

**Statement of**

**Kevin Smartt**

**Chief Executive Officer and President**

**Kwik Chek Food Stores Inc.**

**Bonham, Texas**

**On Behalf of the**

**National Association of Convenience Stores (NACS)**

**Before the**

**Senate Committee on the Judiciary**

**May 12, 2020**

**Hearing on**

**“Examining Liability During the COVID-19 Pandemic”**

## **I. SUMMARY OF TESTIMONY**

- During this national emergency, Kwik Chek and other essential businesses have stayed open in order to serve their customers and provide them with essential goods and services.
- Staying open has not been easy. Kwik Chek has had to overcome numerous obstacles, including significant supply chain deficiencies, to do so. We also had to contend and sift through the constantly shifting and conflicting public health guidelines from the Centers for Disease Control and Prevention (“CDC”) and other federal, state, and local government agencies in order to adapt our daily operations.
- Despite this confusion, we changed how we operate, implementing strict labor-intensive cleaning protocols, among other changes, to ensure we protect our employees and customers. We refuse to sacrifice the health and safety of our employees and customers just to stay open.
- We have chosen to put people first over economics. Although COVID-19 has put a dramatic dent in our business, we have chosen to keep all of our over 600 employees on payroll for full pay despite the mismatch that presents with our current level of business.
- Yet, despite our best efforts, COVID-19 is everywhere. It is not possible for us to guarantee that it won’t impact our stores. In fact, we had to shut down one of our stores after an employee was diagnosed with the virus.
- Our business, and other essential businesses, that have made real efforts to do the right thing should not be punished with unfair lawsuits just because we kept our doors open for the American public.
- Principles that should be included in legislation to protect against unwarranted liability include:
  - Protecting essential businesses that were asked to keep operating to serve their communities and first responders;
  - Protecting against claims that the virus was contracted by a customer or employee on the premises or due to the continued operation of an essential business;
  - Ensuring the protections cover employers that take precautions;
  - Tailoring liability protections so that they still allow true bad actors to be sued;
  - Separating any questions of compensation for people who get sick from the question of whether and when businesses should be liable; and
  - Limiting the duration of these protections so that they apply to situations arising out of the current crisis but are not permanent changes to liability laws.

## **II. INTRODUCTION**

Chairman Graham, Ranking Member Feinstein, and Members of the Judiciary Committee, thank you for the opportunity to testify today on the need for liability protections relating to the

COVID-19 epidemic. My name is Kevin Smartt, and I am the Chief Executive Officer and President of Kwik Chek Food Stores Inc. (“Kwik Chek”). In addition, I am the owner and Chief Executive Officer of McCraw Oil Company, a fuel wholesale distribution company; McCraw Transport, Inc., a fuel delivery company; and Texas Born, a food product company. In short, I am a retailer, wholesaler, and distributor—and all of my businesses are considered “essential” and have remained open during the COVID-19 pandemic.

I am testifying today on behalf of the National Association of Convenience Stores (“NACS”)<sup>1</sup> where I serve as Vice Chairman and Treasurer. Members of NACS, including Kwik Chek, account for approximately 80 percent of retail motor fuels sales in the United States and more than 60 percent of our industry is made up of single-store, mom-and-pop operations.

The COVID-19 pandemic has presented unique challenges to our nation and the world as people and businesses strive to move forward against an insidious virus that is found everywhere. Our businesses, like other essential businesses, have strived to keep our doors open and provide consumers with essential items like food and fuel. Although two of my businesses might have qualified for the Paycheck Protection Program, we chose not to apply for a program loan because we thought we could weather the storm without it and wanted to leave the funds for others who couldn’t. Since early-March, we have implemented time and cost intensive virus mitigation protocols to protect the safety of our employees and our customers. Nevertheless, we reevaluate how we are approaching and responding to the COVID-19 threat every day to ensure we are doing what needs to be done. When one of our employees tested positive for COVID-19, we were ready and followed our new protocols in order to address the health threat swiftly. This required temporarily closing one store, but we did our best to continue to provide service for our customers—and I am proud to report that that employee has recovered and other employees in that location did not get sick.

