No. 130862/130863 Consolidated

IN THE SUPREME COURT OF ILLINOIS

MARTIN PRODUCE, INC. Third-Party Plaintiff/Appellee, v. JACK TUCHTEN WHOLESALE PRODUCE, INC. and LA GALERA PRODUCE, INC., Third-Party Defendants/Appellants.	Appeal from Appellate Court of Illinois, First Judicial District, Fifth Division Appellate Court No: 1-23-1369 Circuit Court of Cook County, Illinois Court No. 2016L006628

THIRD-PARTY DEFENDANT/APPELLANT JACK TUCHTEN WHOLESALE PRODUCE, INC.'S BRIEF AND APPENDIX

Nicholas J. Parolisi, Jr. (#6201759)
Phillip G. Litchfield (#6317818)
LITCHFIELD CAVO LLP
303 W. Madison, Suite 300
Chicago, Illinois 60606
Phone: 312-781-6665 (direct-Parolisi)
Phone: 312-781-6584 (direct-Litchfield)
Fax: 312-781-6630
Email: parolisi@litchfieldcavo.com
Email: litchfieldp@litchfieldcavo.com
Attorney for Third-Party Defendant/Appellant Jack Tuchten Wholesale Produce, Inc.

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NATURE OF THE ACTION

This action involves a claim by a restaurant to recover economic losses as a result of an *E. coli* outbreak allegedly associated with cilantro that resulted in numerous customers becoming ill. The restaurant, Carbon on 26th, LLC and Carbon on Chicago, LLC ("Carbon") filed an amended action asserting a claim for breach of implied warranty of merchantability against its supplier, Martin Produce, Inc ("Martin"). Martin, in turn, brought an amended third-party action against two of its wholesalers, Jack Tuchten Wholesale Produce, Inc. ("Jack Tuchten") and La Galera Produce, Inc. ("La Galera"), asserting a claim for breach of implied warranty of merchantability to recover damages in the event it is found liable to Carbon.

This appeal involves the June 7, 2024 decision of the Illinois Appellate Court, First District, reversing the May 16, 2023 Order of the Circuit Court of Cook County, Illinois granting summary judgment in Jack Tuchten's favor on Martin's Amended Third-Party Complaint.

ISSUES PRESENTED FOR REVIEW

1. Whether the filing of personal injury complaints alleging a product defect were sufficient for a merchant buyer to satisfy the actual knowledge exception to the UCC direct notice requirement enunciated in C*onnick v. Suzuki Motor Co.*, 174 Ill. 2d 482 (1996) when it failed to provide direct notice of a defect to the seller as required under Section 2-607(3(a) of the UCC.

2. Whether application of the actual knowledge exception to the UCC direct notice requirement of Section 2-607(3(a) of the UCC enunciated in C*onnick v. Suzuki Motor Co.*, 174 Ill. 2d 482 (1996) was proper under the facts and circumstances.

STANDARD OF REVIEW

Both issues presented for review are subject to the *de novo* standard of review such that the reviewing court shall consider anew the facts and law related to the case. *Quinton v. Kuffer*, 221 Ill. App. 3d 466, 471 (2nd Dist. 1991). A motion for summary judgment should be granted when the pleadings, depositions, and admissions on file, together with the affidavits, reveal that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Wehde v. Regional Transp. Authority*, 237 Ill. App. 3d 664, 675 (2nd Dist. 1992).

STATEMENT OF JURISDICTION

This case is subject to jurisdiction under Illinois Supreme Court Rule 315 as a result of the Court granting Jack Tuchten's Petition for Leave to Appeal on September 25, 2024.

STATUTES INVOLVED

810 ILCS 5/2-314 (West 2022)

810 ILCS 5/2-607(3)(a) (West 2022)

STATEMENT OF FACTS

This litigation involves an *E. coli* outbreak that occurred at two restaurants owned and operated by Carbon. (C 173-190.) On June 28, 2016, the Chicago Department of Public Health (the "CDPH") received multiple reports of persons developing illnesses from *E. coli*. (C 177, ¶ 24, C 2563-4.) The CDPH determined that the likely source of the outbreak was Carbon's two restaurants located in Chicago. (C 2631-2650, C 2568.)

Fifty-five personal injury complaints were filed against Carbon by its customers alleging that they became ill as a result of consuming food products with *E. coli* contaminated cilantro prepared and sold by Carbon. (C 9, C 173-190.) The first personal

injury suit was brought by Melissa Andrews against Carbon on July 5, 2016. (C 11, C 173-190.)

Carbon filed a third-party complaint against its produce supplier, Martin, on May 18, 2017. (C 173-190.) Carbon alleged that Martin sold it contaminated cilantro which led to the *E. coli* outbreak that sickened many of its customers. (C 178-179.) Carbon sought contribution and indemnity from Martin, asserting claims for negligence, strict product liability, and breach of warranty in the event Carbon was found liable to any of the personal injury plaintiffs. (C 173-190.) Martin filed an Answer to Carbon's third-party complaint on May 26, 2017, denying that it sold contaminated cilantro to Carbon, (C 671-701, C 683, ¶ 40.)

