Associated Wholesale Grocers, Inc.

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House Judiciary CommitteeTestimony Opposing SB124,
Amending the Kansas Restraint of Trade Act (KRTA)

March 13, 2013

Representative Kinzer and Members of the House Judiciary Committee:

Thank you for the opportunity to submit additional written testimony from Associated Wholesale Grocers, Inc. (AWG) relating to amendment of the KRTA. AWG strongly opposes SB124 and hopes that you will amend it using former HB2275 as your guide.

AWG is an 85 year old, member-owned grocery wholesaler headquartered in Kansas City, Kansas. AWG currently employs more than 1,000 employees in this State and 75 of AWG's members, operating 186 grocery stores across the State, employ countless more. Many are family-owned businesses operating family-run stores. The KRTA's protections are of vital importance to AWG, its Kansas members and all other Kansas businesses, large and small.

Although SB124 states that it is intended to "clarify and reduce any uncertainty or ambiguity" about application of the KRTA, it fails to do this. In fact, it would create greater confusion and ambiguity. Moreover, rather than restoring Kansas to its pre-*O'Brien* state (which has been everyone's stated goal), SB124 would move Kansas further away from it.

- For the first time in 100 years, SB124 (Section 1(b)) would require Kansas courts to interpret Kansas law based only on "ruling judicial interpretations of comparable federal antitrust law by the United States supreme court," not language enacted by this Legislature.

    - The KRTA predates federal antitrust law, its language is different and Kansas has always interpreted it based upon what is best for Kansans. SB124 obliterates that.

    - SB124 invites protracted lawsuits and creates enormous confusion. Given their differences, how "comparable" is the federal antitrust law? What level of "harmony" is required? Are only United States Supreme Court opinions truly relevant? What if the Supreme Court has simply denied review of a lower court decision – is that a relevant "ruling"? What if issues have not yet been heard by the Supreme Court but have been resolved by the lower federal courts such as the Tenth Circuit or the District of Kansas federal court? Are those decisions to be ignored, no matter how well reasoned? What if the lower federal courts are in conflict? Must Kansas courts evaluate all federal law, including decisions from the Ninth Circuit in California, to determine what is and is not allowed in Kansas?

- Kansas law currently and narrowly exempts from the antitrust laws certain organizations that "comply" with specific Kansas or federal statutes. SB124 (Section 1(d)) opens the floodgates to anticompetitive conduct by overly expanding these full exemptions.

- SB124 uses three different standards for exemptions - "complies with," "governed by" and "organized under." Not only does this create confusion, it leads to wholly unfair results. The company "governed by" one particular law does not have to make any effort to "comply" and yet enjoys full absolution for conduct made unlawful by the KRTA. Another company under another statute must "comply" to receive the same consideration. In the same section of SB124, one business is favored, while another is not.

- Because full exemption means immunity from the KRTA, any business who wants that privilege should at least be required to show compliance with these other statutes. Otherwise, it is tantamount to allowing the driver pulled over for going 110 MPH to avoid a speeding ticket by claiming they intended to go only 55 MPH, the posted speed.

- Although SB124 properly retains exemptions for franchise agreements and covenants not to compete, it specifically eliminated another equally important exemption, the exemption for group purchasing organizations. Such organizations ensure that Kansans have access to reasonably priced goods and that Kansas-owned businesses can compete with Wal-Mart and other nationwide chains. Unless these organizations have monopoly power, such buying groups are universally viewed as procompetitive and deserve the same exemption status as franchise and non-compete arrangements.

- SB124 (Section 5(b)) eliminates full consideration damages, which have been an essential part of Kansas law, especially for smaller, family-run businesses.

  - Despite arguments to the contrary (often raised by out-of-state businesses), full consideration damages play a critical role in leveling the competitive playing field for all Kansas businesses. Generally Kansas has such a small population (about 1% of the U.S. population) that, without full consideration damages, it would not be feasible, given the cost and risk, to bring corporate wrongdoers to court to recover only an overcharge amount. Thus, full consideration damages create a proper deterrent effect causing such corporations to think twice before launching headlong into activities which unlawfully restrict or destroy competition in Kansas. Moreover, because such damages are simpler, Kansas courts are not tied up for weeks with expert testimony.

