

SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF MONROE

In the Matter of the Estate of

ANTHONY J. COSTELLO,

Deceased.

**SUPPLEMENTAL
AFFIDAVIT**

File No. 2016-787/L&M

STATE OF NEW YORK }
COUNTY OF MONROE } ss:

THOMAS F. BONADIO, being duly sworn, deposes and says:

1. I am the Co-Executor of the Estate of Anthony J. Costello, and have been fully engaged to the best of my abilities over the last five years and four months since the death of Anthony J. Costello in the management of this Estate, the extensive litigation surrounding the Estate and in attempts to compel my co-fiduciary to properly administer the estate's assets. As such, I am fully familiar with the issues pending before this Court.

2. In addition, I was for many years Mr. Costello's personal and business accountant. Such position gave me unique insight into the operation of his businesses and their financial positions at the time of his death. I am convinced that because of this knowledge, Mr. Costello appointed me as an Executor to assure that his assets were properly preserved for the benefit of his family, and I have striven to preform this fiduciary duty to the best of my ability. Unfortunately, as a Co-Executor I cannot out vote or compel my co-fiduciary to act; and since I am not a member of any of the LLCs, I have no direct rights of management in the businesses.

3. In response to the Petition of Lynette C. Ward seeking my removal as Co-Executor and the compelling of an accounting, I filed a detailed Answer on September 3, 2019, a copy of which is annexed hereto as Exhibit "A". I make this affidavit to supplement my response to Ms. Ward's Petition, to which there has yet to be fact-finding hearing, and to clarify my position relative to this Court's Order dated July 1, 2021 directing the filing of an account of my actions.

4. There have been multiple proceedings, conferences, Court appearances and disputes, as well as a myriad of issues that have arisen in this estate. Even those of us

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who have been intimately involved with this matter from the beginning, would have difficulty recollecting and summarizing all that has occurred over the last five years. For this reason, I am setting forth herein what I submit is an accurate summary of my involvement in this estate as an account of my actions as Ordered by this Court.

5. Shortly after Mr. Costello's death on March 14, 2016, and before my appointment as a Co-Executor, I attend a family meeting, at which I presented my plan on how the estate should be administered. I recommended an orderly sale of the businesses in which the estate had an interest. I was aware of the businesses' indebtedness and the difficulty and dangers of an estate operating commercial ventures. The Co-Executor, Brett Costello, openly opposed this approach and took the position that his father wanted the businesses to continue and that the Will gave authority over the businesses to him and excluded me having any say in their operation or liquidation.

6. Anthony Costello's Will, a copy of which is annexed hereto as Exhibit "B", was admitted to probate on April 12, 2016. Throughout the Spring and Summer of 2016 I expressed concern over the financial losses of the residential venture known as The Reserve, but my advice was ignored by my Co-Executor who insisted that it would eventually be profitable and that I had no authority over the business assets of the Estate. He also refused to share any detailed financial information with me.

7. In light of the friction that had developed between myself and Brett Costello we, with the help of our respective counsel, negotiated a "Working Agreement" that spelled out the parameters of the shared fiduciary obligations regarding the business assets, and set up a system for the sharing of information and decision making. A copy of that agreement is annexed hereto as "Exhibit C". At that time I was represented by Harris Beach, PLLC.

8. The Working Agreement called for the active involvement of Timothy Reidy, the Executive Vice-President of the Costello businesses, twice monthly meetings, a delineation of responsibilities, and sharing of financial information, among other things.

9. The Working Agreement was submitted to the Surrogate's Court as a Consent Order, but the Court declined to enter it as such.

10. The Working Agreement was not completely honored by my Co-Executor and my concern regarding maintaining the solvency of the Estate increased. It was becoming clear to me that the proper course was to sell the businesses in a deliberate, orderly manner while they were at maximum value in order to properly fund the estate and end the growing losses from The Reserve. In the fall of 2016 I retained Gallo & Iacovangelo, LLP to represent me in this matter.

11. In December of 2016, without warning to me or consent by me, Brett Costello terminated the services of Mr. Reidy. I protested this action (See Exhibit "D" annexed hereto), and conferred with counsel about exploring legal proceedings to compel delivery of detailed financial data, and effectuating the sale of the business interests. It was at this time I was also hearing from Brett Costello's siblings regarding their increasing frustration with his lack of transparency and their concerns with his ability to manage the various Costello enterprises.

12. In early 2017 my attorneys began work on a proceeding to compel a financial accounting of the business interests, to limit Brett Costello's sole control of the various ventures, and to direct a sale of at least Clinton Crossings and The Reserve.

13. I put a hold on this effort when in late February or early March of 2017, I was approached by Brett Costello who expressed regret at our strained relationship, promised to work me in a more cooperative manner, and agreed with my plans regarding the sale of the businesses and the funding of the Estate and its testamentary trusts.

