

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

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In the Matter of the Application of THOMAS F.  
BONADIO, Co-Executor of the Estate of

**ANTHONY J. COSTELLO**, Deceased,

for advice and direction pursuant to Surrogate's Court  
Procedure Act §2107 and §2102(6)

**File No. 2016-787/F**

**Answer to Petition for Advice  
and Direction Pursuant to  
SCPA § 2107 and § 2102(6)**

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**Answer to Petition of Thomas F. Bonadio for Advice and Direction  
Pursuant to Surrogate's Court Procedure Act § 2107 and § 2102(6)**

Brett A. Costello ("Respondent") hereby answers and opposes the Petition seeking advice and direction pursuant to Surrogate's Court Procedure Act § 2107 and 2102(6) filed by Petitioner Thomas F. Bonadio as follows:

1. Respondent is the Co-Executor of the Estate of Anthony J. Costello (the "Estate") and the Co-Trustee of trusts created under the Last Will & Testament (the "Will") of Anthony J. Costello (the "decedent").
2. Respondent admits the allegations set forth in paragraphs 1, 2, 3, 4, 18, 35, and 36 of the Petition.
3. Respondent denies the allegations set forth in paragraphs 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, and 34 of the Petition and responds to these allegations more specifically herein.
4. It is telling Petitioner does not reference any provision of the decedent's Will, a copy of which is provided as Exhibit B to the Petition. That is because the relief sought by Petitioner is antithetical to the decedent's express intent as is set forth within the four corners of his Will.

## **The Will & The Decedent's Intent**

5. Looking at the Will, the decedent clearly anticipated that, at the time of his death, he would own interests (the “Business Interests”) in various business entities (the “Businesses”), which would be in his Estate. See Will, Article VII.

6. While the decedent’s ownership interest in many of the Businesses at the time of his death was 60%, as is shown on Exhibit C to the Petition (with the remaining 40% owned individually by the decedent’s children in equal parts—Brett Costello, Alicia Costello Smith, Lynette Costello Ward, and Andrea DiLiberto), it is not accurate to represent the interests owned by the decedent at the time of his death as now owned by “Anthony.” See Exhibit C to Petition. As further described below, upon settlement of the Estate the decedent’s ownership interest in **all** of the Businesses are to be transferred to and held by Trust B under the Will, **for the sole benefit of Elaine Costello** (the decedent’s surviving spouse, who is not even specifically mentioned in the Petition) **during the remainder of her lifetime** and to be controlled (*i.e.* voted) under the sole control of Respondent.

7. In his Will, the decedent set forth his express “desire that my Executor and Trustee shall continue **to hold and operate each business** as a part of my estate *and the trusts herein created.*” See Article VII (emphasis added).

8. More specifically, the decedent directed that the Business Interests would be held by Trust B for the benefit of his wife, Elaine Costello, throughout her life. See Article V(A), V(B)(2). The decedent further directed that, after the death of Elaine Costello, Trust B would continue “for as long as my Trustee determines that there is suitable management in place for the operation of the [Business Interests],” to the

extent permitted by the rule against perpetuities, for the benefit of the decedent's children and any of their issue. See Article V(B)(2)(d)(iii)(C)-(E).

9. The decedent also gave Respondent, and any qualified successor appointed by him, authority to, **only after the death of Elaine Costello**, distribute the Business Interests (which are referred to as the "Voting Interests" in the Will) to one or more lineal descendants who "demonstrated the ability and desire to operate and manage" such interests. See Article V(B)(2)(d)(iii)(A). If the Trustee determines that there is not suitable management in place for the continued operation of the Business Interests after Elaine Costello's death, the decedent directed that Trust B may be terminated—by either distribution of the Business Interests by Respondent in accordance with Article V(B)(2)(d)(iii)(A) and/or by an orderly liquidation of the Business Interests and distribution to the decedent's remaining children and/or their issue. See Article V(B)(2)(d)(iii)(D).

10. In other words, the decedent clearly intended that Trust B would continue to hold the Business Interests throughout Elaine Costello's life and even after, to the extent practicable, and that such Business Interests could potentially be distributed to the decedent's lineal descendants by Respondent or by any qualified successor appointed by Respondent. This testamentary plan is in line with the fact that nearly all of the Business Interests are in closely held family businesses.

11. Paramount to the impropriety of the relief sought by Petitioner is Article VII of the Will, wherein the decedent vested Respondent with the **sole powers and authorities to control and manage the Business Interests**.

12. Article VII specifically states: "I hereby vest my son, BRETT COSTELLO, as Co-Executor and Co-Trustee, including his successor, with the following powers and authority . . . all of which may be exercised by him with respect to every business enterprise in my estate." A list of the powers conferred upon Respondent in connection with the Business Interests is set forth in paragraphs (A) through (N) of Article VII, which include, among others, the powers to: "retain and continue to operate the business for any period that [Respondent] may deem advisable"; "control, direct and manage the business"; "hire and discharge officers and employees"; and "sell or liquidate all or any part of any business at any time and price and upon any terms and conditions (including credit) that [Respondent] may determine." See Articles VII(A)-(C), (J).

13. Notably, the decedent vested Respondent with authority to vote any stock or other security or business ownership interest that decedent owned at his death in Respondent's "**sole discretion**," allowing him to vote the Business Interests as he sees fit and to effectively control all of the entities in which the decedent had a majority ownership interest at his death. See Article VII(B). The properties Petitioner suggests should be immediately liquidated are all properties owned by the Businesses.

14. The vesting of these powers solely in Respondent is consistent with Respondent having worked alongside his father for 30 years, during which time Respondent worked on all aspects of and directly managed the decedent's real estate and aviation businesses, primarily under the name Anthony J. Costello & Son Development. Respondent has been the CEO since 2013, and prior to then served as President. (A current organizational chart and one from February 2012 are attached

hereto as **Exhibit A.**) Petitioner's effort to minimize Respondent's role with respect to the Businesses in paragraph 10 is thus completely inaccurate.

15. Moreover, during his life, the decedent expressed to his wife, Elaine Costello, on numerous occasions his intent that Respondent would have sole powers to control and manage the Business Interests after his death. See Affidavit of Elaine Costello ("Elaine Costello Aff."), dated August 23, 2017, submitted herewith, though Elaine Costello has retained separate counsel to represent her in this proceeding—James G. Vazzana.

16. As such, the request that the Court direct Petitioner to "assume responsibility in the management of the business interests," Petition ¶ 32, is contrary to the decedent's express intent that Respondent have sole powers and authorities with respect to such matters.

17. Petitioner's request that this Court direct the Estate to adopt and implement the "plan" set forth in the Petition, see Petition ¶ 33, is contrary to the decedent's intent and against the business judgment of Respondent.

