Questions for the Record – Responses from Kevin Smartt
Senate Judiciary Committee hearing on
"Examining Liability During the COVID-19 Pandemic"

Questions from Senator Ernst:

- **Did you at times have to reconcile state and federal recommendations on how best to handle COVID-19?**

Reconciling state and federal recommendations on how best to handle COVID-19 has been a significant and unceasing undertaking since the pandemic began. It has been a challenge because the guidance provided by the Centers for Disease Control and Prevention ("CDC"), the Occupational Safety and Health Administration as well as state and local governments were often inconsistent and changed frequently. What's more, in addition to being vague and difficult to follow, the guidelines were at times in conflict with one another. For instance, at some points in March, we had to contend with federal guidelines that told us facemasks were not recommended while there were local guidelines recommending or requiring them. In short, it was up to us to use our best judgment while sifting through the ambiguous and changing guidance put forth by federal, state, and local health agencies to establish health and safety protocols that would keep our employees and customers safe and mitigate the spread of the virus. It was clear that regulators at all levels were learning new things about the virus and how it spread as time passed. Our problem as a business, however, was that we had to find ways to operate during all of that time – including with some 24 hour per day, 7 day per week operations. Operationalizing these different and evolving guidelines has been and continues to be a struggle.

- **What would happen to your business if you had to defend against a flood of lawsuits after the pandemic subsides and the economy reopens? Would that put you at a competitive disadvantage versus business that weren't kept open?**

Since the start of the COVID-19 pandemic, business has been way down. At the peak of the pandemic, fuel volumes were down close to 45 percent and in-store sales were down close to 17 percent. Thus, it has taken a massive amount of effort and cost to stay open. Each day of this health crisis, we have chosen to keep all of our employees on payroll for their full pay despite the mismatch that presents with the level of business we are seeing in our stores each day. And, we have had to contend with supply chain deficiencies that made acquiring personal protective equipment challenging. Despite our best efforts to implement stringent health and safety protocols and mitigate the spread of this contagious virus, the reality is it is impossible to be perfect and we anticipate that we may, at some point in the future, be confronted with lawsuits.

The liability risk we face is very real and poses a significant threat to our ability to function. To date, thousands of COVID-related liability claims have already been filed.[1] With sales down,

[1] *See generally* Shayna Jacobs, *771 Lawsuits — And Counting: Wave of Virus Litigation Hits Businesses Across the U.S.*, WASH. POST (May 1, 2020), https://www.washingtonpost.com/world/national-security/771-lawsuits--and-counting-wave-of-virus-litigation-hits-businesses-across-the-us/2020/05/01/6f7c015c-89c3-11ea-9dfd-

we do not have the extra dollars to go to court to oppose COVID-related liability claims. While settling these claims is "cheaper" in the short term, it can lead to more litigation threats and ultimately cost even more than fighting in court. There is no doubt that if we are subject to COVID-related lawsuits after we stayed open to serve our communities as an essential business, we would face serious business risks that would put many of our employees and aspects of our operations at risk.

Additionally, I testified on behalf of the National Association of Convenience Stores and 62 percent of the convenience store industry is comprised of single-store operators. The cost of litigation for these small businesses would threaten their viability when they have already been struggling to survive during this pandemic.

Questions from Senator Grassley:

- **As with any issue, Congress needs to strike the proper balance when examining liability around COVID-19. If Congress and states are drawing certain lines to protect businesses from limitless liability, how do we also protect those who've been exposed to COVID-19 by a business or employer that was clearly reckless? In other words, how do we protect legitimate claims against truly bad actors? Are any states doing a particularly good job of striking this balance? If so, how?**

I believe that the best way to protect businesses that acted in good faith from liability threats can be found in heightened legal standards. This would still allow truly bad actors to face liability while giving broader protections to people who tried their best to do what is right. For the duration of the COVID-19 public health emergency, if a business' actions are not grossly negligent or willful, the business should be protected from liability with respect to any claims resulting from a person being infected by COVID-19. That legal standard should be paired with a safe harbor (or affirmative defense) for businesses that made good faith efforts to comply with guidelines that were in place at the time in question. These combined standards would allow those trying to do the right thing to have some protection and certainty while still ensuring that bad actors and those that ignored their responsibilities be held liable.

Several states are trying to find the right balance in this regard. Utah provides one good example. (*See* Utah S.B. 3007 attached). Utah law would provide a person with immunity from civil liability provided the individual did not engage in willful misconduct; reckless infliction of harm; or intentional infliction of harm.

- **Some unethical trial lawyers file bogus lawsuits—or simply send vague demand letters to small businesses—without the intention of ever pleading their claim before a judge or jury. Instead, they just want a quick payment from their target. Are you concerned about *frivolous* litigation and demand letters related to COVID-19? Should Congress do a better job of deterring these shakedowns, and if so, how?**

990f9dcc71fc_story.html; *see also* Litigation Tracker, *available at* https://www.huntonak.com/en/covid-19-tracker.html.

I am extremely concerned about frivolous litigation and demand letters related to COVID-19. But, the current legal rules designed to prevent this aren't functioning properly. Many demand letters or legal complaints may clear the bar of what is considered frivolous under Rule 11 of the Federal Rules of Civil Procedure ("F.R.C.P."). In part, this is because courts are very reluctant to impose Rule 11 sanctions against lawyers even when lawsuits do not have merit. And, because many of these suits are only threatened in letters and never filed in court, those federal rules never come into play for those demand letters. That has led to a system in which weak claims are asserted without any real concerns from plaintiffs' lawyers.

There needs to be a procedural mechanism to get rid of meritless cases early in the litigation process – before many legal costs are incurred. Perhaps one way to do this is to use a good faith standard as a shield. If defendants in these cases can make some basic showing of good faith efforts, they should have a mechanism to get the case dismissed.

The proliferation of meritless claims is undoubtedly the biggest problem we are facing and it would go a long way if Congress found a way to deter such situations arising from this pandemic.

- **In 2005, Congress achieved reforms to the class action litigation system, which help ensure compensation for *real* victims, instead of lining the pockets of lawyers. Are you concerned that COVID-19 will unleash a wave of new, tenuous class action cases? And are there specific reforms Congress should consider with regard to class actions?**

At this juncture, businesses like mine are just looking for a temporary rule that would apply to the pandemic, not a permanent overhaul of U.S. tort law. There are plenty of permanent changes to our tort system that lawmakers could consider implementing, but it is imperative that policymakers move forward with temporary changes that can provide protections now. While we have concerns with class actions, I believe Congress should consider the following recommendations as it considers implementing liability protections:

1. Protect essential businesses that were asked to stay open during the national emergency against claims that someone contracted the virus due to their operations;
2. Tailor liability protections to cover responsible businesses that take precautions, but do not protect bad actors;
3. Separately evaluate any questions of compensation for people who get sick from the question of whether and when businesses should be liable; and
4. Make these protections temporary – they should only apply to situations arising out of the current crisis.

Frankly, American businesses would be best served if Congress were to consider the unique crisis we are facing and find an appropriate, measured response by implementing limited liability protections specifically to COVID-19 and the time during which the virus poses a threat.