slatkin v. White* (2002) 102 Cal.App.4th 963, 970.)

Here, this Court must determine the scope of the trial court's power to invoke Section 1310(b) – specifically, whether the code section can be invoked to force a party who has not been deemed incapacitated by any court to sell his unique property. A review of the legislative history and case law interpreting predecessor statutes makes it clear that this power is to be

invoked in only the most extraordinary circumstances where necessary to prevent imminent loss or injury.[2]

The legislature first granted the trial court similar powers in 1921, as an amendment to the then California Code of Civil Procedure ("CCP") section 1765, relating to a guardian's duty to care for the person and his estate. This provision provided that:

> An appeal from the order of an appointment [of guardianship] shall stay the power of the guardian, except that, for the purpose of preventing injury or loss to the person or property, the court making the appointment may direct the exercise of the powers of the guardian, from time to time, as though no appeal were pending, and all acts of the guardian pursuant to such directions shall be valid, irrespective of the result of the appeal.

(Request for Judicial Notice ("RJN") Ex. 2 [Senate Bill 190, January 17, 1921].)

The reenactment of this provision as part of the Probate Code in 1931 clarified that the provision related to "[a]n appeal from an order appointing a guardian *for an insane or incompetent person*," recognizing that such protection could be necessary to safeguard the party deemed insane or incompetent. (RJN Ex. 7 [Chapter 281, Statutes of 1931].) (Emphasis added.) Without such power, the incompetent party would have no guardian

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[2] A court may take judicial notice of legislative analyses of bills prior to passage as an aid to interpreting the statute. (Evid. Code §§ 452(c), 455, 459; *McDowell v. Watson* (1997) 59 Cal.App.4th 1155, 1161-62, n.3.) Donald has submitted under separate cover a request for judicial notice attaching portions of the legislative history of section 1310(b).

during the appellate process, exposing him to various risks of injury to his person and property. In the next several decades, the legislature expanded the application of this power to include conservatorships, which serve a similar purpose to guardianships in the protection of a person adjudicated to be unable to care for himself or herself or manage his or her own finances. (RJN Ex. 8 [Chapter 1902, Statutes of 1957 (enacting section 2102 re conservatorships)]; RJN Ex. 11 [Chapter 726, Statutes of 1979 (enacting section 2751, which consolidated the provisions re guardianship and conservatorship)]; see also Probate Code § 1851(a) [requirements for petition for conservatorship].)

While there were several additional iterations of this provision, the changes related only to the type of representative the trial court could appoint. (RJN Ex. 13 [Chapter 1199, Statutes of 1988 (enacting section 7241, which replaced "guardian or conservator" with "personal representative" and "temporary guardian or conservator" with "special administrator")]; RJN Ex. 14 [Assembly Bill 1172, Chapter 724, Statutes of 1997 (enacting 1310, which replaced "personal representative" with "fiduciary" and allowing the court to appoint a "temporary guardian or conservator")].) In 2010, the legislature made a final change in allowing the court to appoint a temporary trustee. (RJN Ex. 16 [Assembly Bill 2271, Chapter 94, Statutes of 2010].)

Thus, while the legislature amended and renumbered the provision many times since it was introduced in 1921, the

provision remained largely unchanged with one exception – the type of person who could invoke the trial court's powers. While the application of the provision is no longer limited to guardians, the legislature has never indicated any change in its intentions – to protect the well-being of those deemed vulnerable by the law. The trial court's use of this provision to override the wishes of Donald to retain ownership of the Clippers undermines this intent.

C. The California Supreme Court has held that the provision must be narrowly construed

The California Supreme Court has confirmed that the exception from the automatic stay should be narrowly construed. In *Gold*, the California Supreme Court construed a predecessor statute, which was limited to guardianship and conservatorship proceedings. (*Gold, supra,* 3 Cal.3d at p. 279.) In confronting an issue of first impression (*id.* at 280), the Court reasoned that the legislature drafted this exception to be narrowly construed and carefully restricted to cases where there is an affirmative showing of extraordinary circumstances. (*Id.* at p. 281.) Pointing to the statute's emphasis on preventative action, the Court found that the language imports a sense of urgency. (*Id.*) The Court also found that "on its face, the language of the statute indicates (1) that the only instances properly falling within the ambit of the exception are those which present a necessity for preventative action against the *particular risk contemplated by the statute*; and (2) that such instances are probably rare." (*Id.*) (Emphasis added.) "In sum, the language of this statute strongly suggests

that the exception applies only to the exceptional case involving a risk of imminent injury or loss." (*Id.*)