At a time when fuel demand is down approximately 40 percent and in-store sales have been down close to 17 percent, it has taken significant effort, energy, and cost to keep our doors open. On a daily basis, we have chosen to keep all of our employees on payroll for full pay despite the mismatch that presents with our current level of business. Yet, we have made these “people decisions” rather than “economic decisions” because it is the right thing to do. That won’t matter if we get sued on a COVID-related claim, however. Unfortunately, despite trying to do everything we can to protect the health and safety of our customers and employees during this pandemic, my companies have targets on their backs because our doors have remained open. That’s just not right. We are all in this together and my businesses shouldn’t become targets for liability threats just because they serve their communities. A business taking precautions and making tangible efforts should get protections from unjust lawsuits. My testimony addresses all of these points in greater detail below.

## **A. BACKGROUND ON THE CONVENIENCE INDUSTRY**

Employing over 2.4 million people, the convenience and fuel retailing industry, with over 152,000 convenience stores in the United States, currently provides essential services and products

---

<sup>1</sup> NACS, the leading global trade association dedicated to advancing convenience and fuel retailing, serves as a trusted advisor to over 1,500 retailer and 1,600 supplier members from more than 50 countries.

to communities, including critical fuel for healthcare and medical professionals, first responders, delivery workers and everyone else who needs to travel the roads. Our industry sells over 80 percent of the retail fuel in the United States. Without fuel marketers selling fuel, for example, supply chains and deliveries will be disrupted. When disasters or emergencies occur, fuel marketers, most of which offer 24-hour operations, remain in operation as long as they can without putting their own employees' safety and wellbeing in harm's way. This means making sure fuel, food and other necessities are available for emergency workers and customers seeking what they need.

Beyond fuel, our members provide essential items and services to consumers including food, over the counter medicine, milk and bottled water, ATMs, and redeeming SNAP benefits. In countless rural and urban communities designated by the U.S. Department of Agriculture as "food deserts," our members are the community grocery store and drug store; serving those who would otherwise be left behind. This function is especially important during this crisis due to the limitations of public transportation being implemented in cities all across the nation.

Most convenience stores are small businesses with more than 60 percent of them being single-store operations and 65 percent are chains of 10 or fewer stores. Many are facing significant financial hardship as Americans heed the call from public health officials to stay home. All of these companies, regardless of size, are going to continue to provide essential services to their communities for as long as they are financially able.

## **B. ABOUT KWIK CHEK**

Headquartered in Bonham, Texas, Kwik Chek Food Stores Inc., operates 47 convenience stores in Texas and Oklahoma across 1250 miles north to south and 950 miles east to west. The company serves both rural and urban consumers, always endeavoring to live up to the company motto: "Leave 'Em Better." Over the past 15 years, the chain has doubled in size, developed a unique customer loyalty program, and has implemented cutting-edge point-of-sale technology, all while becoming a leader in charitable giving and programs. Today, Kwik Chek and its associated companies employ more than 600 professionals in retail convenience, petroleum wholesale, and propane and fuel transportation. All of Kwik Chek's stores sell motor fuel and a large portion of each store focuses on fresh food service offerings. Thirty of our stores are open 24 hours a day, seven days a week.

## **C. ABOUT McCRAW OIL COMPANY, INC. AND McCRAW TRANSPORT INC.**

McCraw Oil Company, Inc. ("MOCI") is a fuel wholesale distribution company. MOCI sells branded and unbranded motor fuels to approximately 110 other convenience stores in both Texas and Oklahoma. In addition, the company sells commercial fuels to farmers, school districts, county and city municipalities, as well as commercial businesses. MOCI also has a propane division that sells propane to over 6,000 residential consumers in both Oklahoma and Texas. MOCI's trained staff also does installation of household heating appliances such as tankless hot water heaters, and fireplace inserts.