14. In early March of 2017, I outlined a comprehensive plan for management of the estate and the funding of the trusts. This plan called for the estate to sell the Clinton Crossings complex as soon as a lease renewal with the major tenant was finalized. The plan also envisioned the estate divesting itself of The Reserve. Further, the plan then directed an orderly liquidation of most of the real property holdings and completion of the development of a commercial retail plaza owned by the estate. The purpose of the plan was to diversify the estate's assets, improve liquidity, finance the tax obligations, and provide distributions to the Estate and its testamentary trusts. I shared this plan with Brett Costello at a meeting on March 23, 2017, and he seemed to be in

agreement, and it was also presented in more general terms at a formal family meeting held on July 21, 2017.

15. It was at the July 2017 family meeting that Brett Costello reverted to his previous position, completely disagreeing with the proposal I put forth, and stating his intention to continue the operation of the businesses and his control of them.

16. It was then clear to me, and to Brett's siblings, that legal action would have to be taken to assure the proper management of the Estate, preserve its solvency and provide it with liquidity. I directed my attorneys to complete the drafting of the proceeding referenced in paragraph 12 above.

17. On or about July 31, 2017, I filed an advice and direction petition wherein I requested the following relief: that the Court advise and direct as to the validity of the direction under the Will of Anthony J. Costello that business matters be under the sole and exclusive control of the Co-Executor, Brett A. Costello; that I be permitted to assume control and direction of the business interests for the benefit of the estate pursuant to the plan purposed by me and outlined in paragraph 14 above; that I have the authority thereunder to retain appropriate business professionals to assist in such management and to sell of real estate holdings; that I be directed to implement the management plan put forth herein; and that the Court grant such other and further relief that seemed to it to be just and proper in the circumstances. A copy of that Petition, with its exhibits, is annexed hereto as Exhibit "E".¹

18. My petition was returnable on September 14, 2017. At that time there was oral argument and my counsel outlined the reasons for my petition and the necessity to act in order to maintain the solvency of the estate. Each of Brett Costello's three siblings, including Lynette Ward, and their counsel submitted affidavits and affirmations, fully supporting my petition, with their counsel at oral argument and in their submissions, providing additional legal arguments justifying the action requested. The affidavits of the

¹ At the direction of the Court, an amended petition was filed in February of 2018 for the sole purpose of adding the grandchildren who were also beneficiaries under the terms of the Will. As there were no substantive changes in the amended petition, it is not being annexed as an exhibit.

sisters are annexed as Exhibit "F", and their counsels' filings are found at entries numbered 88, 95 and 101, in the Court's Electronic Filing Docket.

19. Brett Costello, as respondent, opposed the petition, and at oral argument his attorney challenged my standing to bring the proceeding, denied the necessity and propriety of selling the business assets, and cross-moved to submit the controversy to the dispute resolution mechanism specified in the Working Agreement. (See entries 89, 93, 94, 102 and 103, in the Court's Electronic Filing Docket.) The Court ordered legal briefing and set the matter down for a conference on October 10, 2017.

20. After extensive discussion at the October conference, and after warning all parties of the disruptive nature and expense of the litigation, the Court ordered Respondent to provide counsel with certain financial information and directed the fiduciaries to meet in early November after receipt of the information to discuss reaching a compromise. The Court set December 15, 2017 for a conference to report on the progress of negotiations, and reserved January 8, 2018 for a fact finding hearing in the event there was no progress.

21. At the December 15, 2017 conference, Respondent's counsel reported that "everything was on the table" and a sale of properties could be worked out as soon as an analysis of the tax implications could be prepared and shared, along with a disclosure of the cross-collateralizations and the sharing of funds among the business entities. My counsel expressed concerns that this may be a delaying tactic, but after discussion agreed that such an analysis would be helpful in solidifying a reasonable compromise. With everyone's consent, The Bonadio Group would prepare an analysis as soon as information was turned over to them by the Respondent and the Court ordered retainer for that work was paid to them.

22. The report was to be circulated by the end of January, with a final conference date set for February 23, 2018. The January 8, 2018 reserved hearing date was adjourned to June 4, 2018 and the Court reserved that entire month for trial. It had become clear that the complexity of the financial issues was such that if a settlement could not be reached there would have to be extensive discovery, probable expert

testimony and a lengthy hearing. If no settlement was reached at or before the February conference date the Court would enter a formal scheduling order.