18. Petitioner's "plan" is roughly set forth as: (1) directing the immediate sale of Clinton Crossings Medical Center ("Clinton Crossings"); (2) directing the immediate sale of The Reserve on the Erie Canal ("The Reserve"); (3) directing "an orderly liquidation of most of the real property holdings"; and (4) directing the "completion of the development of a commercial retail plaza owned by the estate" (*i.e.*, CityGate). See Petition ¶ 16. Petitioner's justification for this plan is: "to diversify the estate's assets, improve liquidity, finance the "tax obligations", and provide distributions to the

beneficiaries.” *Id.* Each of these justifications, and the related allegations set forth by Petitioner, are based on improper assumptions, alternative facts, and half-truths.

### **Clinton Crossings**

19. Petitioner first suggested the idea of selling Clinton Crossings in March 2017, at which time Respondent told Petitioner that the sale of properties owned by the Businesses is a matter of strategic timing and that other potential arrangements, such as joint ventures, should also be considered.

20. There have been several changed circumstances since March 2017, which make it inopportune to sell Clinton Crossings at this time. For one thing, the re-negotiation of a lease with Clinton Crossings’ Major Tenant (*i.e.*, the University of Rochester) was completed in May 2017 (not July 2017 as alleged in paragraph 19 of the Petition). At that time, and as Petitioner is well-aware and was consulted about, the Major Tenant, through the efforts of Respondent, entered into a 15-year lease (obtained by Respondent) for Building D (Anthony J. Costello & Son – (Andrea) Development, LLC) with an option to purchase the building for a discount at the end of the term. Over its term, this lease will provide \$22 million in secure revenue.

21. This renegotiated lease secured substantial regular cash flow from a reliable tenant. Selling Clinton Crossings at this time would likely result in the Estate (and the other shareholders) receiving less than its full value due to the Major Tenant’s purchase option, without the Estate (and the other shareholders—Respondent and his siblings) receiving the benefit of the \$22 million guaranteed income stream. Because the value of Building D is expected to continue going up, selling Clinton Crossings at a later date will likely result in a higher sale price (even with the purchase option) and the

Estate (and the other shareholders) will have benefitted from the guaranteed rental income in the meantime.

22. To put this in perspective, a sale of Clinton Crossings at this time, taking into consideration the purchase option, could potentially have a negative net impact of between \$13.5 million and \$21.5 million on the gross sale price. Given that the Estate is a 60% interest owner of the entities that constitute Clinton Crossings, a sale now could potentially have a negative net impact on the Estate of \$8.1 million to \$12.9 million (and a negative net impact on the other shareholders of \$1.35 million to \$2.15 million each).

23. Moreover, as Petitioner knows, due to the July 14, 2017 refinancing of Building D (further described below), the Estate will incur a 3% penalty if it prepays all or any portion of the outstanding principal balance. Thus, given the amount refinanced, if Clinton Crossings is sold at any point over the next year, the Estate will incur a penalty of approximately \$312,000.

24. Additionally, Respondent has been speaking with the Major Tenant about other potential opportunities with the Businesses, and such opportunities would likely vanish if the Estate were to sell Clinton Crossings right now.

25. Thus, the decision of when to sell Clinton Crossings cannot be solely driven by interest rates, as is suggested by Petitioner. See Petition ¶ 25. It is Respondent's business judgment, supported by material facts, that it would be imprudent to sell Clinton Crossings at this time.

### **The Reserve**

26. As for The Reserve that Petitioner is requesting the Court to direct an immediate sale of, Respondent acknowledges that this project has operated at a loss

due to the large front-end infrastructural investment that was made by the decedent during his lifetime.

27. At this point in time, most of the infrastructure for The Reserve (a 350-home development with various community amenities) is complete, so it would be imprudent to sell off the entire project for a mere discount of the debt. The decedent personally guaranteed more than \$15 million in debt related to The Reserve, a significant portion of which would not be funded through a sale of it at this time and would instead fall to the Estate, and the other shareholders (*i.e.*, the decedent's children, who are each 10% owners). So the Estate, and the other shareholders, would suffer significant losses—for which it (nor they) has sufficient liquidity—if there is an immediate sale of The Reserve.

#### **Orderly Liquidation of Assets**

28. As for the third point of Petitioner's "plan," see Petition ¶ 16, nowhere does the decedent's Will direct, or even intimate, that there must be or should be an orderly liquidation of the Estate's "real property holdings" during Elaine Costello's lifetime (nor does the Working Agreement, which is attached as Exhibit D to the Petition, contemplate an orderly liquidation of the Estate's assets).

29. On the contrary, the Will contemplates that there would **not** be an orderly liquidation of the Estate's assets. The Estate's "real property holdings" are the primary assets of the Business Interests, which, as evidenced by the Will, the decedent clearly intended to continue operating throughout the lifetime of Elaine Costello and, only upon her death, to potentially pass to the decedent's lineal descendants and/or to be used for the benefit of the decedent's children and/or their issue.



30. During his life, the decedent expressed his intent to his wife, Elaine Costello, that his various business endeavors would continue operating after his death and potentially pass to their children. See *Elaine Costello Aff.* The decedent further expressed his intent that the Businesses not be immediately liquidated at his death. *Id.*

31. Demonstrating his commitment to the Businesses, Respondent alone, without the Estate or any of the other beneficiaries, has personally guaranteed debt related to The Reserve, as well as other projects in excess of \$63 million.

32. Petitioner's request for the Court to direct an orderly liquidation of the Business Interests seems to be based on the false assumption—as asserted in paragraphs 23 and 24 of the Petition—that assets need to be sold “so that the beneficiaries [can] start receiving benefits,” casting dispersions because “the beneficiaries . . . have yet to receive any lump sum distribution from this Estate.” As previously explained, **Elaine Costello is the only vested beneficiary of Trust B.** Elaine Costello has implicit trust in Respondent's ability to control and manage the Business Interests, and has confidence in the decisions that he is making with respect to them. See *Elaine Costello Aff.*

33. **The decedent's children (including Respondent) are contingent remainder beneficiaries of Trust B—they will only potentially receive income from and/or the corpus of Trust B if they survive Elaine Costello and to the extent the Business Interests are not otherwise distributed to other of the decedent's lineal descendants as set forth in the Will.** Thus, there is no “lump sum” due to the beneficiaries at this time with respect to the Business Interests, and absolutely no need to liquidate the Business Interests under the Will in order “to fund” the Trusts.

34. The decedent's children are continuing to receive the same monthly draws (totaling about \$261,000 annually) as they did during the decedent's lifetime, in connection with their minority ownership interests in the Businesses, as well as any profits that result from the sale of assets held by the Businesses. This has been true even despite the difficult cash flow position that the Businesses were in at the time of the decedent's death, and despite creditor obligations.

35. If any of the decedent's children (and Respondent's siblings) take issue with Respondent's management of the Businesses or contend that there have not been sufficient "distributions" to them (as shareholders), they are really doing so only in their capacities as shareholders—not as beneficiaries of the Estate, because their beneficial interests are contingent upon the occurrence (or non-occurrence) of several events (*i.e.* surviving Elaine Costello, and then only if the Business Interests are not otherwise distributed to other of the decedent's lineal descendants).

