THE KANSAS HOUSE OF REPRESENTATIVES
COMMITTEE ON JUDICIARY

Proponent SB124, as amended but with Qualifications

My name is James P. Rankin and I am a partner in the Foulston Siefkin LLP law firm. We represent multiple clients including Leegin products, otherwise known as Brighton Collectibles, Inc. As you may recall, I appeared as a conferee on this issue about three weeks ago. Since that time, the Senate has passed SB124, as amended. Since I am a proponent, it is obvious there are many things about that Bill I admire and certainly favor. It reflects a scholarly effort at harmonization by Senator King and others. Indeed, this is the approach taken to anti-trust restraint of trade legislation in other states. Delaware, for example, has adopted the harmonization approach. Harmonization is a method for controlling the nature and extent of inevitable controversies over pricing and market participation techniques in a state law litigation context. Indeed, harmonization is a way of telling private business: "we operate similarly to familiar federal and sister state rules so, don't be afraid of nasty surprises in our state." There is a great deal to be gained through the harmonization approach taken by the Senate in SB124, as amended.

Harmonization works well where the language of a state's restraint of trade laws mirrors the wording of congress in the 1890 Sherman Act. These are the so-called "little Sherman" laws adopted after 1890 in some states. But, not all states chose to use the congressional language of 1890.

Unfortunately, a critical component of The Kansas Restraint of Trade Act was conceived and adopted approximately one year before congress passed the Sherman Act. The terminology of our law is thus quite different than that found in the Sherman Act. This difference was noted by The Kansas Supreme Court in last year's *O'Brien v Leegin Creative Leather Products.* Therefore, use of the term "comparable" in SB124, as amended, creates a potential avenue for a court to interpret a revised Kansas anti-trust law contrary to legislative intent. That is, while the Kansas Act uses concepts similar to Sherman and while our law was later amended to pick up concepts similar to later federal legislation (*i.e.*, the Clayton Act of 1914 and the Robinson Patman Act of 1936) the language is not quite comparable. This situation may open our courts to speculative claims unlikely to benefit consumers so much as the lawyers who find Kansas a friendly forum for class litigation. It would be unfortunate to leave any doubt about legislative intent since the current state of affairs is not likely to benefit Kansas consumers and may well damage our fragile economy at the very time Governor Brownback and the legislature are working to enhance Kansas' attractiveness to business, large and small. Kansas needs jobs and economic growth not more law suits.

The second qualification to my support of SB124 arises from the fact that it does not specifically reference the *rule of reason* analysis in the context of testing economic activity based upon the totality of circumstances. Because, as noted above, it would be unfortunate to leave any doubt about legislative intent. I believe that Kansas courts should be specifically directed to apply the *rule of reason* analysis or, regardless of legislative intent, they might continue to read the law literally. True, SB124 refers to United States Supreme Court jurisprudence where totality/reasonableness analysis is undertaken but the term "reasonable" should be used and I would urge referencing the specific factors for testing reasonableness found in Justice Anthony Kennedy's Majority Opinion in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.* (US Supreme Court, 2007). These factors are enumerated in HB2224.

Ultimately, the future of Kansas business and the potential for economic growth in Kansas is before you in legislation such as SB124, as amended. Our laws must be harmonized not only with federal law but also with the reasonable expectations of businesses seeking to operate in or find a home in our state.

The statute we have now, K.S.A. 50-101 *et seq*., is not well drafted and is based upon a 19th century view of the economy. K.S.A. 50-101 *et seq*. was passed during the populist/progressivist era of trust busting before the myriad of federal and state consumer protection and business regulatory rules began to be adopted after World War II. The current law offers our Supreme Court little guidance about the extent of protectionism – especially through private litigation – our elected officials believe is appropriate for our state.

I urge you to correct the situation created by the decision in *O'Brien* rendered last May. SB124 is as good a vehicle as any to begin the process of directing our courts to test market structures and practices against the competition and market prices that actually result. Courts should be guided away from slavish adherence to the language and populist fears of the Gilded Age.