Additionally, the Court pointed to the effect of the statute, in which the conservator's acts made pursuant to the provision would be made valid, irrespective of the result of the appeal. (*Id.* at p. 282.) In drafting such a statute, "the Legislature has created an extraordinary procedure" that affects a party's right of appellate review. (*Id.*) Recognizing this harsh effect, the Court concluded that the provision must be "carefully restricted" and requires "an affirmative showing in the trial court of extraordinary circumstances involving potential injury or loss of the sort contemplated by the statute." (*Id.*)

In addition to analyzing the plain language of the statute, the Court also turned to its legislative history for further support of its conclusion. (*Id.*) Prior to 1957, the only procedure in the code for taking care of a person or property of another was through guardianship, which was available for minors or adults who were insane or incompetent. (*Id.*) To remove the stigma of an adjudication of insanity or incompetency and to expedite the administration of estates, the legislature added a section to the Probate Code that allowed for conservatorships. (*Id.* at pp. 282-283.) The court traced the statute back to predecessor Probate Code section 1631, which stayed the guardian's powers "except in cases clearly presenting extraordinary circumstances." (*Id.* at p. 283.) The legislature adopted this language in response to concerns that an automatic stay in guardianship cases would

lead to hardship "if the appellant be really incompetent [since] his property might be dissipated by designing persons during the pendency of the appeal." (*Id.*. citing to *In re Stratton* (1933) 133 Cal.App. 738, 739.) Thus, the purpose of the statute was to insure that one who has been declared incompetent retains the right to manage his own property pending an appeal from the order appointing a guardian unless he is proven incompetent to do so during that period. (*Id.* . at p. 284 citing to *Guardianship of Walters* (1949) 93 Cal.App.2d 208, 214.) Even then, the control of his estate would not be taken from him except to the extent that it is necessary to avoid loss or injury. (*Id.*)

The reasoning of *Gold* survives the amendments to the statute, and was adopted by the court in *Conservatorship of Hart* (1991) 228 Cal.App.3d 1244, 1261. In interpreting section 2751(b), the court found that because the effect of such an order "is to abrogate, at least as a practical matter, an appellant's statutory right to review of the earlier order, exercise of the power granted by subdivision (b) must be clearly justified by a showing of risk of imminent injury or loss." (*Id.*)

Never has Section 1310(b) or any of its predecessors been used to force a party to sell a unique property he wishes to retain. Nor has it been used to stave off a perceived monetary loss (no matter how large), which would conversely result in another party being deprived of a unique, irretrievable asset. Indeed, the legislative history and case law support the conclusion that, if

anyone had the proper kind of loss cognizable under section 1310(b) here, it would be Donald.

In posttrial briefing, Rochelle and Ballmer cited to *Conservatorship of McElroy* ("*McElroy*") (2002) 104 Cal.App.4th 536 for the proposition that the trial court can invoke § 1310(b) "for the purpose of preventing injury or loss to a person or property."[3] (5 Ex. Tab 40, p. 1181.) Rather than supporting the trial court's order here, this case better illustrates the limited instances when section 1310(b) can be invoked.

In *McElroy*, a son was appointed as his father's conservator following a petition, independent investigation by the court, and a hearing, as required by the Probate Code. (104 Cal.App.4th at pp. 540-541.) The conservatorship was necessary because the father could no longer provide for his personal needs and had "major impairment in orientation to time, place, and situation; major impairment in ability to recall, to reason logically, to understand, and to appreciate quantities." (*Id.* at p. 541.) There, the son sought to set up two living trusts on behalf of his father in order to avoid several million dollars of estate taxes upon his

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[3] Rochelle and Ballmer also cited to *Kane v. Superior Court* (1995) 37 Cal.App.4th 1577, which is inapposite. There the appellate court did not reach the issue of whether the trial court properly invoked section 7241(b), a predecessor statute, but rather decided that an order under the statute did not require an undertaking. (*Id.* at p. 1587.) Further, the trial court ordered the executor of an estate to release sperm the deceased's aging companion, which the deceased had previously authorized. (*Id.* at p. 1580.) Notably, the court did not override the wishes of the deceased in ordering this release, but rather effectuated them.