36. If the decedent's other children want to invoke any rights they may have as shareholders of the various Businesses, they are free to do so but the proper forum is not the Surrogate's Court.

37. The decedent's other children—none of whom have worked in any of the Businesses for any recent or substantial amount of time—are attempting to pressure Respondent through this advice and direction proceeding solely in their interests as shareholders to seek to extract additional money from the Businesses (as they have done in the past) despite the need to address creditors of the Businesses.

38. Presumably Respondents' siblings have been advised by their counsel that many of the operating agreements for the various Businesses provide that if any

member commences a legal action against the company, Anthony Costello, or Brett Costello, then such member's ownership interest shall convert automatically from Class A to Class B (voting to non-voting) and that Brett Costello (after Anthony's death) shall have an irrevocable option to purchase that member's interest. These provisions further demonstrate that the decedent's intent that Respondent control the Businesses, even in the event of any discontent by any of the other minority shareholders. (While his siblings have already triggered these provisions in the course of this proceeding, Respondent has no intent to act on these provisions at the present time or in this forum, as Respondent continues to believe that a resolution can be achieved for the benefit of the entire family.)

39. Respondent agrees that the Estate has sufficient assets that, if properly managed, will be able to satisfy all of its obligations and contribute to the trusts for the benefit of the beneficiaries. But Respondent disagrees with the suggestion in paragraph 28 that the Business Interests must be liquidated in order to do so. Thus, it is Respondent's business judgment, supported by material facts, that it would be imprudent to sell The Reserve at this time.

#### **Diversification of Assets**

40. The suggestion that the real property owned by the Business Interests must be sold in order to diversify the estate's assets rings hollow. In contrast to the allegations in paragraph 12 of the Petition, Respondent has discussed this issue with Petitioner on numerous occasions and Respondent has shared his views that he both (1) believes the Estate's assets are diversified and (2) that the allocation of the investments does not pose a severe risk to the financial status of the Estate.

41. The Estate's assets are indeed diverse, encompassing commercial office space, medical office space, aviation space and services, a residential housing development, and a commercial retail development.

42. The decedent was a real estate developer in Western New York throughout his 35-year career. It is disingenuous for Petitioner to argue for geographic diversification in paragraph 11 of the Petition, given that, upon and information and belief, Petitioner never made any such recommendation to the decedent during his lifetime, despite admittedly serving as his business advisor. The property holdings of the Businesses are located in a wide variety of settings, products, and marketplaces, from city to suburban, and industrial, residential, and aviation.

43. The decedent never sold a single non-residential property during his career, except on one occasion when forced to do so due to the exercise of a purchase option. The Will demonstrates the decedent's clear intent that the Businesses that he and his son built together throughout their lifetimes be continued to the extent practicable and potentially passed on to his lineal descendants, even despite the inherent risks involved in the operation of any business and openly acknowledging that the Estate "is engaged in a speculative enterprise *at my request*." See Article VII (emphasis added).

44. Respondent is not opposed to selling any of the properties held by the Businesses. For example, Respondent expects to close on the sale of a commercial property within the next 60-90 days, which, once concluded, is expected to gross \$1 million. But it is just that Respondent does not think that the value of these properties—and the Business Interests—will be maximized by selling off as quickly as possible. In

fact, just the opposite is true—a liquidation as set forth by Petitioner will certainly not allow the Estate (and Trust B's) assets—and the ongoing projects—to be maximized.

### **The Estate's Debt & Liquidity Issues**

45. Petitioner's nonspecific assertion that there has been "virtually no progress on the business matters to the detriment of the Estate" since February 2017, see Petition ¶¶ 27, is completely unfounded. The management and operation of all of the Businesses have improved since the decedent's death. Contrary to Petitioner's allegation in paragraph 27, debt service costs of the Businesses has decreased by 11%, cash flow has increased by nearly 40%, and revenue has increased by 16% since the Will's admission to probate. (A summary comparing the finances of the Businesses between 2016 and 2017, as well as a summary of recent efforts and current initiatives to continue reducing debt servicing costs and increase cash flow and revenue are attached hereto at Exhibit B). All of this information has been continuously made available to Petitioner and the beneficiaries, and specifically offered to the beneficiaries and their counsel at prior family meetings.

46. Specifically, the aforementioned renegotiation of the lease with the Major Tenant of Clinton Crossings secured significant cash flow.

47. That lease was also the basis for a very favorable refinancing of Building D that closed in July 2017, right before Petitioner filed this Petition. The refinancing provided about \$6 million in liquidity to the Estate, \$3 million of which is set aside for tax obligations **that arose during the decedent's lifetime**, and that went unpaid as a result of the failure of Timothy Reidy, The Costello Group's former Executive Vice President to the CEO and in-house accountant, to set aside a tax reserve for a prior

sale in January 2016 when the decedent was still alive, as further described below. The remaining portion went to pay down debt associated with The Reserve, CityGate, and other Estate debts.

48. The refinancing also significantly cut the applicable interest rate and reduced the monthly mortgage payment on Building D by nearly 50%, for a **total savings of \$720,000 annually**. Additional refinancing of other buildings in Clinton Crossings are underway that would reduce debt service **by an additional \$840,000 annually**. See Exhibit B. And Respondent is in the process of negotiating a sale of property at CityGate with a major developer. So progress is indeed being made to manage the debt of the Businesses and the Estate.

49. Petitioner's assertion in paragraph 19 of the Petition that the proceeds from the refinancing have not "been applied to the other tax obligations of the estate" is disingenuous. As Petitioner knows, \$3 million of the proceeds have been reserved to pay tax liabilities resulting from the sale of a commercial property in January 2016, **prior to the decedent's death**. As Petitioner also knows, taxes have yet to be paid only because (1) Timothy Reidy failed to keep a tax reserve for the sale of this property and also because (2) The Bonadio Group, which is the accountant for all of the Businesses, has not yet completed the tax return for 2016. So Petitioner's suggestion that there is a lack of progress in addressing these tax obligations ignores that the Estate is actually waiting on The Bonadio Group.

### **Distributions**

50. Petitioner's assertion in paragraph 19 of the Petition that the decedent's children were to receive proceeds from the re-financing of Clinton Crossings "as beneficiaries" is the same shareholder versus beneficiary muddling that is rampant in

the Petition. To be clear, no trust distributions are directed, **or even made discretionary**, from Trust B (which is to hold the Business Interests) to the decedent's children (including Respondent) during Elaine Costello's lifetime.

51. The distributions referenced in paragraph 19 of the Petition were shareholder distributions obtained through the refinancing of Building D, which Alicia Costello Smith, Lynette Costello Ward, and Andrea DiLiberto elected to receive in their capacities as 10% owners of that entity, not as beneficiaries under the Will. Contrary to Petitioner's allegation in paragraph 19, these distributions were made within the required timeframe.

