UNITED STATES BANKRUPTCY COURT
DISTRICT OF RHODE ISLAND

In re: BESS EATON DONUT FLOUR CO., INC., Debtor	)	Chapter 11 Case No. 04-10630
In re: LOUIS A. GENCARELLI, SR., Debtor	)	Chapter 11 Case No. 04-10682

ORDER (A) APPROVING SALE OF DEBTORS' OPERATING BUSINESS ASSETS AND RELATED REAL ESTATE TO TIM HORTONS (NEW ENGLAND), INC. FREE AND CLEAR OF CLAIMS, LIENS, INTERESTS AND ENCUMBRANCES, (B) AUTHORIZING ASSUMPTION AND ASSIGNMENT OF CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES, (C) AUTHORIZING REJECTION OF CERTAIN UNEXPIRED LEASES AND SETTING DATE FOR FILING PROOFS OF CLAIM WITH RESPECT THERETO, (D) AUTHORIZING BESS EATON TO OBTAIN SECURED CREDIT AND GENCARELLI TO GUARANTY SAME, (E) AFFIRMING GENCARELLI GUARANTY OF PAYMENT TO BESS EATON CREDITORS, (F) EXEMPTING TRANSFERS FROM SALES, USE, TRANSFER OR DOCUMENTARY TAX, (G) WAIVING THE TEN-DAY STAY OF BANKRUPTCY RULE 6004(g), AND (H) AUTHORIZING PAYMENT OF SECURED CLAIMS AT SALE CLOSING

This matter came before me on the motion (the "**Motion**") of Bess Eaton Donut Flour Co., Inc. ("**Bess Eaton**") and Louis A. Gencarelli, Sr. ("**Gencarelli**" and, together with Bess Eaton, the "**Debtors**") requesting orders pursuant to sections 105, 363, 364, 365 and 1146(c) of title 11, United States Code (the "**Bankruptcy Code**") and Rules 2002, 6004 and 6006 of the Federal Rules of Bankruptcy Procedure (the "**Rules**") (a) approving the sale of a material portion of the business operations and associated assets

of Bess Eaton and certain related real estate assets of Gencarelli (collectively, the "**Business Assets**") pursuant to Bankruptcy Code section 363, (b) approving the assumption and assignment of certain executory contracts and unexpired leases and the rejection of certain unexpired leases, pursuant to Bankruptcy Code section 365, (c) establishing a deadline for the non-debtor parties to rejected leases to file proofs of claim, (d) authorizing Bess Eaton to incur indebtedness secured by a mortgage on certain real property and Gencarelli to guaranty the obligations of Bess Eaton under the mortgage and to Bess Eaton's unsecured creditors, subject to certain conditions, all pursuant to Bankruptcy Code section 364, (e) exempting the transfers from sales, use, transfer or documentary taxes pursuant to Bankruptcy Code sections 363, 1146(c) and 105, (f) waiving the ten-day stay imposed by Bankruptcy Rule 6004(g) and (g) authorizing the payment of certain secured and other claims at the closing of the purchase. The Court having entered an order (the "**Sale Procedures Order**") after a hearing on March 16, 2004, approving bidding and auction procedures, authorizing the payment of the Break-up Fee, and scheduling a hearing on this Motion (the "**Sale Hearing**"), the Court having considered the relief requested in the Motion at the Sale Hearing, upon all of the proceedings had before the Court and after due deliberation and sufficient cause appearing therefor,

IT IS HEREBY FOUND, ORDERED, ADJUDGED AND DECREED THAT:

1. Bess Eaton filed a voluntary petition under chapter 11 in this Court on March 1, 2004, commencing Case No. 04-10630. Gencarelli filed a voluntary petition under chapter 11 in this Court on March 3, 2004, commencing Case No. 04-10682. Case Nos. 04-10630 and 04-10682 shall be referred to singly as a "**Case**" and together as the

"**Cases**"). The Debtors have remained in possession of their property and operated their businesses as debtors-in-possession pursuant to sections 1107(a) and 1108 of title 11, United States Code (the "**Bankruptcy Code**"). The Court entered an order consolidating the Cases for administrative purposes only on March 18, 2004.

2. Determination of the Motion is a core matter of which the Court has subject matter jurisdiction under 28 U.S.C. §§ 157(b)(2)(A), (D), (N) and (O) and 1334.