McCraw Transport, Inc. (“MTI”), is comprised of 15 transport delivery trucks, drivers, dispatchers, and managers that haul and deliver transport loads of fuel to convenience stores in Texas and Oklahoma.

### **III. PRINCIPLES FOR LIABILITY PROTECTION LEGISLATION**

Companies like mine are having a difficult time surviving the current crisis. Business is way down and costs are way up. That is a formula that cannot last for long. The risk of litigation pushing the situation so far out of balance that additional businesses go under is very real. As reported in the Washington Post, more than seven hundred COVID-19 lawsuits have already been filed.<sup>2</sup> That number is rising quickly. As the Committee examines this pressing issue, I urge the Committee to adhere to the following principles:

#### **A. ESSENTIAL BUSINESSES NEED PROTECTION**

When the Administration updated its guidance on the COVID-19 emergency on March 16, 2020, it stated, “If you work in a critical infrastructure industry, as defined by the Department of Homeland Security, such as healthcare services and pharmaceutical and food supply, you have a special responsibility to maintain your normal work schedule.” We took that message to heart and committed to remaining open and serving our customers during this difficult time. As described below, this took significant effort and resources and involved substantial changes to our day-to-day operations. I’d hate to see companies like ours be punished for keeping our doors open.

#### **B. BUSINESSES NEED PROTECTION AGAINST VIRUS EXPOSURE CLAIMS**

According to the latest communications from the CDC, COVID-19 has reached “community spread,” meaning “people have been infected with the virus in an area, including some who are not sure how or where they became infected.” In short, it is extremely difficult, if not impossible, to uncover the source of a particular infection. For businesses like mine, this means that we remain exceedingly vulnerable to claims that the virus was contracted at our stores as refuting such unsubstantiated claims will be very costly and time-consuming. If a company makes a good faith effort to implement health and safety precautions, it should not have to shell out money and expend precious resources to defend itself from cases that are extremely difficult to prove or disprove.

#### **C. PROTECT BUSINESSES TAKING APPROPRIATE PRECAUTIONS**

Similar to other businesses throughout the country, my companies are keeping their doors open because we are trying to do the right thing. Our businesses are providing essential goods and services to our fellow Americans during this national emergency. Yet, we are not undertaking this lightly: we refuse to sacrifice the health and safety of our employees and customers just to stay

---

<sup>2</sup> 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-990f9dcc71fc\\_story.html](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-990f9dcc71fc_story.html).

open. To stay open, therefore, we have made significant responsible investments in our businesses to ensure that our employees can come to work and do their jobs without knowingly being exposed to COVID-19. This has not been simple or inexpensive: in addition to contending with the virus itself, we have had to contend with changing health guidelines, supply-chain shortages and obstacles to acquire personal protective equipment and cleaning supplies among other things. Nevertheless, we persist because we are trying to do right by our employees and our customers. Sadly, however, the uncertainty and compliance challenges feed efforts by some to take advantage of this crisis by bringing lawsuits against businesses, like ours, that kept running. Policymakers should not let businesses that operate in good faith to keep their doors open be harassed by unsubstantiated claims.

#### **D. DON'T PROTECT BAD ACTORS**

No one is asking Congress to protect employers who willfully ignored the risks of COVID-19 and committed gross negligence by not adhering to the recommended health and safety guidance. Those bad actors should be subject to litigation. What I am asking for is merely to protect those companies that are doing the best they can to mitigate COVID-19's spread.