52. Any other suggestion by Petitioner that "distributions" should be made to the decedent's children really refer to amounts that these individuals (Respondent included) may receive as minority shareholders of the Businesses, subject to corporate creditors who stand before them. The children's interest in their capacities as shareholders is not before this Court.

53. Indeed, as is stated in paragraph 8 of the Petition, the testamentary trusts have not yet been funded. As Petitioner is well-aware, the estate tax returns were only just filed on June 15, 2017. It is not possible (and would be irresponsible) to fund the trusts prior to the State and the IRS reviewing the estate tax returns and providing closing letters, which—given the size of the estate—will likely take 18 months.

54. Moreover, Petitioner's assertion in paragraph 11 of the Petition that the Estate should extricate itself from real estate development and sell off (seemingly all) real property controlled by the Estate in order to "fund the trusts" again shows the

incongruence of his position and the decedent's intent. The decedent intended that the Business Interests be held by Trust B if possible, not sold to fund Trust B.

### **Conflicts of Interest**

55. The suggestion that Respondent's decisions are motivated by his own self-interest in order to protect his own salary (which is below-market and is the same salary that he was paid during the decedent's life and for the past nine years) is as ridiculous, unsubstantiated, and false as is Petitioner's allegation that Respondent's prior illness presents a serious risk of incapacitation going forward. Neither is remotely true. Regardless, the future is unknown—for both Petitioner and Respondent—and the Will therefore contemplates that Respondent can appoint a successor with respect to his Article VII powers and authorities.

56. Respondent does not intend to take statutory commissions.

57. Furthermore, Respondent is a 10% interest owner, as are his three siblings, in the entities that comprise Clinton Crossings, as well as most of the other Businesses. It would stand to reason that if Respondent was really motivated by his own self-interest, then he would support Petitioner's call for an orderly liquidation of all holdings, given that Respondent might benefit (in the short term) from such sales as a minority shareholder. But Respondent is duty-bound in his capacity as Co-Executor and Co-Trustee, and given his sole powers to control and manage the Business Interests, to effectuate the decedent's intent and to maximize his mother's beneficial interests and his sisters' beneficial and ownership interests, not his own self-interests.

58. It is actually Petitioner who would benefit from an orderly liquidation of the Estate's assets. The Petitioner would receive a commission upon any sales of Estate or



Trust property that occurs while serving in his fiduciary capacity. Conservatively, and under current circumstances, an orderly liquidation of the Estate would result in Petitioner earning statutory commissions totaling approximately \$1.634 million, based upon the non-discounted value of the Estate assets (approximately \$80 million). To the extent that any of the Business Interests continue to be held in trust throughout Petitioner's lifetime, as is expressly contemplated by the Will, Petitioner will not benefit.

59. Petitioner has indicated that he is aware of several REITs that may be interested in properties owned by the Businesses, see Petition ¶¶ 25, but he has not shared specific information about any such opportunities with Respondent to date. It would seem that if Petitioner were actually aware of interest, that he would *and should* share that information with Respondent in the interest of the Estate.

### **The Working Agreement**

60. Respondent denies the allegations in paragraph 15 of the Petition, which characterize Petitioner as "pressing for progress . . . with little positive results," and the similar connotations in paragraphs 30 and 31. As of the filing of the Petition, Respondent had complied with the requirements set forth in the Working Agreement and provided Petitioner with information requested concerning the Business Interests and/or the Estate. Petitioner did not communicate to Respondent any frustration that matters were not moving forward until just prior to his filing the Petition.

61. Contrary to allegations in paragraphs 29 of the Petition, Petitioner and Respondent agreed on February 28, 2017 after a 2.5 hour discussion to work together more cooperatively, after **both parties** admitted that they had not been forthcoming with each other.

62. As of the filing of the Petition, Respondent had fully complied with his end of the Working Agreement. Respondent has taken many actions as a result of Petitioner's advice, contrary to the allegations in paragraphs 27 and 30 of the Petition.

63. Respondent has consistently granted access to Petitioner to information requested concerning the Businesses and the Estate.

64. Petitioner's assertion that Respondent terminated Timothy Reidy's employment without consulting Petitioner is false. Respondent met with Petitioner on December 14, 2016 and informed Petitioner that he intended to terminate Mr. Reidy. Petitioner stated that it was Respondent's decision, and even so, Respondent continued to communicate with Petitioner about it throughout the termination process. It is worth repeating that it was Mr. Reidy who failed to set aside a tax reserve for the January 2016 transaction, which necessitated the Estate to reserve \$3 million from its recent refinancing of Building D to cover the potential tax liability from that transaction. These funds otherwise would have been available to further improve liquidity or for distributions.

65. It was only later that Petitioner voiced his disagreement with Respondent's decision to terminate Mr. Reidy. But the Working Agreement expressly provides that Respondent has ultimate control as to Reidy's employment status, see Ex. D to Petition at § 7, an authority that is consistent with the Will. See Article VII(C).

66. Additionally, Mr. Reidy's role under the Working Agreement has been filled by Michael Picard, who was hired as Chief Financial Officer and Strategic Advisor of The Costello Group on December 21, 2016. Petitioner has not voiced any concern

regarding Mr. Picard's performance to Respondent. To the contrary, Petitioner has commented favorably on Mr. Picard's business acumen.

67. Petitioner is the one who breached the Working Agreement because he was required to seek a resolution of the issues raised in the Petition by communicating with Respondent and then, and only as a last resort, to resolve the dispute through the Dispute Resolution Procedure set forth in Working Agreement, which required binding arbitration **by a third party neutral**—Robert J. Lunn, Esq.<sup>1</sup>

68. Petitioner sent an email to Respondent on the morning of July 25, 2017 requesting that Respondent “sell [Clinton Crossings] as soon as possible,” articulating his desire to “diversify the [Estate] assets as soon as possible” and his concern about the Estate's liquidity.

69. Contrary to the allegations in paragraph 26 of the Petition, Respondent replied the same day, restating that Respondent did not think the timing was right to list Clinton Crossings for various reasons, which he set forth, and that he, too, was mindful of the Estate's liquidity issues, which arose from decisions made and actions taken prior to the decedent's death.

70. Without even responding to Respondent's email, let alone following the Dispute Resolution Procedure set forth in the Working Agreement, Petitioner simply

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<sup>1</sup> Section 9 of the Working Agreement sets forth the following “Dispute Resolution Procedure”:

*In the event of delay, disagreement or deadlock between the Parties as to any matter pertaining to administration of the Estate not subject to Costello's ultimate control as set forth herein, each of Bonadio and Costello may consult with his respective counsel and authorize such counsel to attempt to resolve the same. If counsel for Bonadio and Costello are unable to resolve their dispute, or agree on a timetable for doing so, within 72 hours, then the parties shall engage Robert J. Lunn, Esq. to resolve the parties' dispute, and his decision shall be final, conclusive and binding on the parties.*

See Ex. D to Petition at § 9 (emphasis added).

instituted this proceeding and thereby needlessly and carelessly caused the Estate to bear the attorneys' fees and costs associated with this proceeding and has taken away valuable personnel time from the Businesses, in addition to wasting judicial resources.