3. Notice and service of the Motion and the hearing thereon were proper and sufficient under the applicable Federal Rules of Bankruptcy Procedure (the "**Rules**"), including without limitation Rules 2002, 4001, 6004, 6006, 9008 and 9014, and the local rules of this Court.

4. The Motion is granted in all respects as provided herein. The objections of the United States Trustee and the Division of Taxation of the State of Rhode Island to the Debtors' request to exempt the Sale from sales, use, transfer or documentary taxes pursuant to Bankruptcy Code sections 363, 1146 (c) and 105 are sustained. Inasmuch as it is contemplated that Bess Eaton will in the near future sell its bakery and office building real estate, Bess Eaton will not obtain a loan from Purchaser secured by such real estate. All other objections to the Motion which were not withdrawn or resolved by agreement of the parties are hereby overruled.

Approval of Sale Pursuant to Section 363

5. The procedures established by the Sale Procedures Order afforded a full, fair and reasonable opportunity for any entity to make a higher and better offer to purchase the Business Assets.

6. The Purchaser's offer as set forth in the asset purchase agreement dated as of February 27, 2004, as amended as of April 23, 2004, (as so amended, the "**Asset Purchase Agreement**")[1] a copy of which is attached hereto by and among Bess Eaton and Gencarelli as Sellers and Tim Hortons (New England), Inc. as purchaser (the "**Purchaser**") is the highest and best offer received by the Debtors for the Business Assets. The transfers contemplated by the Asset Purchase Agreement constitute transfers for reasonably equivalent value and fair consideration under the Bankruptcy Code and the laws of Connecticut, Massachusetts, and Rhode Island and any other applicable state laws.

7. The sale of the Business Assets pursuant to the Asset Purchase Agreement is in the best interests of the Debtors and their respective estates and creditors.

8. All of the terms and conditions of the Asset Purchase Agreement are hereby approved in all respects, and the sale of the Business Assets pursuant to the Asset Purchase Agreement is hereby authorized under Bankruptcy Code sections 363(b) and (f). The omission in this Order of specific reference to any provision of the Asset Purchase Agreement shall not impair or diminish the efficacy, propriety, or approval of such provision.

9. Each of the Debtors is authorized and directed to execute, deliver and perform the Asset Purchase Agreement and all other documents contemplated thereby and to consummate the transactions contemplated thereby. The execution, delivery, and performance by each of the Debtors of the Asset Purchase Agreement and all other

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[1] Capitalized words not defined herein shall have the meanings assigned in the Asset

documents contemplated thereby, and the consummation of the transactions contemplated thereby, have been duly authorized by all necessary corporate action on the part of each of the Debtors. No consents or approvals are required to consummate the Sale; and all consents and approvals necessary for the assignment of the Assumed Agreements have been obtained. The Debtors are authorized and directed to assign and transfer to the Purchaser all of their respective rights, titles, and interests (including common-law rights) in and to any intangible property included within the Business Assets.

10. The Debtors have demonstrated adequate business justification to sell the Business Assets pursuant to the terms of the Asset Purchase Agreement prior to confirmation of a plan or plans of reorganization in the Cases.

11. Consummation of the Sale pursuant to the Asset Purchase Agreement will vest in the Purchaser all of the respective rights, titles, and interests of Bess Eaton and Gencarelli in and to the Business Assets, free and clear of all interests and encumbrances, and free and clear of all "liens" and "claims" (within the meanings ascribed to them in sections 101(37) and 101(5) of the Bankruptcy Code, respectively) whatsoever, known or unknown, fixed, liquidated, contingent, or otherwise, of any of Bess Eaton's and Gencarelli's respective creditors, vendors, suppliers, employees, or lessors and any other person that is the holder of one of such claims (collectively "**Claimants**"), including without limitation all liabilities, debts, claims, liens, pledges, offsets, set-offs, recoupments, and charges, employment related claims, payroll taxes, and successor, product, environmental, tax, and other liabilities, whether arising under contract, in tort, under statute or regulation, or otherwise, and, except for the Assumed Liabilities and its

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Purchase Agreement.

obligations under the Asset Purchase Agreement, the Purchaser shall not be liable in any way (as successor entity or otherwise) for any claims that any of the Claimants or any other third party may have against Bess Eaton, Gencarelli, the Business and/or the Business Assets. A sale of the Business Assets other than one free and clear of liens and claims except as noted would be of substantially less benefit to the Debtors' respective bankruptcy estates.

