KANSAS LIVESTOCK ASSOCIATION

Since 1894

To: Senate Committee on Judiciary
Sen. Jeff King, Chair

From: Aaron M. Popelka, V.P. of Legal and Governmental Affairs, Kansas Livestock Association

Re: **SB 124 and SB 123 re the Kansas Restraint of Trade Act**

Date: February 21, 2013

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.

Thank you, Chairman King and members of the Committee, my name is Aaron Popelka and I am with the Kansas Livestock Association (KLA). KLA appears today as a proponent of HB 124 and an opponent of SB 123.

As was indicted by previous testimony by Leslie Kaufman, KLA associates our comments with the testimony presented by Ms. Kaufman and a coalition of Kansas businesses. Previous testimony by Ms. Kaufman laid the groundwork on the background of why reform of the Kansas Restraint of Trade Act (KRTA) is necessary. This testimony is to draw the Committee's attention to how failure to act could adversely impact the state's livestock industry. It will also highlight specific language in SB 124 that are necessary to protect the Kansas livestock industry. In addition, it will highlight why SB 123 is insufficient to address the needs of our members and inconsistent with the federal preemption doctrine.

The Kansas Supreme Court opinion, *O'Brien v. Leegin Creative Leather Products, Inc.*, 294 Kan. 318, 273 P.3d 1062 (2012), substantially changed how Kansas courts interpret the KRTA. The legislature must act to return Kansas antitrust law to the certainty that prevailed prior to the *O'Brien* decision. Rather than apply the longstanding reasonableness test to marketing arrangements that exist in the Kansas livestock industry, the *O'Brien* court decided to take a literal interpretation of an antiquated antitrust statute that predated federal antitrust law. If allowed to stand, such an interpretation would put Kansas at a significant disadvantage to other states and run contrary to the governor's and legislature's goal of creating a business friendly atmosphere in the state.

Unlike many businesses, the livestock industry is governed by more than the federal Sherman and Clayton Antitrust Acts. As a reaction to the famous book, *The Jungle*, by Upton Sinclair, Congress enacted the Packers and Stockyards Act of 1921 (PSA). The PSA added additional

protections for the livestock and meat industries that did not exist under the previously enacted federal antitrust statutes. As a result, the PSA dominates the area of antitrust law pertaining to the livestock and meat industries and preempts state antitrust statutes. *See Colorado v. United States*, 219 f.2d 474, 478 (10th Cir. 1954) (stating that "Congress . . . preempted and occupied the entire field with respect to the regulated activities [and] . . . provided for comprehensive regulations with respect to the activities covered by the [Packers and Stockyards] Act.")

To understand our concerns, the Committee must first understand how marketing arrangements exist in the livestock industry and have improved consumer choice of product type, quality, and price at the meat case. The fed cattle market has evolved to where an increasing number of cattle are traded based on the value provided to the end user. This system rewards cattle producers who focus on genetics and management practices that deliver the beef products desired by consumers. It allows cattlemen to respond to consumers by finding innovative ways to develop and market premium quality and branded products. These innovative techniques are embodied in the industry marketing arrangements that can stretch from the cow/calf producer, through the cattle feeding industry, to the packing industry. The agreements are geared to specifically deliver to retail meat providers a desired quality and quantity of beef in a given day.

The use of contracts, cooperatives, alliances, and joint ventures has been driven not by packers, but by independent cattle producers intent on capturing more of the value from their high quality cattle. The commodity-based marketing system prevalent in the 1980s and 1990s coincided with a 50 percent decline in beef demand. As producer-driven, coordinated marketing programs have been implemented, beef demand has rebounded. A Grain Inspection, Packers & Stockyards Administration (GIPSA) study determined eliminating alternative marketing arrangements would cost cattle producers $10.5 billion in the first year and $68 billion over ten years.

Losing or limiting consumer-demanded product means loss of customers and decreased profitability to cattle producers. Alternative marketing arrangements have allowed cattle producers to get paid for the value they add. Without the contracted supply of cattle that meet the requirements of such programs, these programs will go away or be severely reduced in size and scope. This could have a huge impact on the choices our consumers make. It is this result-oriented system which the Kansas Supreme Court has jeopardized with its decision in *O'Brien*.