### **First Defense**

71. Petitioner lacks standing to seek advice and direction under SCPA § 2107 and § 2102(6), because although he is a fiduciary, he has no powers under the Will with respect to Business Interests.

### **Second Defense**

72. Any interest that Petitioner may have with respect to the Business Interests arises only under the Working Agreement. This dispute must therefore be submitted to arbitration before the third party neutral as required by the Working Agreement.

73. Petitioner has carelessly and needlessly caused the Estate to bear the expense of this proceeding by failing to submit this dispute to arbitration.

74. The Court should therefore deny the Petition, order Petitioner to submit his dispute to arbitration per the Working Agreement, and further order Petitioner to reimburse any attorneys' fees and/or costs incurred by the Estate related to the Petition.

75. Although Alicia Costello Smith, Lynette Costello Ward, and Andrea DiLiberto are not parties to the Working Agreement, Respondent consents to their participation in any arbitration under the Working Agreement.

### **Third Defense**

76. The Court lacks jurisdiction to entertain Petitioner's request that it "advise and direct as to the validity of the direction under the [Will] that business matters be under the sole and exclusive control of [Respondent]." See Petition, Wherefore Clause.

77. Neither SCPA § 2107 nor § 2102(6), under which the Petition was brought, allow the Court to invalidate a provision of the Will. SCPA § 2107 may be invoked to request advice and direction as to “the propriety, price, manner and time of sale” in extraordinary circumstances. See *Estate of Bernstein*, 13 A.D.2d 743, 215 N.Y.S.2d 138, 140 (1st Dept. 1961) (“it is only in extraordinary circumstances that the court should lend its approval to the executors’ proposed sale”); *In re Osterndorf*, 75 Misc. 2d 730, 730-31 (N.Y. Sur. Ct. Nassau Cnty. 1973) (denying petition seeking advice and direction as to whether to sell property because the issue was “one of business judgment” and it was not an extraordinary situation).

78. Additionally, the Will has already been probated and thus Petitioner cannot now request to invalidate its provisions.

79. To the extent Petitioner seeks to re-frame this issue as a matter of construing the Will, the Will is clear on its face—the decedent vested Respondent with sole powers to control and manage the Business Interests. See Article VII.

80. Moreover, the decedent shared his wishes that Respondent have sole power to control and manage the Business Interests on numerous occasions with his wife, Elaine. See *Elaine Costello Aff.*

81. Petitioner’s concern that “the assignment of the responsibilities in the Will” does not insulate him from liability, see Petition ¶ 7, is unfounded because Petitioner could not possibly have liability as to matters over which he has no authority.

#### **Fourth Defense**

82. The Court also lacks jurisdiction to entertain Petitioner’s request that the Court direct Petitioner to “assume responsibility in the management of the [B]usiness

[I]nterests” and “retain . . . business professionals to assist in the . . . management of the business entities.” See Petition ¶¶ 32, 34.

83. Again, Petitioner’s request is an improper attempt to invalidate the Will and usurp the decedent’s clear intent as expressed in Article VII that Respondent would have sole powers with respect to control and management of the Business Interests.

84. Although Petitioner may have different **opinions** as to how Respondent should exercise his **business judgment** with respect to the Business Interests, these differences of opinion do not mean that Respondent is unfit to exercise the powers and authorities granted to him **alone** under Article VII of the Will.

85. If anything, Petitioner is simply speculating that “now is the time to sell” Clinton Crossings (and “most” of the other real property owned by the Business Interests too) solely because of low interest rates. While interest rates impact pricing,<sup>2</sup> this opinion does not take into consideration other factors—*e.g.* the impact of existing lease terms, refinancing terms, or any other limitations on the properties.

86. Petitioner is also speculating that selling off The Reserve as soon as possible, and taking a discount on the debt incurred by the decedent to finance the upfront infrastructural development of that project, will be a better way to mitigate losses than to complete the project.

87. But Petitioner has not alleged, and cannot show, that any **specific** damage or harm has either been incurred by the Estate or is reasonably likely to occur as a result of Respondent’s management of the Business Interests.

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<sup>2</sup> There has been speculation that interest rates will go up significantly for the past 15 years. While the Federal Reserve has increased short term interest rates twice over the past year, long-term interest rates (which would drive lending for the properties held by the Businesses) have actually been relatively stagnant. Thus reasonable minds can differ as to when long term rates will rise, and to what extent.

88. The decedent acknowledged that the Estate “is engaged in a speculative enterprise at my express request” and he tasked Respondent alone, who worked alongside the decedent for 30 years in all aspects of the Businesses, to manage the inherent risks in operating them. See Article VII; see also *id.* (setting forth the decedent’s intent that Respondent “not be held liable for any loss resulting from the retention and operation of any business unless the loss shall result directly from the Executor’s or Trustee’s gross negligence or willful misconduct”).

89. Given that the Will gives the decedent sole power and authority to manage and control the Business Interests, Petitioner cannot entirely usurp control simply because he would manage the Businesses Interests differently.

#### **Fifth Defense**

90. The Court further lacks jurisdiction to entertain the Petition to the extent that it requests advice and direction for the Estate to adopt the “plan” set forth in the Petition. See Petition ¶ 33.

91. The relief contemplated by SCPA § 2102(6) is where there is a disagreement between fiduciaries as to matters over which they share joint powers. See *In re Stanley*, 240 A.D.2d 268, 269-70 (1st Dept. 1997) (co-fiduciary may petition the court for direction if he or she disagrees with the other co-fiduciary with respect to matters over which the co-fiduciaries have joint powers) (citing SCPA § 2102(6)). This provision does not apply because Petitioner does not have any authority under the Will to manage and control the Business Interests.

#### **Sixth Defense**

92. The Court should also deny the Petition because it is really just a veiled and improper request to the Court to substitute its own business judgment for that of

Respondent. See *Matter of Lovell*, 23 A.D.3d 386, 387 (2d Dept. 2005) (“SCPA 2107 does not empower the Surrogate’s Court to substitute its judgment for that of the executor, especially when the executor is exercising a specifically-granted power”); *In re Ebbets*, 139 Misc. 250, 252 (N.Y. Sur. Ct. Kings Cnty. 1931) (denying petition for advice and direction as to whether trustees should vote shares to place a mortgage on the corporation because the question presented was “not of law but of business judgment”).