12. All persons hereby are permanently enjoined from taking any action against the Purchaser and the Purchaser's affiliates, successors, and assigns, and the directors, officers, employees, and other representatives and personnel of any of these, to recover any claim which such person has or at any time had or may have against Bess Eaton or Gencarelli or any of their respective affiliates, other than claims on the account of Assumed Liabilities and claims of Bess Eaton's and Gencarelli's permitted successors and assigns in respect of any breach or default of the Purchaser under the Asset Purchase Agreement.

13. Each entity with a lien or other interest on the Business Assets, subject to entry of this Order, has consented to the Sale, or the Sale is permissible under Bankruptcy Code section 363(f) over the objection of the entities not so consenting.

14. Each of the Debtors is hereby authorized and directed to use the proceeds of the Sale to pay such claims and costs as may be authorized pursuant to such Order as may be entered by the Court regarding the Debtors' Amended Application to Distribute Sale Proceeds at Closing, Including Payment of Secured Claims, Taxes and Cure Amounts (the "Payment Order"). The automatic stay of section 362(a) of the Bankruptcy Code is hereby modified to the extent necessary for such creditors to accept and apply

such proceeds. The subject secured creditors are hereby directed to execute and file or record such documents as may be required to effect the release or discharge of such mortgage, security interest or lien, including amendments of any Uniform Commercial Code financing statement covering any Business Asset. In the event any such secured creditor fails or refuses to file or record such documents, each of the Debtors is hereby authorized to do so. This Order shall constitute sufficient authority for the Debtor to take any such action, and shall be binding on the applicable federal, state and local authorities.

15. The sale and auction process conducted by the Debtors pursuant to the Sale Procedures Order was non-collusive and conducted at arms' length and in good faith. All of the actions taken by the Purchaser and the Debtors, and their respective officers, directors, employees, counsel, financial advisors and other professionals in connection with the Asset Purchase Agreement and the Motion, including without limitation the negotiation of the Asset Purchase Agreement and related agreements, have been taken in good faith. The Purchaser is a good faith purchaser within the meaning of Bankruptcy Code section 363(m) and is entitled to all of the protections afforded by Bankruptcy Code section 363(m).

16. In the absence of a stay pending appeal, the Purchaser will be acting in good faith within the meaning of Bankruptcy Code section 363(m) in closing the Sale as contemplated by the Asset Purchase Agreement, including the assumption and assignment of the Assumed Agreements (as hereinafter defined), at any time after the entry of this Order and, accordingly, such closing in the face of an appeal will not deprive the Purchaser of its status as a good faith purchaser. If the parties to the Sale consummate the transactions contemplated thereby while an appeal of this Order is

pending, the Purchaser shall be entitled to rely upon the protections of Bankruptcy Code section 363(m), absent any stay pending appeal granted by a court of competent jurisdiction prior to such consummation.

17. There is no common identity among the Purchaser or its Affiliates and the Debtors' incorporators, officers, directors or material interest holders.

18. The Purchaser does not constitute a successor to the Debtors or their estates. The Sale does not amount to a consolidation, merger or *de facto* merger of the Purchaser and the Debtors or their estates; and the Purchaser is not a mere continuation of the Debtors or their estates, there is no substantial continuity between the Purchaser and the Debtors or their estates, and there is no continuity of enterprise between the Purchaser and the Debtors and their estates.

19. No party has asserted the application of any "bulk-transfer" or similar laws and, to the extent any such laws do apply, the Sale pursuant to Bankruptcy Code section 363 supersedes any such state law restriction in all relevant jurisdictions.

20. There are no brokers involved in consummating this Sale and no brokers' commissions are due.

21. The Purchaser is only purchasing the Assets referenced in the Asset Purchase Agreement, and is not purchasing the Excluded Assets identified therein, which Excluded Assets include all avoidance actions and recovery actions arising under Bankruptcy Code Sections 541, 542, 544, 547, 548 and 549 and applicable remedies under Section 550 and 551.

22. The Purchaser does not assume and has no liability for any of Bess Eaton's or Gencarelli's liabilities or obligations whatsoever other than as specifically set

forth in the Asset Purchase Agreement with respect to the Assumed Liabilities, and is not assuming the Excluded Liabilities.

23. The Purchase Price for the Business Assets shall be paid and allocated as provided in the Asset Purchase Agreement provided however, that the allocation of the Purchase Price pursuant to the Asset Purchase Agreement shall not be binding upon the Creditors' Committee and shall be without waiver of or prejudice to the right of said Committee to seek a different allocation for any purpose other than with respect to the Bankruptcy Court's approval of the Sale

24. The Debtors are hereby authorized and directed to pay any land transfer taxes in connection with the Sale as provided in the Asset Purchase Agreement.