23. Respondent delayed the provision of the requested information to the Bonadio Group and the payment of the retainer. As a result, the requested analysis was not available until early February 2018. Meanwhile, a dispute arose between the sisters and Brett Costello over the failure of the sisters to receive their periodic distribution from the businesses, apparently occasioned by the airport entities' lack of available cash to pay for de-icing materials. This resulted in a telephonic Court conference on February 3, 2018, requests for additional financial information and ultimately the sisters exercising their rights under the operating agreements against their brother to dissolve certain of the LLCs and to have him removed as the manager of certain of the LLCs.

24. On February 14, 2018 a meeting was held at The Bonadio Group's office to review its draft report with my counsel and counsel for Brett Costello. At that time it appeared that a settlement agreement to sell off at least the Reserve and Clinton Crossings was probable. A meeting was scheduled for February 20 at the office of Bond, Schoeneck & King, counsel for the Respondent, for a meeting to present the analysis to the family and their counsel. A copy of that analysis is annexed as Exhibit "G".

25. The February 20 meeting began with The Bonadio Group presenting its report, going over it in detail and explaining how the financial information in the report supported the necessity to sell the business interests promptly and in an orderly manner. Up to this point it had appeared that a settlement in principal had been reached, and what remained was to hammer out the details.

26. It was at this juncture that the Respondent reversed his position, reverted to opposing any sales and put forth a counter-proposal. His new accountants from Mengel, Metzger, Barr (MMB) presented a power point presentation supporting a major refinance of all the debt and a continued operation of the businesses. The plan was supported only by Brett Costello and Elaine Costello. The sisters and their lawyers objected to it, pointing out that they would not support new borrowing and continued operation of the business under current management. It was also pointed out by my

counsel that the debt of the businesses was higher than that stated by MMB and exceeded the maximum loan to value ratio that MMB said was necessary to make its plan feasible.

27. At the Court conference on February 23, 2018 it was clear that because of the mixed messages conveyed by the Respondent, the settlement negotiations were at an impasse. The sisters as both beneficiaries of the Estate and members of the LLCs were not going to approve any more borrowing. Creditors were filing liens and taking judgments. The Court requested that the parties seriously consider an orderly liquidation of all the businesses and set a final conference date of March 9, 2018.

28. On March 5, 2018 a meeting of the Executors, their counsel and the accountants was held at Bond, Schoeneck & King to see if there was any common ground still remaining. There was some movement on sale of some of the businesses. It was clear that the sisters as LLC members would not under any circumstances approve further borrowing and that sealed the fate of the MMB plan. My position remained that only the sale of Clinton Crossings would generate enough liquidity to deal with the creditors and permit an orderly sale of the remaining assets. It is my recollection of this meeting that Brett Costello couldn't stay for the entire meeting and that after he left, there was movement by all the other participants to seriously consider the sale of Clinton Crossings.

29. At the March 9, 2018 Court conference, there were again verbal requests for a forensic accounting. The sisters reported through their counsel that meetings had been held under the operating agreements where dissolution of 10 of the LLCs (those governed by the so called New York operating agreements) were approved. Though there were discussions regarding sale of the various businesses, no firm agreement could be reached. The Court confirmed the June 4 trial date and directed that discovery proceed.

30. Discovery demands began being exchanged, and there was production of numerous documents. On or about March 23, 2018 Brett Costello filed an Advice and Direction Petition seeking a Court declaration as to the legality of the dissolution resolutions passed by his sisters for the ten New York operating agreement LLCs. On or about April 20, 2018 Martin O'Toole, Esq., as attorney for Lynette Ward and Karen Schaefer, Esq., as attorney for Alicia Smith, filed a motion to dismiss the Advice and

Direction proceeding claiming that documentary evidence, to wit the subject operating agreements, supported the dissolution resolutions being challenged in the Advice and Direction proceeding.

31. By this point, the discovery exchange made clear that the businesses lacked liquidity, and creditor debt was beginning to pile up. Neither the businesses nor the estate, could withstand the cost of further litigation and possible appeals. Further delay in taking action to resolve the underlying problems would only serve to guarantee the insolvency of the Estate. The Respondent began to understand that the only viable solution was to do what I proposed shortly after the death of his father two years earlier; that is, sell The Reserve, Clinton Crossings, and now City Gate as well.

32. A settlement conference was held on May 8, 2018. It was a somewhat contentious meeting. Besides the parties and Court personnel there were sixteen lawyers in attendance. Not only did the debate swirl around what assets to sell and how to sell them, but there was further consideration of whether it was financially and practically feasible to have a forensic audit, argument over an installment LLC distribution payment to Alicia Smith, what and how financial information should be distributed, how to resolve the existence and governance of the ten LLCs in light of the dissolution litigation and numerous other debates over the details, both trivial and important. The conference spread itself over three days, May 8, 10 and 11, then multiple further days circulating the consent decree to secure acceptable wording and everyone's signature. The Consent Decree, annexed hereto as Exhibit "H", was finally entered on June 7, 2018.