#### **E. PROTECTING AGAINST LIABILITY CLAIMS IS A SEPARATE AND DISTINCT QUESTION FROM COMPENSATION**

Whether one should compensate those who get sick is separate from the question of broad liability claims brought against a business. I am not suggesting that compensation for an employee or customer incident is inappropriate. I am sympathetic to the need for an infected individual to be able to support his or her family during and after illness, but I do not believe that the only way that can happen is by subjecting employers to a myriad of lawsuits and exorbitant legal fees. Businesses are not in a position to be a financial backstop to compensate large numbers of Americans who get infected with this virus. Whether infected people should have a financial backstop is a public policy question, but my business and others can't afford to be that backstop – especially when it's imposed through an expensive system of litigation.

#### **F. TAILOR PROTECTIONS TO THE COVID-19 CRISIS**

I am not here asking lawmakers to permanently overhaul U.S. tort law. I am asking you to consider the unique crisis we are facing and find an appropriate measured response. Congress should consider limiting liability protections specifically to COVID-19 and the time during which the virus poses a threat. Now is not the time to debate longstanding legal reform questions unrelated to the current crisis.

In light of Congress' and the Administration's use of trillions of dollars of investments to save businesses of all sizes and the jobs they provide Americans, it would be devastating to have these same employers go under because of unjust lawsuits. This crisis is historic and businesses like Kwik Chek are trying to rise to the occasion. I thank the Committee for considering liability protections, which are a very important component to the nation's eventual recovery.

#### **IV. RESPONDING TO COVID-19**

To shed some light on why liability protection is necessary as well as the difficult and costly questions facing businesses, I thought it would be helpful to provide some background on the experience at my companies during this crisis. These challenges may be different from business to business – and may be much more complex for some – but we know they have challenged us every day throughout this crisis and I think they may illuminate the reasons why some liability protections are necessary during this difficult time.

##### **A. CHANGES TO DAY-TO-DAY OPERATIONS**

Kwik Chek's first priority is the safety of our employees and customers. Beginning in early-March, we adjusted our daily protocols to mitigate the spread of the virus. This was a challenge because the guidance provided by the CDC, the Occupational Safety and Health Administration as well as state and local governments often conflicted with one another in addition to being vague and difficult to follow. Yet, despite many uncertainties, including the constantly fluctuating public health guidelines, we began to adjust to the pandemic, starting by educating our employees about critical health protocols. Then, on March 13, 2020, we publicly announced changes to many of our stores and store practices.

The first major change to our daily operations was a swift and immediate increase in our cleaning and sanitation guidelines and practices, which involved a company-wide education and training program for all employees. Kwik Check also contracted with a third-party cleaning company (as well as a backup company) that specializes in medical grade cleaning and sanitation (e.g., hazmat suits, etc.). In stores where we sell fresh and prepared foods, staff were instructed and trained to clean and disinfect all high-touch point areas (e.g., cashier counters, PIN pads and point-of-sale areas, and food preparation areas) every 15 to 30 minutes. In traditional-format stores, where only prepackaged food is sold, staff were instructed and trained to clean and sanitize high-touch point areas every 90 minutes to two hours.

The company also instituted new protocols for cleaning fuel dispensers: employees were directed to clean and sanitize dispensers every 15 to 30 minutes and to wear gloves and masks while doing so. Kwik Chek also made sure to provide sanitizer for customers and employees both inside the store and outside by the fuel dispensers—although we soon learned that sanitizer dispensers located outside the store would be stolen mere moments after being placed and filled, hence we have stopped providing sanitizer by the fuel pumps.

Further, by the end of March, Kwik Chek had built and installed its own sneeze guards in all of its stores since at that time, sneeze guards were not readily available. Unfortunately, sneeze guards have just been the tip of the iceberg with respect to supply chain disruptions. We have repeatedly had difficulty obtaining many items including, but not limited to, sanitizer and masks. When we have found those items, we had to pay a premium to acquire them and had to wait a long time for them to be delivered. In sum, such supply disruptions have been a very real obstacle to our day to day operations and should not end up being the basis for allegations that we aren't doing enough to mitigate the spread of the virus.