father's death, which the court authorized. (*Id.* at pp. 543, 556.) His father's long-time companion opposed this action and sought to appeal the order. (*Id.* at pp. 541-43) Because the father was in poor health and could die at any time, the trial court invoked section 1310(b) to allow the son to create the trusts despite the appeal. (*Id.* at p. 557.) The court of appeal affirmed the trial court's order. (*Id.*)[4]

The invocation of section 1310(b) in this case may serve as a convenient vehicle to make what the court thinks is the right business choice – to sell the Clippers for $2 billion – but this is not the purpose of § 1310(b). Section 1310(b) was designed to protect vulnerable parties who could not manage their personal and business affairs from being swindled while an appeal was pending. It was not the intent of the Legislature to allow the trial court to make business decisions on behalf of parties, and to circumvent review of this decision by ordering a sale to proceed irrespective of any appeal.

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[4] In contrast to *McElroy*, at no time has Donald been deemed incapacitated by any court. Indeed, Rochelle took the issue of an independent capacity determination by the court off the table from the very beginning. Rochelle further conceded that Donald had capacity in December 2013, when he restated the Trust, and stipulated that he had capacity in June 2014, when he revoked the Trust. This is inconsistent with the notion that Donald is so incapable of managing his own property that someone else must make his business decisions for him.

IV

The Parties Stipulated That Donald Has Revoked the Trust and, as a Result, the Only Authority to Compel a Sale of Trust Assets Can Be Probate Code Section 15407, Which Permits a Trustee To Engage in Acts "Reasonably Necessary" to "Wind Up" A Trust. Selling The Clippers Does Not Fall within This "Wind Up" Authority.

A. Upon termination of the trust, beneficial title to Trust assets was restored to each Settlor.

The Trust was expressly made revocable by its terms and was revocable by either settlor during their joint lifetimes. Donald exercised his unilateral right to revoke the Trust on June 9, 2014, which immediately terminated the trust. Beneficial title to trust assets held in a revocable trust remains with the settlors of the trust. (*Arluk Med. Center Indus. Group, Inc. v. Dobler* (2004) 116 Cal.App.4th 1324, 1331-32 ["[a] settlor with the power to revoke a living trust effectively retains full ownership and control over any property transferred to that trust . . ."]; *Steinhart v. County of Los Angeles (2010)* 47 Cal.4th 1298, 1319 ["Under general principles of trust law, trust beneficiaries hold 'the equitable estate or beneficial interest in' property held in trust and are 'regarded as the real owner[s] of [that] property'"].) Therefore, Rochelle, as sole remaining Trustee, has a duty to return the Trust assets to Donald now that the Trust has been terminated. (See Restatement Second, Trusts § 345 ["Upon the termination of the trust it is the duty of the trustee to the person beneficially entitled to the trust property to transfer the property to him or, if the trustee has possession but not title, to deliver possession to him"].)

The Trust specifically provides that upon revocation, assets "shall promptly be distributed to the settlors as their community property." (Trial Ex. 29, ¶ 2.5.a.) Probate Code Section 15410 further provides that "[a]t the termination of a trust that is revoked by the settlor, the trust property shall be disposed of," in order of priority, "as directed by the settlor" or "as provided in the trust instrument." Upon Donald's revocation of the Sterling Family Trust, Donald and Rochelle, as husband and wife, both hold the right to control any community property assets. Ordinarily, then, Rochelle could not unilaterally proceed to consummate the prospective sale of the Clippers in violation of Donald's ownership interest. (See *Masry v. Masry* (2008) 166 Cal.App.4th 738, 743 ["married parties are permitted to dispose of [only] their share of the community without the consent of the other spouse"].

B. The sale of the Clippers over Donald's objections is not properly within the scope of winding up the trust

The trial court allowed Rochelle to nonetheless force the sale of the Clippers by determining that it fell within the rubric of the trustee's nebulous powers to "wind up" the Trust under Probate Code section 15407(b).

There is little authority that explains the scope of these "wind up" powers, but the authority that does exist supports the view that it should be limited, and should not extend to situations like this, involving a sale to increase assets.

