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TO: Rep. Lance Kinzer, Chairman  
Members of the Committee  
House Committee on the Judiciary

FROM: Leslie Kaufman, Kansas Cooperative Council, and on behalf of  
Kansas Electric Cooperatives, Inc.  
Kansas Grain & Feed Association  
Kansas Agribusiness Retailers Association  
Kansas Livestock Association  
Kansas Credit Union Association  
Kansas Bankers Association  
Kansas Farm Bureau  
Kansas Association of Ethanol Processors  
Coalition for a Competitive Kansas  
Petroleum Marketers & Convenience Store Association of Kansas

RE: **Support for SB 124 – Amending the Kansas Restraint of Trade Act (KRTA)**

Chairman Kinzer and members of the House Judiciary Committee, thank you for the opportunity to appear today and offer these comments on behalf of the Kansas Cooperative Council, Kansas Electric Cooperatives, Inc., Kansas Grain & Feed Association, Kansas Agribusiness Retailers Association, Kansas Livestock Association, Kansas Credit Union Association, Kansas Bankers Association, Kansas Farm Bureau, Kansas Association of Ethanol Processors, the Coalition for a Competitive Kansas and the Petroleum Marketers & Convenience Store Association of Kansas. For those of you that may not be familiar with our associations, we have provided information regarding the interests we serve at the end of our testimony. I am Leslie Kaufman and I am the President/CEO of the Kansas Cooperative Council. I will be providing the over-view testimony for our group and you will hear more industry/organization specific comments from a few of our other members, too. We join in support of their individual testimony, as well.

As you will remember, our coalition testified before your committee earlier this session regarding several proposals to amend the Kansas Restraint of Trade Act (KRTA). At that time, we acknowledged our coalition had drafted a reform bill and introduced it on the Senate side. SB 124 was our work product and a recommended approach for re-asserting a reasonableness standard in the evaluation of claims arising under the KRTA.

In short, many of you remember last spring when the Kansas Supreme Court issued an opinion on May 4, 2012 in the case of *O'Brien v. Leegin*. That decision, as seen by us and many others, arguably changed the landscape for evaluating certain cases under the Kansas Restraint of Trade Act (KRTA) opining that a reasonableness analysis is not part of Kansas law.

As a reminder, a **reasonableness analysis** allows an action, alleged to be anti-competitive, to be evaluated in light of all the circumstances surrounding the activity. The court is allowed to consider if the activity in question provides a benefit to commerce or the consumer and weigh that against any possible anti-competitive impact. The reasonableness analysis does not automatically declare an action "reasonable". An act may still be evaluated and found to be in violation of the KRTA. It simply provides a framework for judging activity from a comprehensive viewpoint. In contrast, a *per se* standard declares certain activities to be automatically in violation of anti-trust laws, without ever considering if there is a benefit to the activity.

You will also remember from our earlier testimony before this Committee, that our coalition has very straightforward, **basic goals for revising the KRTA post-O'Brien**:

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1. Recognize a reasonableness analysis for evaluating most conduct under the KRTA, either through articulating a reasonableness test or directing the court to the federal jurisprudence for evaluating anti-trust case through a reasonableness analysis;
  2. Clarify that Kansas law has long-recognized certain exemptions to the KRTA and continue those exemptions;
  3. Clarify that federal law preempts certain state action and the venue and standards for evaluation of certain activity rests under federal law;
  4. Recognize that certain exemptions have developed regarding franchise agreements and agreements not to compete; and
  5. Reform the damages provisions by removing recovery of full consideration, thus eliminating a multi-layered punitive damages structure (full consideration + treble damages + attorneys' fees).

These goals may be met in different ways, but the version of SB 124 passed by the Senate Committee of the Whole is a viable approach with the addition of a technical amendment. The bill left the Senate on a very strong 36-4 vote, garnering the support of all Republican members of that chamber along with half of the Democrat members.

The Senate Committee on Judiciary substituted language directing the court to review actions brought under the KRTA "...in harmony with the ruling judicial interpretations of **comparable** federal antitrust law..." (pg. 2, lns. 8-9). The word "comparable" needs to be stricken from that sentence and the phrase "and apply a rule of reason to claims involving restraint of trade" needs to be added at the end of the sentence on pg. 2, ln. 10. We have attached to this testimony a balloon illustrating this amendment.