In addition to the changes to employee protocols, Kwik Chek initiated several consumer-facing changes to prevent the spread of COVID-19. All in-store dining areas were closed beginning March 20 until further notice. In addition, we removed refillable mugs from all of our stores and posted notices not allowing customers to use their own cups to refill from soda fountains and beverage stations. The company also removed open self-serve pastry and cookie products and all loose condiments, including disposable coffee lids, creamers, ketchup, mustard, etc., from publicly accessible areas.

To encourage customers to follow social distancing guidelines, we put down tape or markers on the floor to show what six feet of social distancing should look like, starting at the checkout station and continuing through the stores in high traffic areas. In fact, in the food order area, we took to using cases of water as physical barriers to prevent customers from overcrowding when we noticed customers often overlooked or disregarded the tape markers. Finally, we alerted customers that we were providing them with an option to call ahead to their local Kwik Chek location and place their food order for takeout and partnered with DoorDash and other delivery services to provide store-to-home delivery in order to cut out in-person interactions.

## **B. PROTECTING AND CARING FOR OUR EMPLOYEES**

As an essential business, we have strived to serve our community during this pandemic all while protecting our employees. Kwik Chek, MOCI, and MTI advised all team members, both in stores and at our corporate offices, to be cautious and follow the guidelines provided by the CDC. We provided masks and gloves to all of our employees, despite difficulty sourcing such items (and above average costs for those items), and strongly encouraged employees to properly use those items while on the job.<sup>3</sup> The company also instituted an infection symptom matrix to guide employees on how to determine whether or not they should report to work if they are experiencing certain symptoms. Related to that matrix, employees are required to self-certify that they do not have symptoms of COVID-19 and have not been in any high exposure risk situations when reporting for work each day. Finally, the companies informed all employees that anyone exhibiting symptoms must remain at home and follow CDC guidelines regarding return to work.

Caring for our employees is not limited to protecting their health while on the job, it also means keeping them “whole” and employed. Despite a 45 percent reduction in fuel volume demand and a 17 percent decline in in-store sales over the past month, to date we have not laid off a single employee and are continuing to pay full salaries. In fact, because MTI’s drivers are paid a base salary that is supplemented by the number of loads a driver does during a pay period – and the loads have decreased by 40 percent – we changed the pay structure to give a higher base salary to make up for the drivers hauling fewer loads and we’ve tried to disperse loads evenly amongst all drivers.

While we evaluate our numbers weekly, our goal is to keep all of our employees on payroll to help them and their families get through this dangerous and challenging time. This choice isn’t easy or cheap. Keeping employees on full pay in a reduced demand environment is not efficient

---

<sup>3</sup> In localities where face masks were required by law, employees were obligated to wear them while on the job. In localities where face masks were not required by law, the company strongly encouraged employees to wear them while on the job.



and there is a cost. Over the past two months, for example, we have spent over \$65,000 across our three companies to support remote working for our employees, purchase personal protective equipment (i.e., masks, sanitizer, etc.), build protective barriers in stores, and pay for supplemental cleaning. Notwithstanding these high costs, we decided to take this course because it is the right thing to do as our nation faces this very scary threat.

### **C. RESPONDING TO AN ILL EMPLOYEE**

Unfortunately, on April 22, 2020, one of our team members was positively diagnosed with COVID-19. Per our COVID-19 protocols, when that employee began exhibiting COVID-like symptoms, we immediately sent her home and encouraged her to get evaluated and tested by a medical professional. Upon notification that the employee tested positive for COVID-19, we closed the store where she had worked and reviewed which other employees had overlapped with that employee for the seven days prior. We then notified those employees and directed them to self-quarantine for 14 days. Our third-party cleaning contractor was then called in to do a medical grade clean of the store before it was reopened. Thankfully, our employee only experienced mild symptoms and subsequently recovered and no other employees got sick. While we are proud of how we addressed the situation, it was neither easy nor inexpensive given the costs of the medical grade cleaning and the need to pull employees from another store in order to reopen the store where the employee got sick.