The Restatement Second of Trusts provides that the trustee "should buy or sell assets only to facilitate termination, not to increase value." (CEB California Trust Administration § 16:49, p. 1184; see also Restatement Second, Trusts § 344 Comment c; Restatement Second, Trusts § 345 Comment f; 3 Cal. Transactions Forms – Est. Planning § 13:16.)

Comment b to Restatement (Third) of Trusts § 89 further make clear that the provision relates only to unsaleable interests:

> The period for winding up the trust refers to the period after the termination date and before trust administration ends by complete distribution of the trust estate. . . If . . . the trust terms or circumstances require the sale of property that is not readily saleable, . . . the period for winding up the trust may be longer than it would be in the absence of these or other complicating circumstances.

Rest. 3d Trusts, § 89, comment b.

Moreover, however the wind up power is exercised, it must be subject to the trustee's fiduciary duties. The annotations to section 15407 observe that a trustee enjoys "limited powers" to wind up the affairs of the trust, and, in referring to a trustee's other powers under Section 16200 et seq, suggests that this authority, like other powers of the trustee, must be exercised only to the extent it does not violate the trustee's fiduciary duties. (See Probate Code section 15407, annotations ["Subdivision (b) makes clear that even though the trust has terminated, the trustee retains limited powers needed to wind up the affairs of the trust. For other provisions relating to trustees' powers, see Section 16200 et seq."]; Cal. Prob. Code § 16202 ["The grant of a

power to a trustee, whether by the trust instrument, by statute, or by the court, does not in itself require or permit the exercise of the power. The exercise of a power by a trustee is subject to the trustee's fiduciary duties"]; Cal. Prob. Code §16202, annotations [".... This section recognizes that a power granted to the trustee from any source does not necessarily permit the exercise of the power, nor does it prevent the exercise of a power in a manner that conflicts with a general a general duty whether the trust instrument so directs (see Section 16000) or where the trustee is directed so to act by a person holding the power to revoke the trust (See Section 16001)."].)

There is no California case that specifically addresses the scope of wind up authority following the revocation of an inter vivos revocable trust such as the one here. In her attempt to obtain the court's blessing to wield unlimited power to dispose of Trust assets as she wishes, in complete disregard to Donald, Rochelle relied on inapposite cases dealing with post-death administration or administration of testamentary or irrevocable trusts, e.g., *Botsford v. Haskins & Sells* (1978) 81 Cal.App.3d 780 (distribution of a trust asset consisting of a cause of action to 500 shareholders), *Myrick v. Enron Oil & Gas Co.* (Tex. App. El Paso 2009) 296 S.W.3d 724 (dealing with an irrevocable trust after the death of the settlor), and *Estate of Nicholas* (1986) 177 Cal.App.3d 1071 (termination of a testamentary trust). These three cases involve the very different circumstance of irrevocable trusts and their termination at death. But the winding up of an irrevocable trust upon the death of a settlor who can no longer

speak for himself or enjoy his trust assets is quite different from the winding up of a trust upon the revocation of the trust by a living settlor who has the right to beneficial ownership and management of his assets. Here, Donald, as a living, breathing, revoking settlor, is perfectly capable of speaking for himself and directing the trustee to return his Trust assets as required under Probate Code section 15410(a)(1).

V

The doctor certifications of Donald's incapacity did not satisfy Rochelle's burden under the terms of the Trust to remove Donald as Co-Trustee. As a result, she could not unilaterally sell the Clippers.

Probate Code section 810, subd. (a) establishes a rebuttable presumption of capacity. A person is presumed to be sane and competent and the party challenging capacity has the burden to overcome the presumption. (See Prob. Code, § 810, subd. (a); see also *Estate of Fritschi* (1963) 60 Cal.2d 367, 372; *Estate of Sarabia* (1990) 221 Cal.App.3d 599, 604.) Rochelle, as the Petitioner, therefore had the burden of establishing that the Trust's removal provision for determining incapacity was satisfied. (1 Ex. Tab 8, pp. 176-77; 2 Ex. Tab 18, pp. 292-93.)