  - Smaller states across the country, including South Carolina and Tennessee, provide full consideration damages for violations of their antitrust statutes.

HB2275 (which was recently before the Committee) serves as the perfect model for amending SB124. In fact, the differences between HB2275 and HB2224 (also recently before the Committee) could be reconciled to create a proper amendment to the KRTA – one that restores Kansas to the state of the law pre-*O'Brien* (as all parties desire) while avoiding the confusion and issues caused by SB124.

As for reconciling the major differences between, and opposition to, HB2275 and HB2224,

- The disagreement between the language "horizontal conduct" versus "horizontal price-fixing" could be reconciled by finding language that properly covers bid-rigging, supply-fixing and similar anticompetitive conduct without being more expansive than necessary.

- Although HB2275 sets forth factors for "reasonableness" which HB2224 does not, it does not appear that there is any significant disagreement that providing this kind of additional guidance in the KRTA is a good idea. Thus, reconciling this should be relatively simple.

- To the extent potentially exempt companies worry that strict, administrative compliance with the relevant statute is somehow too onerous, that issue could be reconciled by finding suitable language requiring effort and action in achieving good faith, full compliance.

- Finally, although neither HB2275 nor HB2224 addressed damages under the KRTA, the issues surrounding treble and full consideration damages could be reconciled by providing for an election of remedies – treble damages *or* full consideration.

For the sake of large and small Kansas businesses, like our members who are the grocery stores in your Kansas hometowns, we strongly urge you to significantly amend SB124 or, alternatively, to vote **No** on it and any other similar bill.

We greatly appreciate the opportunity to provide this testimony.

Sincerely,

ASSOCIATED WHOLESALE GROCERS, INC.

James C. Holland

James C. Holland
Senior Associate General Counsel

SEABOARD CORPORATION

March 7, 2013

Dear Representative Kinzer and Members of the House Judiciary Committee:

Thank you for the opportunity to submit written testimony from Seaboard Corporation, one of only three Fortune 500 companies headquartered in Kansas. Seaboard is one of the largest vertically integrated pork producers and processors in the United States. In Kansas alone, Seaboard has employees and offices located in Merriam, Hugoton, Leoti and Rolla.

Seaboard strongly opposes SB124 and hopes that you will vote against all efforts to change the KRTA to be consistent with this Senate Bill.

Seaboard's recent experience underscores why the KRTA is essential to even the largest Kansas businesses. In 2009, Seaboard was forced to file a lawsuit in Kansas state court against two out-of-state companies involved in an anticompetitive conspiracy that directly harmed Seaboard. In violation of the KRTA, these out-of-state companies rigged bids for insurance policies Seaboard purchased for its businesses here in Kansas and around the world.

Without the full consideration damages provided by the KRTA, it would have been incredibly difficult and enormously costly for Seaboard to prove the amount of its damages. By eliminating full consideration damages, SB124 only rewards those companies involved in anticompetitive conduct that harms every Kansan and harms every Kansas business. SB124 makes it easier for companies engaged in reprehensible conduct like bid-rigging and price-fixing to avoid punishment for conduct we all agree should be against the law.

As a Kansas company, Seaboard relies upon Kansas law to ensure that there is a level playing field for businesses in this State so that we can fairly compete with business in other states and around the world. The KRTA provides that protection. While we agree that the Legislature should make reasonable and measured changes to the KRTA, SB124 destroys these protections that are essential to small and large Kansas businesses alike.

We strongly oppose SB124 and ask that you vote against all attempts to wholly eliminate full consideration damages from the KRTA.

Very truly yours,

SEABOARD CORPORATION

David M Becker

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Senior Vice President and General Counsel

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