KANSAS LIVESTOCK ASSOCIATION

Since 1894

To: House Committee on Judiciary
Rep. Lance Kinzer, Chair

From: Aaron M. Popelka, V.P. of Legal and Governmental Affairs, Kansas Livestock Association

Re: **SB 124 re the Kansas Restraint of Trade Act**

Date: March 13, 2013

The Kansas Livestock Association (KLA), formed in 1894, is a trade association representing over 5,500 members on legislative and regulatory issues. KLA members are involved in many aspects of the livestock industry, including seed stock, cow-calf and stocker production, cattle feeding, dairy production, grazing land management and diversified farming operations.

Thank you, Chairman Kinzer and members of the Committee, my name is Aaron Popelka and I am with the Kansas Livestock Association (KLA). KLA appears today as a proponent of SB 124 with an amendment.

As indicted in previous testimony by Leslie Kaufman, KLA associates our comments with the testimony presented by Ms. Kaufman and a coalition of Kansas businesses. Previous testimony by KLA on February 20, 2013, laid the groundwork for why reform of the Kansas Restraint of Trade Act (KRTA) is important and how inaction could adversely affect Kansas agriculture. This testimony will highlight specific provisions of SB 124 that are necessary to protect the Kansas livestock industry and two alternative recommendations for amending this legislation that KLA believes would accomplish the goal of returning the reasonableness test to the KRTA.

The central theme of SB 124, whether it is the version originally introduced in the Senate Committee on Judiciary or the version that was passed by the entire Senate, is to return a reasonableness standard to the KRTA. This is necessary following the Kansas Supreme Court opinion, *O'Brien v. Leegin Creative Leather Products, Inc.*, 294 Kan. 318, 273 P.3d 1062 (2012). The *O'Brien* case substantially changed how Kansas courts interpret the KRTA. Rather than apply the longstanding reasonableness test to marketing arrangements that exist in the Kansas livestock industry and others, the *O'Brien* court decided to take a literal interpretation of an antiquated antitrust statute that predated federal antitrust law. The legislature must act to return Kansas antitrust law to the certainty that prevailed prior to the *O'Brien* decision.

Recommendation #1

The first recommendation, which was the approach adopted by the Senate and embodied in the current text of SB 124, ties the KRTA to judicial rulings from the U.S. Supreme Court on federal antitrust law. This approach, by reference to federal jurisprudence, should incorporate the rule

of reason in Kansas law. It also avoids a debate about how to categorize per se violations, as Kansas courts would simply look to federal cases on when to apply the rule of reason. KLA believes this approach will work, but suggests a small technical change to the version of SB 124 passed by the Senate. **On page 2, line 9, strike the word "comparable" and on page 2, line 10 after the word "court" insert, "and apply a rule of reason to claims involving restraint of trade".**

The aforementioned technical amendment is necessary because Sec. 1(b) of SB 124 is based on a Delaware antitrust law. The provision works with the accompanying Delaware antitrust statute because Delaware adopted an antitrust statute that mirrors federal antitrust statutes. The KRTA, however, predates the federal antitrust laws and the statutory text is different than federal statutes. If "comparable" is left in SB 124, the Kansas Supreme Court will likely disregard federal precedence claiming the KRTA is not "comparable" to federal antitrust laws. In addition, given the court's predisposition to a literal interpretation of antitrust statutes, there must be an affirmative directive from the legislature to follow the rule of reason.

KLA and the broader business coalition support the current approach in SB 124 with the above technical amendment. This approach was adopted the Senate on a vote of 36- 4 and we believe it is a viable solution.

Recommendation #2

If the Committee is uncomfortable with adopting the rule of reason by reference to federal jurisprudence, KLA would suggest an alternative approach that would adopt a descriptive reasonableness test without specifically directing Kansas courts to follow federal precedence. **To accomplish this approach the Committee would need to reinstate the stricken language in SB 124 starting on page 1, line 13, and continuing through page 2, line 6. It would also need to strike the reference to federal jurisprudence starting on page 2, line 7, and continuing through page 2, line 23.** This approach would preserve other components of SB 124 that are important to KLA and members of the business coalition, while allowing Kansas to articulate in statute its own rule of reason.