This technical change is very important. The language was pulled from Delaware anti-trust law and incorporated into SB 124 through a Senate Judiciary amendment. As we have looked at the language more closely, it became evident that "comparable" must be stricken to effectuate the intent of directing the court to a federal reasonableness analysis. The "comparable" language works for Delaware as they adopted anti-trust law that mirrors federal law. The KRTA was enacted prior to key federal anti-trust laws, so it could be argued that those later evolving federal statutes would not be "comparable". Thus, striking the word "comparable" is necessary.

The Senate adopted language does not differentiate between horizontal or vertical conduct. As you will recall from the earlier hearing, we strongly support narrowing the types of actions that would not be subjected to a reasonableness test under the KRTA. If this Committee should decide to return to language drawing a distinction between horizontal and vertical conduct, we strongly recommend that be narrowly drawn by using "horizontal price fixing" and not a broader phrase such as "horizontal conduct".

Another alternative would be to reinstate the original SB 124 language on pg. 1, ln. 13 through pg.2, ln. 6, and striking pg. 2, lns. 7 through 23. This change adds back a reasonableness test and factors the court should follow when considering the reasonableness of an action.

SB 124, in its current form, still contains the exemption language we have advocated in favor of all session. The language provides clarification regarding credit unions and rural electric co-ops and reiterates the KRTA does not apply to ag marketing cooperatives or entities/activities governed under the federal Packers & Stockyards Act. It is important that the exemptions regarding the Capper-Volstead Act, rural electrics, credit unions, and Packers and Stockyards Act **use the language "governed by" not "complies with."** This is critical so that minor technical errors do not result in loss of the exemption protections.

**Each of the co-op exemptions currently in SB 124 are carried over for clarification purposes from other federal or state law.** We included clarifying language regarding credit unions and rural electrics. Both are already excluded under KSA 50-148, but we wanted to ensure that REC's exercising their legal right to opt-out of Kansas Corporation Commission rate jurisdiction were not jeopardizing in any way their exemption under KSA 50-148. Additionally, clarification regarding credit unions was necessary. Credit unions were exempt originally as they were supervised by the banking department. That language has not been updated since 1915

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to reflect the creation of a separate supervising authority, the Kansas Dept. of Credit Unions. We are not proposing any additional clarification regarding our telecommunications cooperatives. We have consulted with their lobbyist and we understand they are comfortable that the wording in KSA 50-148 is still sufficient to exempt them from the KRTA.

Exemptions for cooperative societies and “group purchasing cooperatives” or “group purchasing organizations” were stricken via a Senate floor amendment. We support this amendment because, unlike the other co-op exemptions contained in SB 124, cooperative societies are not required to operate on a “cooperative basis” and “group purchasing co-ops/organizations” have no state-level authorizing legislation in Kansas. We have a Kansas co-op marketing act, a rural electric act, and a Kansas credit union act, but there is no statutory act specifically creating the entity of a “group purchasing cooperative/organization”. Without such authorization, defining these entities is difficult, resulting in a new area of uncertainty under the KRTA and creating a potential loop-hole for avoiding regulatory oversight. Those issues are mitigated with the co-op exemptions currently in place in the bill.

The co-ops granted exemptions under the current SB 124 are all subject to additional agency or federal oversight apart from the KRTA. Credit unions are regulated by the Kansas Dept. of Credit Unions. REC’s are under the jurisdiction of the Kansas Corporation Commission. Ag marketing co-ops (Ks co-op marketing act), via the federal Capper-Volstead Act, are subject to review and anti-trust enforcement actions from the US Secretary of Agriculture and the US Dept. of Justice. For the reasons noted above, we would strongly object to granting exemptions to cooperative societies and “group purchasing co-ops/organizations.”

The current version of SB 124 eliminates full consideration. We strongly support this revision to the damages section of the KRTA. As you know, entities currently found in violation of the Act are penalized through a multi-level system. Successful plaintiffs can recover full consideration (full cost of item not just portion attributed to the anti-trust activity), treble damages (3 times the damages) and attorneys’ fees. Kansas is an anomaly when it comes to damages. No other state allows recovery of both full consideration and treble damages and only a hand-full of states provide for full consideration. Treble damages are punitive. Retaining them, in addition to awarding attorneys’ fees, provides full recovery to aggrieved parties and a deterrent to anti-trust activity. Eliminating full consideration will better align us with other states and help prevent potential forum shopping by those seeking to file cases in Kansas hoping to gain considerably more in damages than allowed in other jurisdictions.