Carbon filed a second amended supplemental counterclaim against Martin on April 17, 2018 for the first time seeking recovery for its own alleged economic losses as a result of the outbreak. (C 166-171.) Carbon asserted negligence, strict liability, and breach of warranty claims against Martin in its second amended supplemental counterclaim. (C 166 -171.) Martin filed an Answer to Carbon's second amended supplemental counterclaim, denying that it sold Carbon contaminated cilantro. (C 900, ¶ 6.)

The personal injury plaintiffs later added Martin, Jack Tuchten, La Galera, and other wholesalers as defendants. The first personal injury suit brought against Jack Tuchten was filed by Melissa Andrews on June 13, 2018 in a third amended complaint. (C 4234-4267.) Andrews' third amended complaint was brought against Carbon, Martin, Jack Tuchten, La Galera, and three other wholesalers, asserting that they sold contaminated cilantro, which led to her illness. (C 4234-4267.) Andrews did not allege any specific transactions or shipments of cilantro that caused her alleged illness. (C 4234-4267.)

On April 16, 2019, Martin filed a third-party complaint against Jack Tuchten, La Galera, and three other wholesalers relating to Carbon's second amended supplemental counterclaim seeking recovery of economic losses. (C 904-909.) Martin sought contribution from its five wholesalers, including Jack Tuchten, for their alleged negligence to the extent Martin was found liable to Carbon on its second amended supplemental counterclaim. C 904-909.)

Martin later filed a motion for summary judgment on Carbon's second amended supplemental counterclaim. (C 854-861.) Martin asserted in its motion that Carbon's claims were barred under the economic loss doctrine. (C 854-861.) Jack Tuchten and La Galera, in turn, filed motions for summary judgment on Martin's third-party complaint for contribution, asserting that Martin's third-party complaint was barred under the economic loss doctrine. (C 154-164, C 616-621.) On June 30, 2022, the trial court granted summary judgment to Martin, Jack Tuchten, and La Galera, finding that the economic loss doctrine barred Carbon's claims for negligence against Martin and Martin's contribution claims against Jack Tuchten and La Galera. (C 2429-30.) Carbon and Martin were each granted leave to file amended pleadings five weeks before the scheduled jury trial. (C 2429-30.)

On June 29, 2022, Carbon filed Amended Count IX to its Second Amended Counterclaim against Martin, asserting that it breached express and implied warranties for allegedly selling *E. coli*-contaminated cilantro to Carbon. (C 2414-2418, C 2416, ¶¶ 13-16.) Carbon alleged that the contaminated cilantro resulted in an outbreak in June and July 2016 that caused numerous illnesses and lawsuits brought by personal injury plaintiffs. (C 2415-6, ¶¶ 8-13.) Carbon sought recovery of economic losses from Martin that allegedly

resulted from the outbreak. (C 2417-8, ¶¶ 20-2.) Martin denied in its Answer that it supplied contaminated cilantro to Carbon. (C 2433-4, ¶¶ 11-14.)

On July 1, 2022, Martin filed an Amended Third-Party Complaint against Jack Tuchten and La Galera relating to Carbon's Amended Count IX to its Second Amended Counterclaim. (C 2553-2558.) Martin alleged that Jack Tuchten and La Galera breached the implied warranty of merchantability by selling Martin contaminated cilantro that it, in turn, sold to Carbon. (C 2557, ¶¶ 24, 25.) On July 13, 2022, Jack Tuchten and La Galera filed Motions for Summary Judgment on Martin's Amended Third-Party Complaint, asserting as one of their arguments that Martin failed to provide proper notice of the defect as required under Section 2-607(3)(a) of the UCC. (C 2527-2540, C 2705-2719.) It is undisputed that Martin did not provide UCC notice of a defect to Jack Tuchten. Martin's manager, Alexander Maciel, testified that Martin never informed Jack Tuchten of the alleged outbreak of *E. coli.* (C 2668.) Martin's counsel also conceded that Martin never provided UCC notice of a defect to Jack Tuchten. (C 3379.) As Martin's counsel stated in its response brief in opposition to Jack Tuchten and La Galera's motions for summary judgment on September 23, 2022, "Martin always denied, and continues to deny, that there was anything wrong with the cilantro provided by the third-party vendors, Logically, Martin would never notify Tuchten or La Galera of a defect that Martin Produce, itself, denied existed." (C 3379.) Martin instead sought to establish that Jack Tuchten and La Galera had actual notice of the alleged defect as a result of being named as defendants in complaints brought by various personal injury plaintiffs. (C 2556, ¶¶ 19, 20.) Martin sought recovery of damages from Jack Tuchten and La Galera in the event Martin was found liable to Carbon. (C 2557, ¶ 27.)

On March 20, 2023, Circuit Court Judge Daniel Kubasiak issued an order denying Jack Tuchten and La Galera's Motions for Summary Judgment. (C 3999-4006.) Judge Kubasiak found that material questions of fact existed as to Jack Tuchten and La Galera had reasonable notice of a breach of implied warranty because "it could not ignore its common sense nor ignore the over five years of litigation, to apply Section 2-607 without considering the E.coli outbreak that injured over 70 of Carbon's customers." (C 4004-5.)