25. The Asset Purchase Agreement and any related agreements, documents or other instruments may be modified, amended or supplemented by the parties thereto in accordance with the terms thereof without further order of this Court so long as any such modification, amendment or supplement is not materially adverse to either Debtor.

26. Bess Eaton is hereby authorized and directed to change its name and the name of any of its Affiliates which include the words "Bess Eaton" to a name which does not include the words "Bess Eaton" or any part thereof or any similar words, not later than five business days following the Closing Date.

27. The Debtors are hereby authorized to accept transfer from Eastern Bank of its ownership interest in equipment constituting Business Assets.

Approval of Assumption of Executory Contracts and Unexpired Leases

28. The notice provided to the non-debtor parties to executory contracts and unexpired leases pursuant to the Sale Procedures Order was adequate and sufficient notice of the Debtors' intentions with respect to such contracts and leases and identified the correct version of each such contract or lease.

29. The leases of real property described in Schedules 2.1(a), 2.2(b), 2.2(c) and 2.2(d) of the Asset Purchase Agreement (the "**Assumed Leases**"), and the other executory contracts to be assumed by either of the Debtors, pursuant to the Asset Purchase Agreement (the "**Assumed Contracts**" and, together with the Assumed Leases and Assumed Licenses, the "**Assumed Agreements**") are hereby assumed by the Debtors and assigned to the Purchaser pursuant to section 365 of the Bankruptcy Code.

30. Any non-Debtor party to any of the Assumed Agreements that may have had the right to consent to the assumption and assignment of such agreement is deemed to have consented to such assignment as required by section 365(e)(2)(A)(ii) of the Bankruptcy Code.

31. The amounts (the "**Cure Amounts**") to be paid pursuant to the Payment Order or in such modified amounts as provided for therein will result in a cure of any defaults or compensate for actual pecuniary loss resulting from any defaults by the Debtors under the Assumed Agreements. Except to the extent that such Cure Amounts are paid by the Purchaser and are deducted from the Purchase Price consistent with the terms of the Asset Purchase Agreement, such Cure Amounts are payable by Bess Eaton or Gencarelli, as applicable. The nondebtor parties to the Assumed Agreements are

hereby enjoined from asserting any allegedly uncured default in Assumed Agreements that arose prior to the date of this Order.

32. The Purchaser need not provide any adequate assurance of future performance with respect to the Assumed Agreements pursuant to section 365(f)(2) of the Bankruptcy Code other than Purchaser's promise to perform under the Assumed Agreements following the Closing, which promise satisfies sections 365(b) and 365(f)(2)(B) of the Bankruptcy Code.

33. The Purchaser's intended use of the property leased under each Assumed Lease, as set forth in the Motion, complies with the use of the property permitted under the Assumed Lease, and use of the property by the Purchaser as so stated to be intended will not constitute a lack of performance by Purchaser of the Assumed Lease.

34. This Order may be recorded in lieu of, and with the same legal effect as, a memorandum of lease with respect to any or all of the Assumed Leases.

35. The Excluded Leases and Excluded Contracts (together, the "Excluded Agreements") shall be deemed rejected by the Debtors upon the Closing of the sale of the Business Assets.

36. The Debtors' assumption and assignment to the Purchaser of the Assumed Agreements and rejection of the Excluded Agreements represent a prudent exercise of the respective Debtor's business judgment.

37. On or before June 30, 2004 (the "**Rejection Bar Date**"), the non-debtor parties to the Excluded Agreements shall file proofs of claim for any and all claims relating to such Excluded Agreements or the rejection thereof, including without limitation prepetition arrears and any claimed rejection damages. The Purchaser, as the

party of economic interest, is hereby granted standing to object to any proofs of claim filed by the non-debtor parties to the Agreements, to prosecute any such objection and to seek approval of any compromise of any such objection. The Debtors are hereby directed to cooperate with the Purchaser in providing information and, if necessary, testimony, with respect to any such claim or objection.

38. The Debtors shall serve the Notice of the Rejection Bar Date, in the form attached to this order as Exhibit A, on all non-debtor parties to the Excluded Agreements on or before May 1, 2004 and file a certificate of service with respect thereto within 2 days thereafter.