Our hope is this Committee will move forward expeditiously with KRTA reform. **Simply allowing the *O’Brien* decision to stand is unacceptable.** This issue has been debated, studied, and further debated again and again. **We encourage this committee to act favorably on SB 124 and our proposed amendments to that bill.**

We appreciate the opportunity to present our areas of support and concern, as well as our proposed amendments, on this very important issue. I would stand for questions and with the Chair’s permission if appropriate, call on our coalition members to assist with answering those questions. Thank you.

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## **Brief Descriptions of Our Associations**

### **Kansas Cooperative Council (KCC)**

The Kansas Cooperative Council represents all types of cooperative businesses in Kansas including agriculture marketing and supply, utilities, financial co-ops and consumer cooperatives. Formed in 1944, the KCC works through educational and advocacy efforts to advance cooperative business success.

### **Kansas Electric Cooperatives, Inc.**

Kansas Electric Cooperatives, Inc. (KEC) is the Kansas statewide service organization for 29 electric distribution cooperatives and three generation and transmission cooperatives. Formed on August 18, 1941, and headquartered in Topeka, KEC represents the interests and provides needed services and programs to electric cooperatives that serve member/consumers within the state. KEC functions for the mutual benefit of its members to promote rural electrification and foster the principles on which electric cooperatives were founded.

### **The Kansas Grain and Feed Association (KGFA)**

The KGFA is a voluntary state-wide trade association with a membership encompassing the entire spectrum of the grain receiving, storage, processing and shipping industry in the state of Kansas.

### **Kansas Agribusiness Retailers Association (KARA)**

KARA's membership includes over 700 agribusiness firms that are primarily retail facilities which supply fertilizers, crop protection chemicals, seed, petroleum products and agronomic expertise to Kansas farmers.

### **Kansas Livestock Association (KLA)**

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.

### **Kansas Credit Union Association (KCUA)**

For more than 75 years, the Kansas Credit Union Association has been dedicated to assisting Kansas credit unions in meeting the needs of their members and furthering the success of the credit union movement. Kansas credit unions are not-for-profit financial cooperatives whose sole purpose is to serve the financial needs of their 626,000+ member-owners.

### **Kansas Bankers Association (KBA)**

The Kansas Bankers Association's membership includes 99% (286 of 289) of the commercially chartered banks in Kansas. KBA member banks employ more than 13,400 Kansans that provide financial services in more than 400 towns and cities across the state.

### **Kansas Farm Bureau (KFB)**

KFB is the state's largest general farm organization representing more than 40,000 farm and ranch families through our 105 county Farm Bureau Associations.

### **Kansas Association of Ethanol Processors (KAEP)**

The Kansas Association of Ethanol Processors (KAEP) is a state-wide trade association that represents the majority of ethanol processors in Kansas, which together produce nearly 500 million gallons of ethanol annually. Kansas' ethanol processing facilities bring millions of dollars of revenue and economic development to Kansas communities.

### **Coalition for a Competitive Kansas**

The Coalition for a Competitive Kansas advocates for a fair and reasonable regulatory framework to govern business practices in our state. Specifically, the Coalition seeks legislative reform of the Kansas Restraint of Trade Act (KRTA), which, as currently written and interpreted, makes Kansas a less attractive state in which to operate a business. The Coalition believes that, by bringing the KRTA in line with federal law, Kansas can ensure a welcoming operating environment for business and remain competitive among neighboring states.

### **Petroleum Marketers and Convenience Store Association of Kansas (PMCA of Kansas)**

Petroleum Marketers and Convenience Store Association of Kansas (PMCA of Kansas), a statewide trade association representing over 300 independent Kansas petroleum distribution companies and convenience store owners throughout Kansas.

