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

FROM: Stan Stark, Farmers Cooperative Co., Haviland, KS
On behalf of Land O'Lakes, Inc.

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

Thank you very much for the opportunity to speak on behalf of Land O'Lakes and in support of SB 124. I am Stan Stark, CEO of Farmers Cooperative Company in Haviland and a member of Land O'Lakes Board of Directors. I have provided some background information about my company and our relationship to Land O'Lakes at the end of this testimony.

Last month Land O'Lakes director of government relations, Steven Krikava, testified before you. In his testimony, he urged the legislature to take action that will bring the Kansas Restraint of Trade Act more closely in line with federal anti-trust law. Our view is that if Kansas wants to have a competitive business environment and promote growth of jobs in the state, KRTA needs to be reformed. The bill that's before you today, SB 124, will accomplish the changes that we think are necessary.

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 attorneys' 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. The legislature should abolish it.

SB 124 – Support; Land O'Lakes, Inc.

HOUSE JUDICIARY

DATE:

ATTACHMENT 

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's 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. Thus, 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.

SB 124 will 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 bill was developed by a large coalition of agricultural and other business groups in the state. 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.

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 Farmers Cooperative Company and Land O'Lakes:

Land O'Lakes is a farmer-owned cooperative with headquarters in St. Paul, MN. It operates three major lines of business for the benefit of its farmer-members. The cooperative provides a market for its dairy farmer members, processing their milk and marketing value-added, branded dairy products nationwide. Purina Animal Nutrition manufactures and distributes branded, high quality animal feed for livestock producers and animal owners. The third major business is crop inputs, primarily agricultural seeds and crop protection products, marketed through our Winfield operations.

Farmers Cooperative is a farm supply and grain marketing cooperative. We had sales in 2012 of \$69 million. The cooperative has facilities in eight communities. We are a member of Land O'Lakes and we sell crop inputs from Winfield and animal feed from Purina.