KLA believes that the best and most efficient means of providing certainty to the industry is to fully repeal the KRTA. As previously indicated, the terms of the PSA preempt the KRTA. Therefore, full repeal of the KRTA would indicate in no uncertain terms that the livestock industry has one set of laws and regulations to comply with, the PSA.

If the Committee desires to retain the KRTA, KLA urges the committee to adopt SB 124, which is supported by a broad coalition of Kansas businesses. Included in the bill are two crucial reforms important to KLA members.

First, KLA believes the current PSA exemption language in SB 124 is appropriately crafted and the exemption language in SB 123 is seriously flawed. The current exemption contained in SB 124 on page 2, lines 24 through 26 states: "The Kansas restraint of trade act . . . shall not apply to . . . any trust, agreement or arrangement that is governed by the provisions and application of 7 U.S.C. § 181 et seq., the packers and stockyards act . . . ." This provision in SB 124 accurately

represents the state of the law and protects the industry from unnecessary litigation. The use of the phrase "governed by" would accurately represent that the KRTA is preempted by the PSA.

Conversely, KLA believes the exemption language in SB 123 is flawed because on page 2, lines 12 through 14 uses the words "complies with" rather than the phrase "governed by". If the words "complies with" are used instead of "governed by", it would require our members to make the preemption argument every time a case is brought in state court as a result of a minor technical violation of the PSA that is not a true restraint of trade that the KRTA was intended to prevent. For example, the PSA contains record keeping standards, a duty for certain entities to maintain registration, and scale certifications. Defending KRTA cases predicated on such technical infractions would be a burden on industry and only serve to encumber Kansas courts with cases it should rightfully dismiss under the preemption doctrine. Using the words "governed by" as are contained in SB 124 would decrease the case load of state courts and provide certainty to the industry by stating in statute that it must comply with one set of laws – the PSA.

Second, KLA would like to draw the committee's attention to the reasonableness factors in SB 124. For marketing arrangements that are not directly implicated by the PSA, like feed and other input contracts, it is important that we give trial courts some direction in how to properly weigh the reasonableness of an agreement. This would also allow an appellate court greater ability to review trial court cases that may not comport with the spirit of the reasonableness test. The reasonableness factors, laid out in SB 124 are taken directly from the preeminent U.S. Supreme Court case on determining the reasonableness of a marketing arrangement, *Leegin Crative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

In addition, KLA supports the use of the phrase "horizontal price-fixing" contained on page 1, line 34 of SB 124 and opposes the use of "horizontal conduct"used on page 1, line 34 of SB 123. Horizontal conduct is overly broad and would subject arrangements to a per se illegal standard, which is inconsistent with the U.S. Supreme Court decision in *Leegin*, 551 U.S. 877, 886 (2007) (stating that "[r]estraints that are per se unlawful include horizontal agreements among competitors to fix prices . . . or to divide markets . . . ."). Using the broader term of "horizontal conduct would make Kansas law more restrictive than federal law and potentially invalidate otherwise valid joint ventures and pooling arrangements.

Finally, KLA supports language to limit damages under KRTA cases. The *O'Brien* case suggests that a plaintiff could recover full consideration damages and treble actual damages. This frustrates original legislative intent and would lead to a windfall recovery. Current language in SB 124 gives a successful plaintiff the choice of full consideration or treble actual damages. A proposed amendment by a coalition of Kansas businesses attached to Ms. Kaufman's testimony would repeal full consideration damages and limit recovery to only treble actual damages. KLA prefers this amendment, but would note that the current language in SB 124 is better than the current state of law following *O'Brien*. SB 123 fails to address this issue and KLA opposes its approach to allow both forms of damage recovery.

Thank you for the opportunity to submit testimony. KLA urges the committee to pass SB 124 favorably. KLA also stands in opposition to passage of SB 123, which would not accurately restore the KRTA to pre-*O'Brien* precedence and would inaccurately exempt federally preempted activities.