**{As Amended by Senate  
Committee of the Whole}  
As Amended by Senate  
Committee**

*Session of 2013*

**SENATE BILL No. 124**

By Committee on Judiciary  
2-5

***Balloon proposed by KS Co-op  
Council and coalition  
3-13-13***

1 AN ACT concerning the Kansas restraint of trade act; amending K.S.A.  
2 50-101, 50-112, **50-158** and 50-161 and repealing the existing sections;  
3 **also repealing K.S.A. 50-108 and 50-115.**  
4 *Be it enacted by the Legislature of the State of Kansas:*  
5 New Section 1. (a) The purpose of this section, and the amendments  
6 to K.S.A. 50-101 and, 50-112, **50-158 and 50-161** by this act, is to clarify  
7 and reduce any uncertainty or ambiguity as to the application of the  
8 Kansas restraint of trade act and applicable evidentiary standards to certain  
9 types of business contracts, agreements and arrangements that are not  
10 intended to unreasonably restrain trade or commerce and do not  
11 contravene public welfare.  
12 (b) (1) Except as provided in subsection (b)(3), an arrangement,  
13 contract, agreement, trust, understanding or combination shall not be  
14 deemed a trust pursuant to the Kansas restraint of trade act, K.S.A. 50-101  
15 through 50-162, and amendments thereto, and shall not be deemed  
16 unlawful, void, prohibited or wrongful under any provision of the Kansas  
17 restraint of trade act, K.S.A. 50-101 through 50-162, and amendments  
18 thereto, if that arrangement, contract, agreement, trust, understanding or  
19 combination is a reasonable restraint of trade or commerce. An  
20 arrangement, contract, agreement, trust, understanding or combination is a  
21 reasonable restraint of trade or commerce if such restraint is reasonable in  
22 view of all of the facts and circumstances of the particular case and does  
23 not contravene public welfare.  
24 (2) Whether an arrangement, contract, agreement, trust,  
25 understanding or combination is a reasonable restraint of trade or  
26 commerce in view of all of the facts and circumstances, shall include, but  
27 not be limited to, an analysis of the following factors:  
28 (A) Specific information about the relevant industry;  
29 (B) whether the history, nature, and effect of the restraint stimulates  
30 or harms interbrand competition;  
31 (C) whether there were legitimate business justifications; and  
32 (D) whether the defendant involved has market power.  
33 (3) The reasonableness standard described in subsections (b)(1) and

1 (b)(2) shall not apply to any claim of horizontal price-fixing between or  
 2 among competitors that otherwise violates the Kansas restraint of trade act,  
 3 K.S.A. 50-101 through 50-162, and amendments thereto. A manufacturer  
 4 or wholesaler that also engages in retail sales shall not be considered  
 5 engaged in horizontal conduct with respect to sales the manufacturer or  
 6 wholesaler makes to third-party retailers.

7 ***(b) Except as otherwise provided in subsections (c) and (d), the***  
 8 ***Kansas restraint of trade act shall be construed in harmony with ruling***  
 9 ***judicial interpretations of comparable federal antitrust law by the United***  
 10 ***States supreme court:***

Ln. 9 - Strike "comparable".

11 ***(c) The Kansas restraint of trade act shall not be construed to***  
 12 ***prohibit:***

13 ***(1) Actions or proceedings concerning intrastate commerce;***

14 ***(2) actions or proceedings by indirect purchasers pursuant to***

15 ***K.S.A. 50-161, and amendments thereto;***

16 ***(3) recovery of damages pursuant to K.S.A. 50-161, and***  
 17 ***amendments thereto;***

18 ***(4) any remedy or penalty provided in the Kansas restraint of trade***  
 19 ***act, including, but not limited to, recovery of civil penalties pursuant to***  
 20 ***K.S.A. 50-160, and amendments thereto; and***

21 ***(5) any action or proceeding brought by the attorney general***  
 22 ***pursuant to authority provided in the Kansas restraint of trade act, or***  
 23 ***any other power or duty of the attorney general provided in such act.***

Ln. 10 after "court" add  
 "and apply a rule of reason to  
 claims involving restraint of  
 trade"

24 (c) (d) The Kansas restraint of trade act, K.S.A. 50-101 through 50-  
 25 162, and amendments thereto, shall not ***be construed to*** apply to:

26 (1) Any association that is governed by ***complies with*** or becomes  
 27 subject to the provisions and application of article 16 of chapter 17 of the  
 28 Kansas Statutes Annotated, and amendments thereto, the cooperative  
 29 marketing act;

30 (2) any association, trust, agreement or arrangement that is governed  
 31 by the provisions and application of 7 U.S.C. § 291 et seq., the Capper-  
 32 Volstead act;

33 (3) any corporation organized under the electric cooperative act,  
 34 K.S.A. 17-4601 et seq., and amendments thereto, or which becomes  
 35 subject to the electric cooperative act in any manner therein provided; or  
 36 any limited liability company or corporation, or wholly owned subsidiary  
 37 thereof, providing electric service at wholesale in the state of Kansas that  
 38 is owned by four or more electric cooperatives that provide retail service  
 39 in the state of Kansas; or any member-owned corporation formed prior to  
 40 2004;

41 (4) any association that is governed by the provisions and application  
 42 of article 22 of chapter 17 of the Kansas Statutes Annotated, and  
 43 amendments thereto, the credit union act;