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TO: Sen. Jeff King, Chairman
Members of the Committee
Senate Committee on Judiciary

FROM: Steven Krikava, Land O'Lakes, Inc.

RE: Support for **SB 124**, with amendments
Opposition for **SB 123**

Thank you very much for the opportunity to present Land O'Lakes perspective and recommendations relative to proposed legislation pertaining to the Kansas Restraint of Trade Act. I have provided some background information about Land O'Lakes and our presence in Kansas at the end of this testimony.

Land O'Lakes view is that if Kansas wants to have a competitive business environment and promote growth of jobs in the state, KRTA should be more closely aligned with federal anti-trust law. There are two specific ways that KRTA sets Kansas apart from federal law and raises concerns from companies that may consider doing business in the state.

First, the legislature should eliminate full consideration in awarding damages under the KRTA. Full consideration means a business must reimburse a successful plaintiff for the full cost of the product (and the plaintiff gets to keep the product) even if the actual damages they suffered were only a small fraction of the purchase price. Kansas is only one of a small handful of states that allows full consideration.

Federal law provides for treble damages, plus attorneys' fees and costs, and potential criminal liability. This has proven to be a stiff deterrent to anticompetitive behavior. Full consideration provided for in the current KRTA allows for the refund of the full amount paid regardless of the amount of damage actually incurred, plus attorney's fees and costs. To make matters worse, some insist that it also allows for the recovery of treble damages on top of the full consideration recovery. Full consideration is excessively harsh, unfair, creates an incentive for litigation, and undermines good faith efforts to settle differences out of court. We believe the legislature should abolish it.

The legislature also ought to take action to restore the reasonableness standard to lawsuits brought under the KRTA. This is necessary because of the Kansas Supreme Court opinion in May 2012 in the case of O'Brien v. Leegin.

The rule of reason holds that only agreements that unreasonably restrain trade are subject to legal action, and logically requires courts to consider all circumstances before determining whether or not a practice is unlawful

Without the rule of reason, certain common, and supposedly lawful agreements among businesses, are now inherently unlawful in Kansas. This includes everyday agreements such as:

- Joint ventures,
- Many activities of trade associations, including exclusive member benefits, exchanges of information and ethical rules,
- Non-competition agreements, such as contract provisions prohibiting an employee from working for a competitor for a period of time,
- Standards setting agreements, such as technology standards for communication between multimedia devices, or safety standards for a particular industry,
- Agreements between manufacturers and distributors to share the cost of advertising.

Land O'Lakes has direct experience with these issues because it along with several large egg producers is currently involved in litigation under the KRTA with Associated Wholesale Grocers ("AWG"). Our case illustrates both aspects of the problem with the law as it currently stands and is interpreted by the Supreme Court. Moark is a wholly owned subsidiary that's in the business of producing and distributing eggs. A few years ago, organizations like PETA and the Humane Society of the United States (HSUS) pressured the industry to provide more room for hens in layer cages and pressured large egg customers such as Wal-Mart and McDonalds to buy only eggs that were produced under the PETA and HSUS standards. The industry association, United Egg Producers ("UEP"), of which Moark was a member, convened a panel of scientists to study these demands and created a certification program that revised the standard for cage sizes and the number of hens in each cage. Lawsuits brought against Moark and other UEP members charged that the certification program and the new standard were anti-competitive because it allegedly had the effect of reducing egg production.

It's instructive to note that Land O' Lakes and Moark resolved the claims of every customer in the United States except for the one brought by AWG under the KRTA. In Kansas, without the reasonableness standard, the threshold for determining a violation of the act is very low. At the same time, full consideration holds out the prospect of a windfall award, much higher than would be possible under federal law since we believe that AWG has suffered no actual damage. Consequently, there is very little room for negotiating a settlement that avoids continued court action.

The distortions in the fair application of the antitrust law caused by the Supreme Court's recent interpretation of the KRTA has also led to Moark bringing a counterclaim against AWG and its members alleging that their activities in collectively purchasing eggs is a violation of the express language of the KRTA. As is evident, the current state of the law in Kansas invites a never ending spiral of claims and counterclaims.

There are two ways for the legislature to resolve the problems with the KRTA and prevent potential forum shopping by those seeking to file cases in Kansas hoping to gain considerably more in damages than allowed in other jurisdictions.

The simplest and most straight-forward solution would be to repeal KRTA, leaving Kansans and Kansas business owners of all sizes with the option of pursuing claims of anti-competitive behavior under federal law. That approach certainly is appealing to any company like ours that does business in many states, and we support it.

While there is a repeal bill in the Kansas House, there is not one currently before the Senate. If the legislature is not willing to fully repeal KRTA, the second option that we support would be to revise KRTA to address full consideration and the reasonableness standard. We support SB 124, which was developed by a large coalition of agricultural and other business groups in the state and presented by the Kansas Cooperative Council along with a package of amendments. This group worked diligently to accommodate the interests of all parties, but ultimately was not able to reach consensus. Still, SB 124 strikes a fair compromise and ought to be adopted.

Land O'Lakes opposes SB 123, which we believe has the support of AWG. That bill totally fails to address the problem of full consideration. Also, while it purports to address the reasonableness standard, it introduces language to legalize AWG's conduct in engaging in group purchasing, without even a reasonableness standard, and continues to make industry standard setting, such as was done by UEP, or the electronics industry in setting the Blu-Ray standard for DVD players for example, per se illegal because all horizontal conduct is expressly excluded from the reasonableness standard.

Thank you for the opportunity to present Land O'Lakes perspective and recommendations on the KRTA. For the background of the committee, here is some information about the company:

Land O'Lakes is a farmer-owned cooperative. Our headquarters are in St. Paul, MN. We operate three major lines of business for the benefit of our farmer-members. We provide a market for our dairy farmer members, processing their milk and marketing value-added, branded dairy products nationwide. That's about one-third of our business. Another third of our business is conducted through our Purina Animal Nutrition operations. This business manufactures and distributes branded, high quality animal feed for livestock producers and animal owners. Our third major business is crop inputs, primarily agricultural seeds and crop protection products, marketed through our Winfield operations.

Kansas is a very important part of the cooperative system that's served by Land O'Lakes. While we don't have any milk producer members in the state, we do distributed animal feed and crop inputs through the independent farm supply and grain marketing cooperatives here. We have 84 member cooperatives in the state, and Purina and Winfield conduct about $200 million in business with those cooperatives.

We have about 130 employees in the state with an annual payroll in excess of $6.5 million. Purina's largest facility in Kansas is a feed mill in Russell. That facility manufactures a high-value, proprietary dairy feed that is distributed throughout our cooperative system nationwide. They have a second feed facility in Wichita. Winfield has operations in Dodge City, Garden City, Inman, and McPherson.

As a cooperative, Land O'Lakes leaders are elected by our farmer-members. We currently have one Kansan on our Board of Directors – Myron Voth, a farmer from Walton. At our annual meeting next week, a second Kansan will join Myron on our Board. He is Stan Stark who manages Farmers Cooperative Co. in Haviland.