The Gencarelli Guaranty of Payments to Creditors of Bess Eaton

39. The Asset Purchase Agreement also provides that, if the Closing occurs, Gencarelli will affirm a guaranty of the payment in full of the allowed unsecured claims in Bess Eaton's Case (the "**Bess Eaton Claims**") which he executed prior to the Petition Date (the "**Guaranty**", a true copy of which is attached hereto as Exhibit B). Provision of the Guaranty is a condition required by the Purchaser, and is necessary in order for the Debtors to realize the value of the Business Assets for the benefit of their estates.

40. Gencarelli has executed the Guaranty subject to this Court's approval. Gencarelli's execution of the Guaranty is hereby approved and affirmed, and Gencarelli is empowered, authorized and directed to perform all of his obligations thereunder (the "**Gencarelli Obligations**"). The Guaranty shall not be subject to avoidance under any of the provisions of chapter 5 of the Bankruptcy Code or any state law of similar effect.

41. Gencarelli has represented that he believes he will retain value in his estate following the sale of the Gencarelli Assets sufficient to honor the Guaranty and the

claims of all other creditors in his Case (the "**Gencarelli Creditors**"). In the event that Gencarelli's assets available to pay the Bess Eaton Claims are not sufficient to pay both the claims under the Guaranty and the claims of the Gencarelli Creditors, priority in payment shall be given to the claims of the Gencarelli Creditors without giving effect to the Guaranty.

42. Upon execution and delivery, the Guaranty shall be affirmed as a valid and binding obligation of Gencarelli, enforceable against him in accordance with its terms.

43. The provisions of this Order with respect to the Guaranty shall be binding upon and inure to the benefit of the Purchaser, the Debtors and their respective successors and assigns (including any trustee or other fiduciary hereinafter appointed as a legal representative of either of the Debtors or with respect to the property of the estate of the Debtors) whether in the Cases, in any subsequent case(s) under chapter 7 of the Bankruptcy Code or upon dismissal of any such chapter 11 or chapter 7 case.

44. Based on the record presented to this Court by the Debtors and the Purchaser at the Sale Hearing, the terms of the Guaranty have been negotiated in good faith and at arm's length between the Purchaser and the respective Debtors; and such terms are fair, reasonable and the best available under the circumstances, reflect the Debtors' exercise of prudent business judgment consistent with their fiduciary duties, and are supported by reasonably equivalent value and fair consideration.

45. The provisions of this Order with respect to the Guaranty and any actions taken pursuant thereto shall survive entry of any order which may be entered confirming any plan of reorganization in either of the Cases (each a "**Plan**"), converting either of the

Cases to a case under chapter 7 of the Bankruptcy Code, or dismissing either of the Cases; the terms and provisions of this Order shall continue in full force and effect notwithstanding the entry of such order.

Retention of Jurisdiction

46. This Court shall retain exclusive jurisdiction to interpret, construe, and enforce the provisions of the Asset Purchase Agreement and this Order; to resolve any and all disputes that may arise under or in connection with the Asset Purchase Agreement as between or among the Purchaser, Bess Eaton, and Gencarelli; and to hear and determine any and all disputes between or among the Purchaser, Bess Eaton, and/or Gencarelli and any other party relating to (a) the assignment to the Purchaser of any of the Assumed Agreements or (b) any claim against the Purchaser relating to any liability other than the Assumed Liabilities. In the event the Court abstains from exercising or declines to exercise jurisdiction with respect to any such matter or is without jurisdiction, such abstention, refusal, or lack of jurisdiction shall have no effect upon and shall not control, prohibit, or limit any obligations of the parties to the Asset Purchase Agreement to arbitrate any disputes among the parties or the exercise of jurisdiction of any other court having competent jurisdiction with respect to any such matter.

Waiver of Stay of Rule 6004(g)

47. The stay of Rule 6004(g) shall not apply, and this Order shall take effect and be enforceable according to its terms immediately upon entry on the docket in the Cases.

Miscellaneous Provisions

48. All of the provisions of this Order are nonseverable and mutually dependent.

49. The findings of fact set forth herein and conclusions of law stated herein shall constitute this Court's findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052, made applicable to this proceeding pursuant to Bankruptcy Rule 9014. To the extent any finding of fact later shall be determined to be a conclusion of law, it shall be so deemed, and to the extent any conclusion of law later shall be determined to be a finding of fact, it shall be so deemed.

Arthur N. Votolato
United States Bankruptcy Judge

Dated: April 23, 2004
Providence, Rhode Island

Judament#: 1:04-bk-10630-287-71

Entered on Docket: 4/23/04