### **Seventh Defense**

93. The Court cannot provide advice and direction as to the sale of either Clinton Crossings or The Reserve, or really any of the real properties owned by the Business Interests, because there are no sale terms before the Court. See *In re Estate of Goldfarb*, 93 Misc. 401, 402 (N.Y. Sur. Ct. N.Y. Cnty. 1916) (denying petition for advice and direction that failed to “state facts which would enable the court to approve the particular method of sale suggested by the petitioner”).

94. It would be impossible to direct the sales of these properties without taking into consideration their values and potential sale terms, and Petitioner is really just improperly asking the Court to direct a management plan for the Estate. See *In re Hanna*, 119 Misc. 285, 286 (N.Y. Sur. Ct. Westchester Cnty. 1922) (noting that a petition for advice and direction regarding management of the estate is improper because “the court would become the executor and would be foreclosed upon a final accounting to hear objections urged against the acts of the executors”).

95. Directing the sale of these properties is not even possible, given that the Estate is only a 60% shareholder of the entities that own Clinton Crossings and The



Reserve, and the majority of the other real estate owned by the Businesses. The other shareholders would likely need to consent to any sales.

#### **Eighth Defense**

96. Additionally, for the reasons previously described, a sale of Clinton Crossings **at this time** is inadvisable because of the prepayment penalty for the refinancing, the purchase option on Building D, and the likelihood of losing other potential opportunities with the Major Tenant.

97. Selling Clinton Crossings also creates risk for the other Business Interests because these properties are a potential source of funds and collateral that may be invested or pledged with respect to the other Business Interests. See Article VII(D). It would cause a total restructuring of the business organization, thereby hindering the prospects of ongoing development projects, including the Commercial Retail Plaza that Petitioner admits should continue to be developed. See Petition ¶ 16.

98. The Petition gives no thought as to how liquidation impacts security for the financing of the various projects, in addition to Respondent's personal guarantees (of which Petitioner is aware). As Petitioner knows, an orderly liquidation is inconsistent with the continued development of CityGate, given that financing requires the pledging of assets as collateral and cross-collateral across The Costello Group portfolio.

99. A sale of The Reserve **at this time** would also cause the Estate to lose millions of dollars in upfront development costs that were invested by the decedent during his lifetime and which would not be recouped on a wholesale of the project.

100. Furthermore, Petitioner's request that the Court direct "an orderly liquidation of most of the real property holdings," see Petition ¶ 16, is clearly contrary to

the decedent's intent that the Business Interests continue to held by his Executor and Trustee, to the extent practicable. See Article VII.

**Ninth Defense**

101. Petitioner's request that the Court direct "an orderly liquidation of most of the real property holdings" conflicts with Petitioner's ongoing acquiescence to Respondent's agreement to personally guaranty debt in excess of \$63 million.

102. With respect to the Reserve, Respondent Brett Costello has personally guaranteed \$53 million of debt for the project.

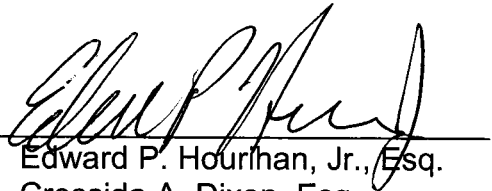
103. The recent refinancing of Building D added an additional \$10.5 million of personal guarantees by Respondent.

104. That Petitioner now steps forward suggesting a liquidation of these very assets, and others, all while agreeing to allow Respondent to personally guarantee indebtedness of over \$63 million in debt, is at a minimum, grossly irresponsible.

**WHEREFORE**, Respondent requests that this Court deny the Petition in its entirety for the reasons stated herein, and further order that Petitioner be ordered to pay any attorneys' fees and/or costs incurred by the Estate in connection with this Petition, and award any other and further relief as the Court deems just and proper.

Dated: September 8, 2017

BOND, SCHOENECK & KING, PLLC

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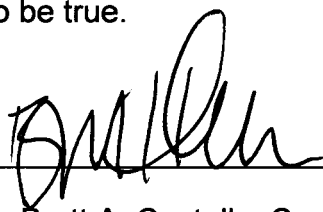
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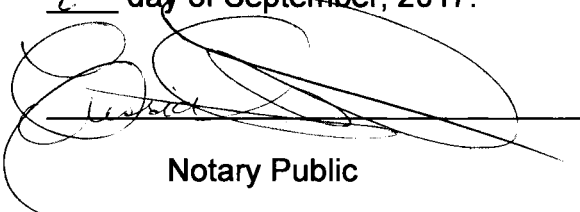
**VERIFICATION**

STATE OF NEW YORK        )  
COUNTY OF MONROE       ) ss.:

Brett A. Costello, being duly sworn, deposes and says that deponent is the Respondent in this action, that deponent has read the foregoing Answer and Objection to Petition and knows the contents thereof, that the same is true to the knowledge of deponent, except as to such matters which are stated to be alleged on information and belief, and as to those matters deponent believes it to be true.

  
\_\_\_\_\_  
Brett A. Costello, Co-Executor of  
the Estate of Anthony J. Costello

Sworn to before me this  
8<sup>th</sup> day of September, 2017.