Paragraph 7.5.c. of the Trust provides in relevant part: "Any individual who is deemed incapacitated, as defined in Paragraph 10.24., shall cease to serve as a Trustee of all trusts administered under this document." (7 Ex. Tab 54, p. 1704.) Paragraph 10.24(b) of the Trust specifies:

> "'Incapacity and derivations thereof mean incapable of managing an individual's affairs under the criteria set forth in California Probate Code §810 et seq. An individual shall be deemed to be incapacitated if any of the following conditions exist: . . . (b) two licensed physicians who, as a regular part of their practice are called upon to determine the capacity of others, and neither of whom is related by blood or marriage to any Trustee or beneficiary, examine the individual and certify in writing that the individual is incapacitated . . ." (7 Ex. Tab 54, p. 1727.)

Thus, to remove Donald as Trustee, the Trust instrument requires: (1) two licensed physicians (2) who are regularly called upon to determine capacity (3) to examine Donald and certify in writing that he is "incapable of managing [his] affairs under the criteria set forth in California Probate Code §810 et seq." (Id. at pp. 1704, 1727 [Trust, ¶¶ 7.5.c. and 10.24(b)].) Requirements (1) and (2) were not at issue. (2 Ex. Tab 18, p. 306.) However, the parties expressly agreed that the trial court would determine requirement (3) as to whether the certifications of incapacity by Drs. Platzer and Spar satisfied the Trust's requirements, including Probate Code sections 810 et seq. (2 Ex. Tab 18, pp. 292, 304; 2 Ex. Tab 22, pp. 404.)

Evidence of a deficit in mental function alone does not support a determination of incapacity under Probate Code section 811, subd. (a). To the contrary, Section 811, subd. (a), requires not only evidence of at least one deficit in the statutorily identified mental functions, but also requires "evidence of a correlation between the deficit or deficits and the decision or acts in question." (Prob. Code, § 811, subd. (a); see also, *In re Marriage of Greenway* (2013) 217 Cal.App.4th 628, 640 ["[t]here

must be a causal link between the impaired mental function and the issue or action in question;" "in considering the causal link . . . the frequency, severity, and duration of period of impairment" are assessed].) Section 811(b) confirms that "[a] deficit in the mental functions listed [in Section 811(a)] may be considered only if the deficit, by itself or in combination with one or more other mental function deficits, significantly impairs the person's ability to understand and appreciate the consequences of his or her actions with regard to the type of act or decision in question." (Prob. Code, § 811, subd. (b).)

Probate Code sections 811 and 812 require incapacity to be measured by a "certain act" or decision at issue, such as capacity to enter into a specific contract, execute a trust, or make a will. (See Prob. Code §§ 811(a) ["do a certain act"]; 811(b)[" type of act or decision in question"]; 811(c) ["capacity to do a certain act"]; 811(d) ["capacity to do a certain act"].) 812 ["the rights, duties, consequences, risks and benefits involved in the decision"]. As one court has explained: "Probate Code section 811, subdivision (b) provides that a deficit in mental function is relevant only to the extent 'it significantly impairs the person's ability to appreciate the consequences of his or her actions *with regard to the type or act or decision in question.*' [Citation.] And under Probate Code section 812, a person's capacity is evaluated with regard to 'the rights, duties, consequences, risks and benefits 'involved in the decision.'" (*Lintz v. Lintz* (2014) 222 Cal.App.4th 1346, 1352, fn. 2, quoting *Andersen v. Hunt* (2011) 196 Cal.App.4th 722, 730 [emphasis in original]; see also *In re*

Marriage of Greenway, *supra*, 217 Cal.App.4th at p. 640 ["There must be a causal link between the impaired mental function and the issue or action in question."].)

Here, the doctors' certifications discuss mental deficits, but do not provide any correlation to any "certain act" or decision by Donald as required by the Trust and Probate Code sections 810 et seq. Quite simply, the general conclusion that Donald was incapacitated to serve as Trustee was made in a vacuum, without any correlation to how the mental deficits substantially impair Donald's ability to do any certain act or make any specific decision as Trustee. The certifications recite only that the deficit(s) rendered Donald incapacitated to serve as Trustee in a general sense. (6 Ex. Tab 46, pp. 1514-18; 6 Ex. Tab 50, pp. 1526-27.) Moreover, the doctors testified at trial that they did not talk to Donald about his involvement with the Trust's businesses, and there is no evidence that either doctor knew about or considered any particular acts or decisions by Donald as Trustee. (2 Ex. Tab 24, pp. 483, 485, 513; 3 Ex. Tab 26, p. 625.) The doctors did not, for example, inquire or consider whether Donald's actions as Co-Trustee were limited to arriving at his office every day and directing others to carry out the functions of Trustee. Dr. Spar admitted that he never even read the Trust including the removal provisions of Paragraphs 7.5.c. and 10.24(b) that require compliance with Sections 810 et seq. (2 Ex. Tab 24, pp. 513-14, 519-20.) While Dr. Platzer opined that Donald was "unable to reasonably carry out the duties as Trustee" (1 Ex. Tab 1, p. 80), Rochelle did not present any evidence that Dr. Platzer knew

