**Statement of Robert D. Katz, CTP, MBA, CPA, Managing Director**

**Executive Sounding Board Associates Inc.**

**To the American Bankruptcy Institute Commission to Study the Reform of Chapter 11**

**Field Hearing**

**68th Annual Commercial Finance Association Hearing, Scottsdale, Arizona**

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I am Robert D. Katz, a Managing Director at Executive Sounding Board Associates Inc. (ESBA), a boutique turnaround, crisis management, corporate restructuring and bankruptcy consulting firm. ESBA was founded in 1978 and was one of the early consulting firms which focused on corporate restructuring and turnaround consulting. We have been named one of the top turnaround consulting firms in the nation on multiple occasions. I have been with ESBA since 1991 and have been named one of the top turnaround consultants of the year by two prestigious organizations within our industry. I have led numerous operational and financial turnarounds for both publicly traded and privately held companies; have served as an Interim Restructuring Officer for companies both inside and outside of bankruptcy. I have testified and served as an expert witness in Bankruptcy Court’s in multiple jurisdictions. I serve as a member of the Commercial Finance Association’s Education Foundation, am a former Turnaround Management Association Executive Committee member, and an Adjunct Professor of Finance and Strategic Management. The views and opinions expressed in this statement are mine and do not reflect the views of the firm, its clients or the University.

It is a privilege to have the opportunity to share my thoughts, views and opinions, and I thank the Commission for the opportunity to testify today regarding Chapter 11 reform.

**Is a More Time Requirement Needed or Beneficial?**

Excerpting from the Commission’s mission statement/purpose, “The Commission will study and propose reforms of Chapter 11 and related statutory provisions that will better balance the goals of effectuating the effective reorganization of business debtors – with the attendant preservation and expansion of jobs – and the maximization and realization of asset values for creditors and stakeholders.”

Whether these goals are accomplished through standalone Chapter 11 reorganizations, Section 363 sales, Article 9 sales, via cash collateral or with debtor-in-possession financing to me doesn’t really matter. What does matter is that we can sustain and hopefully increase value for the constituencies, preserve jobs and avoid liquidation of businesses; which ultimately leads to more economic production, more GDP production and an improvement of the standard of living in the United States.

A consideration/concern that has been raised is whether Section 363 sales happen too quickly or that the process may be short circuited. Should consideration be given to a minimum (i.e. mandatory) evaluation time for assessment of circumstances, except if the proverbial “melting ice cube” effect prevails? As a consultant in the middle to lower middle market for the better part of the last two decades, I can assure you that the melting ice cube situation has historically been and will continue to be the rule more than and rather than the exception. Based on my experience, the quicker a company gets in and gets out of bankruptcy, the better the chance for its long term viability.

**Why should there be a mandatory waiting time?**

If a constituency feels there is a need for more assessment time, there is nothing stopping the particular stakeholder from going into court; presenting their case to the Judge and explaining their circumstances. I have never been involved in a case where, if a party presented a compelling reason for more time, the Judge didn’t grant the request. So why establish a mandatory time limit that could have far reaching negative implications and could likely force a potentially viable business into a further distressed alternative?

Future bankruptcy legislation should continue with the same purpose as the Bankruptcy Reform Act of 1978, which sought to expeditiously focus and efficiently streamline proceedings.

I believe we are blessed in our system, and in the jurisdictions that I have practiced and testified, to have exceptionally bright and diligent Judges. Enabling and empowering them to use their business judgment in determining timelines is a critical aspect for debtors and their estates to achieve the mission and purpose that the Commission has outlined.

Most recently, I have been involved in a Section 363 sale that exited bankruptcy in 28 days (no it wasn’t GM and there was no TARP money). It was done before a court appointed examiner to insure that there were not only alternatives but also that all parties had ample time to present opposing points of view. The process was fair and adequate and in line with the Commission’s intent and mission statement as one of the underlying principals.

On the other side of the spectrum, I was involved with a standalone Chapter 11 reorganization of a hospital in an economically challenged area that remained in Chapter 11 for two years until it was able to amongst other things raise the financing and gain stakeholders’ acceptance to exit. In trying to maximize constituency value and preserve jobs, I don’t think one timeline and one rule applies – there are far too many nuances to consider and most are better I believe on a case-by-case basis.

When thinking about this issue, I am reminded of a quote by Former President Franklin Delano Roosevelt during his second term in office, “I never forget that I live in a house owned by all the American People and I have been given their trust.” Establishing additional mandatory timing delays for Section 363 sales may jeopardize the very premise of what the commission’s goals and objectives are. If there is a need for additional time it seems to me based on past experiences that the prudent parties involved will allow it and facilitate it.

Having the right people using proper judgment in a good system is a better alternative.

**Debtor-in-Possession Financing (DIP)….Truly the World of Supply and Demand**

Should there be statutory limitations on what a DIP lender is allowed to charge? I think it would be tremendously advantageous for the Debtor and, on behalf of those client engagements where I represent the company, I am all for it. Would it help the Company debtor? Absolutely! Offer a better chance to preserve jobs, yes.

However, to me it is counter intuitive to our economy and our free market system. Even a “standard” DIP loan usually has more risk than a loan to a non-bankrupt entity and, as such, the lender or investor should be compensated for the risk.

Imposing “artificial” restrictions on the capital system would likely in the short run be beneficial to the debtors; however, the risk is that if lenders and investors into this capital structure don’t feel they are fairly compensated, they ultimately will not lend into these situations. Thus reducing the number of participants, ultimately increasing costs in the long term for debtors.

While seemingly there is more money and more potential lenders/investors today than ever, it doesn’t necessarily trickle down to the middle market. Some middle and lower middle market companies going through a Chapter 11 process are still having trouble attracting capital and we should not be creating additional barriers to dissuade potential capital sources from providing capital to these companies. There are times when an expensive choice is better than no choice; although some would argue that may not necessarily be true.

Based on my experience, there are few, if any, participants that go through Chapter 11 that don’t understand the associated risks. They may not at the initial consideration stage but early on with the capable professionals assistance involved, they are well informed. An artificial rate or structure cap may provide some initial positive benefit, however it is unlikely to have a sustainable impact in the longer term and may indeed result in negative long-term effects. An emerging debtor has to be able to generate cash flow, and Chapter 11 affords a Company the opportunity to restructure its debt. No great opportunity comes without a certain cost and assessment. I believe that it is better to leave it up to the market and the prudent stakeholders from all sides of the transaction to determine the appropriate price and cost.

I appreciate the ABI Executive Director, Samuel J. Gerdano, and the Commercial Finance Association for coordinating today’s field hearing. I also appreciate the Turnaround Management Association and Mr. Gerdano for coordinating the hearing on November 3rd 2012 in Boston and further appreciate the monumental time and effort that the Members of the Commission, Commission Reporter and Advisory Committee Members have dedicated.

I welcome the opportunity to provide additional insight and information should the Commission desire.

Respectfully submitted,

Robert D. Katz

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