33. In light of the history surrounding the creation of the Consent Decree in which every represented party had the benefit of vigorous argument by experienced counsel, I was incredulous when I had to join in a contempt motion to enforce the decree to effectuate the sale of the Hydroacoustics building, and when its validity was challenged by Lynette Ward and Elaine Costello in the late summer of 2019. While Elaine Costello at the time was no longer represented by counsel, she had the full benefit of the financial disclosure provided each party, and her position was put forward by her son Brett.

34. On October 3, 2018, at a Court conference Richard Beers, the Special Master tasked with selling business properties under the Consent Order, gave a presentation in Court, reporting on the status of the sale and marketing of the properties, as well as his efforts to secure the necessary financial information. MMB was given to November 20, 2018 to provide a cash flow analysis.

35. I met with James Schell of MMB and counsel in January of 2019, to review the cash flow analysis MMB prepared. I questioned him on a number of items, particularly regarding accounts receivable and payable. He acknowledged a need for further elaboration which was subsequently provided.

36. Since the entry of the Consent order I have had numerous meetings and conversations with Richard Beers to provide my input and advice as a Co-fiduciary and receive his reports regarding the marketing and sale of the properties.

37. I remain actively engaged in the performance of my duties as a Co-Executor.

38. I have worked with my legal counsel throughout 2019 and 2020 in the transfer of the mortgage enforcement actions to the Surrogate's Court to insure a uniform handling of these issues which threaten the estate's solvency.

39. Subsequent to the appointment of the Special Master to the present time, I have repeatedly pressed my co-fiduciary for more detailed financial information and greater transparency in the operation of the businesses.

40. I have been hampered in these efforts to obtain more detailed financial information, not only by the apparent inability of Brett Costello to fulfill his promises to provide requested information, but also by the fact that I have no ownership interest in any of the LLCs, and hence have limited ability to compel production of the business data.

41. In addition, I have had to balance the contemplation of further legal proceedings with their concomitant costs and delays, against the precarious financial position of both the estate and the businesses, and the impact such proceeding would have on the Special Master's ability to sell the properties for the best obtainable price.

42. I have appropriately decided that the best action I can pursue for the benefit of the Estate is to support the Special Master's efforts, provide him the benefit of my business expertise, and avoid doing anything that impedes those efforts or increases the financial burden on the Estate.

43. In the last three years since the entry of the Consent Order I have actively opposed the special treatment of one beneficiary over another; have successfully opposed the efforts of Elaine Costello and Lynette Ward to vacate that Consent Order; have thoroughly examined, and where appropriate questioned, financial information provided by MMB and my Co-fiduciary; consulted with the Special Master and reviewed the letters of intent, and contracts that have been presented; and through my counsel help secure a portion of the proceeds from the sale of the Hydroacoustics building for the minority owners of the controlling LLC.

44. I have in no way violated my fiduciary duty nor in any other manner presented grounds for my removal as Co-Executor of the Estate. Further, it is respectfully submitted that the Petition of Lynette Ward contains nothing more than vague, generalized allegations containing no descriptions of specific actions or inactions on my part which would justify my removal as a fiduciary.

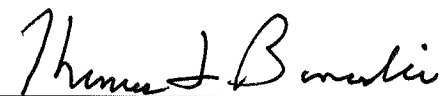
45. In reference to the demand for an accounting, it is the same demand I made in my initial petition in July of 2017, and still endorse today.

46. As outlined in this affidavit and my other filings in this estate, I have only slightly better access to the business financial data than she does. Without that data, I cannot provide that requested accounting. To obtain the data, I would have to bring a proceeding to compel its production and possibly remove my co-fiduciary. I am informed by counsel that the law surrounding LLCs may negatively impact the success of such a proceeding and I cannot justify the further expense, when we have the mechanism in place under the Consent Decree to liquidate the business assets in an orderly manner and ultimately account for them.

47. Regarding the non-business assets of the Estate, I submit herewith an asset inventory prepared in February 2020 that provides the information available at that time

as to the Estate's assets and their value. ^{Exhibit "I"} Obviously, the value of the business assets have been impacted by events, and their true value must await their orderly liquidation by sale through the efforts of the Special Master.

WHEREFORE, Respondent, Thomas F. Bonadio, again respectfully requests that to the extent that Petitioner's Petition requests relief against him, it be dismissed, and that he have such other and further relief as to the Court seems just and proper in the circumstances.



Thomas F. Bonadio

Sworn to before me this 29th day
of July, 2021



Notary Public

EDWARD A. WIRTZ
Notary Public, State of New York
No. 02WU4623554
Qualified in Monroe County
My Commission Expires 6/30/23

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