If Recommendation #2 is adopted by the committee KLA would like to draw the committee's attention to the reasonableness factors articulated on page 1, line 25 through line 33. It is important that we give trial courts some direction in how to properly weigh the reasonableness of an agreement. This would also allow an appellate court greater ability to review trial court cases that may not comport with the spirit of the reasonableness test. The reasonableness factors, laid out in the stricken language in SB 124 are taken directly from the preeminent U.S. Supreme Court case on determining the reasonableness of a marketing arrangement, *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

KLA would also like to affirm our support for the exemptions contained in Sec. 1(d) and the provisions on damages contained in Sec. 5 of SB 124. These provisions should remain in the version of SB 124 approved by the Committee.

First, KLA believes the current Packers and Stockyards (PSA) exemption language in SB 124 is appropriately crafted. The current exemption contained in SB 124 on page 3, line 1 through line 3 states: "The Kansas restraint of trade act . . . shall not apply to . . . any trust, agreement or arrangement that is governed by the provisions and application of 7 U.S.C. § 181 et seq., the

packers and stockyards act . . . ." This provision in SB 124 correctly represents the state of the law and protects the industry from unnecessary litigation. The use of the phrase "governed by" would accurately represent that the KRTA is preempted by the PSA.

Unlike many businesses, the livestock industry is governed by more than the federal Sherman and Clayton Antitrust Acts. As a reaction to the famous book, *The Jungle*, by Upton Sinclair, Congress enacted the Packers and Stockyards Act of 1921 (PSA). The PSA enacted additional protections for the livestock and meat industries that did not exist under the previously enacted federal antitrust statutes. As a result, the PSA dominates the area of antitrust law pertaining to the livestock and meat industries and preempts state antitrust statutes. *See Colorado v. United States*, 219 f.2d 474, 478 (10th Cir. 1954) (stating that "Congress . . . preempted and occupied the entire field with respect to the regulated activities [and] . . . provided for comprehensive regulations with respect to the activities covered by the [Packers and Stockyards] Act.")

Conversely, KLA believes the exemption language used in HB 2224, which the Committee reviewed on February 20, 2013, is inadequate and flawed. This exemption language uses the term "complies with" rather than the phrase "governed by". If the words "complies with" are used instead of "governed by", it would require our members to make the preemption argument every time a case is brought in state court. Furthermore, it would prevent a KRTA claim from being filed against a member of the livestock and meat industries as a result of a minor technical violation of the PSA. Such a minor technical violation would not be a true restraint of trade the KRTA was intended to prevent. For example, the PSA contains record keeping standards, a duty for certain entities to maintain registration, and scale certifications. Defending KRTA cases predicated on such technical infractions would be a burden on industry and only serve to encumber Kansas courts with cases it should rightfully dismiss under the preemption doctrine. Using the words "governed by" as are contained in SB 124 would decrease the case load of state courts and provide certainty to the industry by stating in statute that it must comply with one set of laws – the PSA.

Second, KLA supports language to limit damages under KRTA cases. The *O'Brien* case suggests that a plaintiff could recover full consideration damages and treble actual damages in a restraint of trade case brought under the KRTA. This frustrates original legislative intent and would lead to a windfall recovery. Current language in SB 124 would repeal full consideration damages and limit recovery to only treble actual damages. Full consideration is unnecessarily punitive and places Kansas at a disadvantage compared to most other states. Treble damages still allows a punitive component to recoverable damages, but ensures that damages are relevant to the alleged harm.

Thank you for the opportunity to submit testimony. KLA urges the committee to pass SB 124 favorably with either the technical amendment suggested in Recommendation #1 or the alternate approach recommended in Recommendation #2. If SB 124 is not passed and the *O'Brien* decision is allowed to stand, it would put Kansas at a significant disadvantage to other states and run contrary to the governor's and legislature's goal of creating a business friendly atmosphere in Kansas.