  
\_\_\_\_\_  
Notary Public

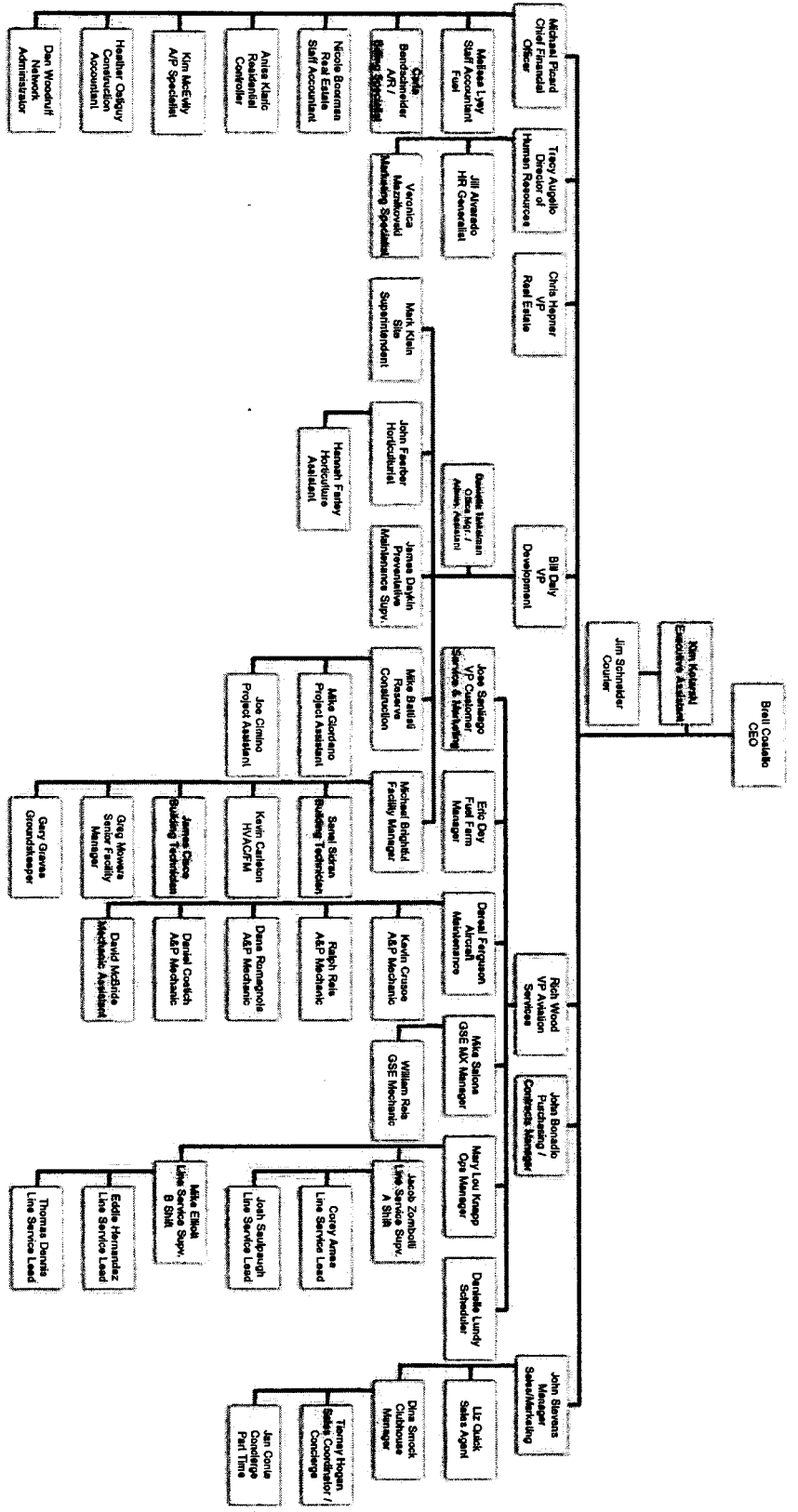
CRESSIDA A. DIXON  
Notary Public, State of New York  
Registration #: 02DI5075652  
Qualified in Monroe County  
Certificate Filed in Monroe County  
My Commission Expires: May 30, 2018

EXHIBIT

A

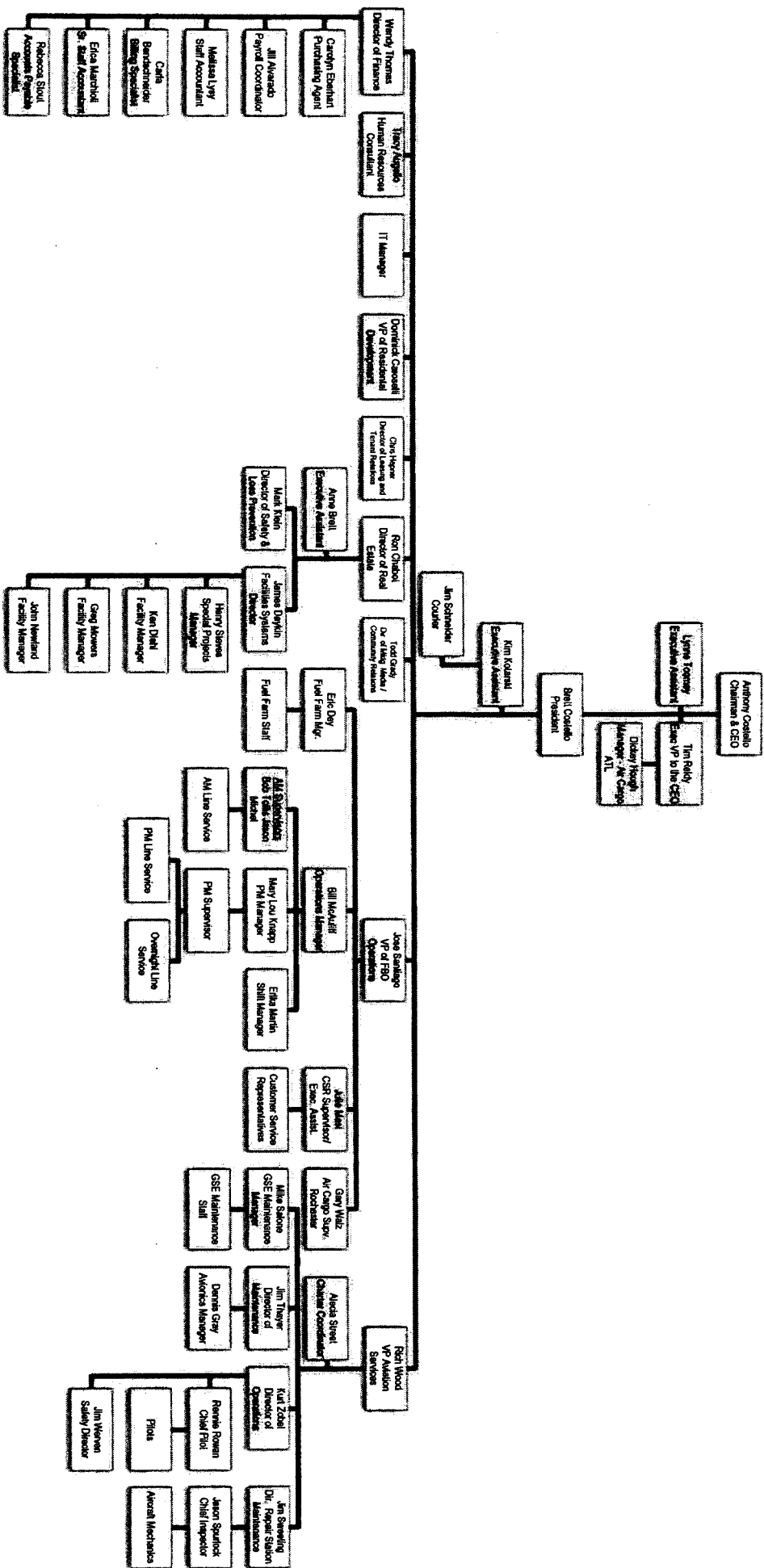
# USAIRPORTS / ANTHONY J. COSTELLO & SON DEVELOPMENT

August 30, 2017



# USAIRPORTS / ANTHONY J. COSTELLO & SON DEVELOPMENT

FEBRUARY 7, 2012





EXHIBIT

B

Costello Family Enterprises

June 2017

(in thousands)