about or considered any duties, acts or decisions by Donald as Trustee that were significantly impaired by the mental deficits. By failing to correlate the mental deficits to any certain act or decision, the certifications beg the question: what exactly was Donald incapacitated from doing as Trustee?

The doctors' certifications of a mental defect, in the form of a diagnosis of Alzheimer's, are not enough. Probate Code section 811, subd. (a), is clear that evidence of a mental deficit alone – without evidence that it significantly impairs a person's ability to understand and appreciate the consequences of his actions with regard to a certain act – is insufficient to support a determination of incapacity. "The mere diagnosis of a mental or physical disorder shall not be sufficient in and of itself to support a determination that a person is of unsound mind or lacks the capacity to do a certain act." (Prob. Code § 811(d).)

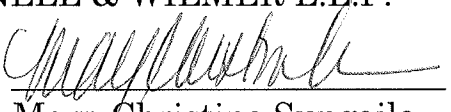
In sum, there is no evidence, as required under the Trust, of any correlation between the mental deficits and significant impairment of any certain act or decision by Donald as Trustee. The doctors' certifications fail to satisfy the requirements of Probate Code sections 810 et seq. that are expressly incorporated into the Trust to protect the Trustees from removal. Accordingly, Rochelle improperly removed Donald as Trustee, and cannot unilaterally sell the Clippers.

Conclusion

For the foregoing reasons, this Court should grant the requested writ and stay.

Dated: August 8, 2014

SNELL & WILMER L.L.P.

By: 
Mary-Christine Sungaila

Attorneys for Petitioner
Donald T. Sterling

Certificate of Word Count

The undersigned certifies that pursuant to the word count feature of the word processing program used to prepare this petition, it contains 9,581 words, exclusive of the matters that may be omitted under Rules 8.204(c)(3) and 8.490(b)(6).

Dated: August 8, 2014

SNELL & WILMER L.L.P.

By: _____
Mary-Christine Sungaila

Attorneys for Petitioner
Donald T. Sterling

19870290.1

Proof of Service

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 600 Anton Boulevard, Suite 1400, Costa Mesa, California 92626-7689.

On August 8, 2014, I served, in the manner indicated the foregoing document described as **Petition for Writ of Mandate and/or Prohibition or Other Appropriate Relief and Request for Immediate Stay; Memorandum of Points and Authorities; Supporting Exhibits (filed under separate cover); Request for Judicial Notice (filed under separate cover)** on the interested parties in this action by placing true copies thereof, enclosed in sealed envelopes, at Costa Mesa, addressed as follows:

Please see attached Service List

☒ BY REGULAR MAIL: I caused such envelopes to be deposited in the United States mail at Costa Mesa, California, with postage thereon fully prepaid. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. It is deposited with the United States Postal Service each day and that practice was followed in the ordinary course of business for the service herein attested to (C.C.P. § 1013(a)).

☐ BY ELECTRONIC SERVICE: C.R.C., rule 8.212(c)(2)(A)) as indicated on the service list.

☐ BY FACSIMILE: (C.C.P. § 1013(e)(f)), as indicated on service list.

☐ BY FEDERAL EXPRESS: I caused such envelopes to be delivered by air courier, with next day service, to the offices of the addressees. (C.C.P. § 1013(c)(d)), as indicated on service list.

☒ BY PERSONAL SERVICE: I caused such envelopes to be delivered by hand to the offices of the addressees. (C.C.P. § 1011(a)(b)), as indicated on the service list.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on August 8, 2014, at Costa Mesa, California.

Sandy Cairelli

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