I think it is also important to note that in addition to our internal company response, we also notified the public via social media and the newspaper about why the store was closed and what we were doing to maintain a safe and healthy environment. And, because the store that was closed was a 24-hour store that is frequented by public safety personnel and other first responders, we also chose to notify the local police and first responders and alerted them that we would keep a different store that was in the same neighborhood open 24 hours so they would have a place to go refuel and get food.

Finally, within the last week, another employee exhibited symptoms and we chose to reenact the procedures described above even before the employee was tested for the virus.

## **V. LIABILITY AND COVID-19**

### **A. CONCERNS WITH LIABILITY THREATS**

Fortunately, none of my businesses have been sued relating to COVID-19 thus far—but that could change tomorrow. Since the start of the pandemic, hundreds of businesses, including many essential businesses, have been sued on COVID-related claims.<sup>4</sup> Despite our good faith efforts to protect our employees and our customers, we run a very real risk that someone who has been in our stores will file a claim at some point. Many of the decisions we have made over time could be second-guessed endlessly. And, as I said, there have been real challenges that have

---

<sup>4</sup> 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-990f9dcc71fc\\_story.html](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-990f9dcc71fc_story.html).

delayed our ability to get protective equipment in some instances and we have faced difficult problems with deploying that equipment (including frequent thefts by customers). My business should not face liability due to these practical problems that make being perfect impossible in this situation.

Given the high costs we are facing to keep our businesses open during this national emergency combined with the drastic reduction in demand, the potential cost of litigation and the uncertainty we face is just overwhelming. We are working tirelessly to make sure we can keep all of our employees on payroll—we don't have the funds to go to court to fight COVID-related liability claims or to settle them one off, which is "cheaper" in the short term but a major expense in the long-term. Frankly, we want to remain focused on serving our communities, making sure our customers and neighbors have the fuel and groceries they need, and keeping our team members safe and employed.

## **B. LIABILITY PROTECTIONS ARE NEEDED**

No one is asking for protection for bad actors. No one is asking for immunity. What we need is protection for essential businesses, like ours, that have overcome the incredible challenges presented by this virus and made drastic changes to business protocols at significant costs in order to serve our communities. Our friends and neighbors rely on us; it would not be right to punish us or put us in the hot seat just for doing our duty to stay open.

It is exceedingly difficult to contact trace and determine the source of someone's illness. That "unknown" places businesses like mine, which have remained open, acutely vulnerable to claims that someone contracted COVID-19 at one of our stores. It would be unfair to subject businesses like mine, which have undertaken wide-ranging health and safety measures, to expend resources defending against claims that we are the source of someone's infection.

Despite a pernicious virus, changing health guidelines, supply-chain shortages and obstacles, and significant costs, we are trying to do right by our employees and our customers. We are trying to perform an essential function – providing food and fuel to consumers – while simultaneously protecting our employees' and customers' safety and keeping a viable business (and keeping jobs for our employees). Lawmakers shouldn't let businesses that operate in good faith to keep their doors open be harassed by unsubstantiated claims. It would be tragic if we had to close our doors after doing so much to stay open because of exorbitant legal costs related to liability threats. Good faith efforts during this national emergency should be enough to protect us from unjust lawsuits.

For all of the above reasons, I call upon this Committee and Congress to enact legislation that takes into account the principles I enumerated earlier in this testimony.

## **VI. CONCLUSION**

Kwik Chek, MOCI, and MTI are proud to have kept our doors open to serve our customers during this difficult time. We are also proud of the care we have taken to safeguard the health and

safety of our employees and to keep them employed. As such, I hope this Committee will consider ways to protect companies like mine, from unsubstantiated and unjust lawsuits.

Thank you for the opportunity to testify before you today. I am happy to answer any questions you may have.