	2016 Year-To-Date					2017 Year-To-Date Budget					2017 Year-to-Date				
	Operating	Debt Service	Net Cashflow	CAPEX	Total	Operating	Debt Service	Net Cashflow	CAPEX	Total	Operating	Debt Service	Net Cashflow	CAPEX	Total
<b>SUMMARY:</b>															
Clinton Crossings	2,770	(2,403)	367	(20)	347	2,503	(1,633)	870	(103)	767	2,670	(2,113)	557	(24)	533
Hydro	97	(58)	39	-	39	55	(57)	(2)	-	(2)	38	(58)	(20)	-	(20)
Airport Operations	1,538	(1,116)	422	(17)	405	1,352	(614)	738	(42)	696	1,554	(675)	879	(57)	822
Management	(977)	(53)	(1,030)	-	(1,030)	(972)	(34)	(1,006)	-	(1,006)	(1,106)	(83)	(1,189)	-	(1,189)
Corporate Center	(40)	(42)	(82)	-	(82)	(40)	(51)	(91)	-	(91)	(26)	(38)	(64)	-	(64)
City Gate	(191)	(607)	(798)	-	(798)	(14)	(50)	(64)	-	(64)	168	(742)	(574)	-	(574)
Reserve	(98)	(298)	(1,096)	-	(1,096)	(448)	(325)	(773)	-	(773)	(506)	(362)	(868)	-	(868)
	2,399	(4,577)	(2,178)	(37)	(2,215)	2,395	(3,438)	(1,043)	(145)	(1,186)	2,792	(4,071)	(1,279)	(81)	(1,360)
<b>Clinton Crossings</b>															
Bldg A	325	(239)	86	-	86	331	(196)	135	(9)	126	316	(257)	59	-	59
Bldg B	123	(233)	(110)	(2)	(112)	116	(128)	(12)	-	(12)	75	(250)	(175)	-	(175)
Bldg C	114	(193)	(79)	(8)	(87)	198	(128)	70	(76)	(6)	195	(207)	(12)	-	(12)
Bldg D	905	(724)	181	-	181	517	(460)	57	-	57	732	(672)	60	(13)	47
Bldg E	545	(396)	149	-	149	534	(242)	292	(3)	289	557	(244)	313	-	313
Bldg F	103	(128)	(26)	-	(26)	189	(91)	98	-	98	209	(92)	117	-	117
Bldg G	252	(220)	32	-	32	213	(121)	92	(5)	87	175	(122)	53	-	53
Bldg H	403	(269)	134	(10)	124	405	(267)	138	(10)	128	411	(289)	142	(11)	131
Hydro	2,770	(2,403)	367	(20)	347	2,503	(1,633)	870	(103)	767	2,670	(2,113)	557	(24)	533
	97	(58)	39	-	39	55	(57)	(2)	-	(2)	38	(58)	(20)	-	(20)
<b>Airport OPS</b>															
Roch RE	556	(381)	175	(2)	173	555	(313)	242	-	242	609	(373)	236	-	236
Hangars	349	(289)	60	-	60	327	(289)	38	(42)	(4)	368	(289)	79	(32)	47
Flight Support	690	(384)	306	(15)	291	500	(112)	488	-	488	601	(113)	588	(25)	563
Charters	76	(4)	72	-	72	-	-	-	-	-	5	-	5	-	5
250A/J600AJ	(133)	(58)	(191)	-	(191)	(30)	-	(30)	-	(30)	(29)	-	(29)	-	(29)
	1,538	(1,116)	422	(17)	405	1,352	(614)	738	(42)	696	1,554	(675)	879	(57)	822
<b>Management</b>															
Costello Group	(937)	(53)	(990)	-	(990)	(924)	(34)	(958)	-	(958)	(930)	(83)	(1,013)	-	(1,013)
Property Mgmt	(40)	-	(40)	-	(40)	(48)	-	(48)	-	(48)	(176)	-	(176)	-	(176)
	(977)	(53)	(1,030)	-	(1,030)	(972)	(34)	(1,006)	-	(1,006)	(1,106)	(83)	(1,189)	-	(1,189)
<b>Corporate Center</b>															
82 Acres - Corp Center	(40)	(42)	(82)	-	(82)	(40)	(51)	(91)	-	(91)	(26)	(38)	(64)	-	(64)
<b>City Gate</b>															
Spartan - Land owner/lessor	(407)	(352)	(759)	-	(759)	(262)	(450)	(712)	-	(712)	(279)	(488)	(768)	-	(768)
Samantha - REI (lessee)	230	(191)	39	-	39	221	(224)	(3)	-	(3)	447	(191)	256	-	256
Landon - Bldg A-D (lessee)	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Samuel - 12 acre parcel	(14)	(64)	(78)	-	(78)	(14)	(50)	(64)	-	(64)	-	(62)	(62)	-	(62)
Westral Dev1 - 18 acres adjacent to Citygate	(191)	(607)	(798)	-	(798)	(55)	(724)	(779)	-	(779)	168	(742)	(574)	-	(574)
<b>Reserve</b>															
AJC & Son Dev1	(798)	(298)	(1,096)	-	(1,096)	(448)	(325)	(773)	-	(773)	(506)	(362)	(868)	-	(868)

**Costello Family Enterprises  
Financial Notes**

**Year Over Year:**

1. Overall revenue **increased** by \$393,000 ( \$2,792,000 vs. \$2,399,000) or 16%
2. Overall debt service **decreased** by \$506,000 ( \$4,071,000 vs. \$4,577,000) or 11%
3. Total net Cashflow **increased** by \$855,000 ( -\$1,360,000 vs. -\$2,215,000) or 39%

**Actual -To-Budget 2017**

1. Budget assumed refinancing of the mortgage on Building D would be completed in March - was actually completed at the end of July. Budgeted savings of \$60,000 per month (\$720,000 annually)
2. Budget assumed refinancing of the mortgage on Buildings A,B & C would be completed in March - is targeted for November. Budgeted savings of \$70,000 per month (\$840,000 annually)

**Strategic Highlights for 2017**

1. Continued focus on cost control, specifically staffing levels. Since March of 2016, the overall payroll across all entities has been reduced by \$698,000.
2. Targeted refinancing of debt service. The refinancing of Building D from Northwestern Mutual to Morgan Stanley provided interest rate relief from 7.29% to 4.26%. It also allowed for an additional \$6.2 million of equity to be pulled and used to pay vendors (\$2.5 million) for older invoices, paydown debt on Westfall Development (\$500,000) and set aside a reserve for the 2016 estimated tax liabilities(\$3 million) related to the sale of a medical office building.

The planned refinancing of the debt on Buildings A,B & C solely for the purpose of interest rate relief. The current rate with Wells Fargo is 6.8%. The anticipated rate with Morgan Stanley is 4.6%.

3. Airport Operations has focused on fuel sales, lease renewals and expense reductions which have lead to aircraft hangers leased to capacity and a significant improvement in cash flow.

**Current Initiatives 2017/2018**

1. Selection of buyer for Hydro-Acoustics property (from multiple offers).
2. Complete negotiations with potential joint venture partner on the Reserve project. This will streamline the process; reduce overhead by 15% and accelerate the construction completion.