Jack Tuchten and La Galera jointly moved to reconsider the order denying their Motions for Summary Judgment. (C 4007-13.) Jack Tuchten and La Galera argued that the trial court's order denying the Motions for Summary Judgment was incorrectly decided because it was undisputed that Martin did not provide pre-suit notice as required under Section 2-607(3)(a) of the UCC. (C 4010-12.)

On May 16, 2023, Judge Kubasiak granted Jack Tuchten and La Galera's Motion to Reconsider, and entered summary judgment in their favor. (C 4057-4058.) Judge Kubasiak stated in his order as follows:

> "The court finds that it erroneously failed to hold that the law does not allow a defendant-seller to receive 'reasonable notice' from third-parties via the filing of a lawsuit as the Court suggested. Rather, Illinois law is clear that the defendant-seller must be provided with 'direct notice' from the plaintiff-buyer or that buyer cannot pursue a claim for breach of implied warrant. See *Connick v. Suzuki Motor Co., Ltd.*, 174 Ill.2d 482, 293 (sic) (1997). The court even cited the exact holding from *Connick* in its Opinion, which as a matter of law, required Martin to give direct notice of a potential breach of warranty to La Galera and Tuchten, and Martin admitted in its response brief that it did not provide any notice to Third-Party Defendants.
>
> As such, the Court finds that it erred in essentially creating a new exception to the UCC notice requirements, As Third-Party Defendants argue, Illinois law is clear that only consumer plaintiffs that suffer a personal injury can satisfy their Section 2-607 notice requirement by filing a lawsuit against the seller. *Connick*, 174 Ill.2d at 494-5. The court therefore cannot find that Martin is excused from its notice requirement because someone else sued La Galera and Tuchten for breach of implied warranty." (C 4058.)

Martin filed a motion to reconsider the May 16, 2023 order granting summary judgment in favor of Jack Tuchten and La Galera. (C 4062-4072.) Martin alternatively sought in its motion to reconsider an express finding pursuant to Illinois Supreme Court Rule 304(a) to appeal the summary judgment order. (C 4062-4072.) Judge Kubasiak denied Martin's motion to reconsider and request to appeal under Rule 304(a). (C 4408-4409.) After Martin's motion to reconsider and request to appeal under Rule 304(a) were denied, Carbon filed an emergency motion to continue the jury trial set for July 5, 2023. (C 4450-4453.). Carbon's emergency motion to continue the jury trial was denied. (C 4457.) After Carbon's emergency motion to continue the trial was denied, Martin and Carbon entered into a stipulation to non-suit Carbon's action. (C 4458-4459.) Carbon's action was voluntarily non-suited on July 5, 2023. (C 4463-4464.) Martin appealed Judge Kubasiak's order of May 16, 2023 after Carbon's action against Martin was voluntarily non-suited. (C 4469-4472.)

On June 7, 2024, the Appellate Court reversed the trial court's order granting summary judgment to Jack Tuchten and La Galera. *Andrews v. Carbon on 26th, LLC*, 2024 IL App (1st) 231369, ¶ 43. (A 109-126.) The Appellate Court found that Martin satisfied the actual knowledge exception of the UCC set forth in *Connick* because the personal injury plaintiffs sued Jack Tuchten and La Galera, stating as follows:

> "By naming everyone in the supply chain, the personal injury suits filed here necessarily gave each of these entities actual knowledge that the cilantro *they* sold was alleged to be defective, i.e. this is the sort of actual knowledge that will make it unnecessary for a buyer to separately notify its direct seller that its transaction is considered 'troublesome and must be watched.'" *Andrews v. Carbon on 26th, LLC*, 2024 IL App (1st) 231369. (A 123, ¶ 43.)

In reversing the trial court's order granting summary judgment to Jack Tuchten and La Galera, the Appellate Court stated:

> "The circuit court failed to realize that although the personal injury lawsuit exception did not apply here, the consumer lawsuits could still be the vehicle by which the wholesalers in this case received actual pre-suit knowledge of the defective product." *Andrews*, 2024 IL App (1st) 231369, (A 122, ¶ 42.)

Jack Tuchten appeals the Appellate Court's decision because the Appellate Court misapplied the actual knowledge exception to the UCC direct notice requirement in reversing the trial court's summary judgment entered it its favor.

ARGUMENT

I. The Actual Knowledge Exception Requires A Showing That The Seller Had Knowledge Of An Actual Defect Or An Opportunity To Inspect The Product Defect

A breach of implied warranty of merchantability claim is governed by the Uniform Commercial Code. 810 ILCS 5/2-314 (West 2022). Section 2-607(3)(a) of the UCC requires that a buyer provide direct notice to the seller of a product defect within a reasonable time after he discovers or should have discovered it. See 810 ILCS 5/2-607(3)(a) (West 2022). In general, a buyer must be directly notified by the seller of the troublesome nature of the transaction or be barred from recovering for breach of warranty. *Connick v. Suzuki Motor Co., Ltd*., 174 Ill. 2d 482, 492 (1996). The only two exceptions to the UCC direct notice requirement are set forth by the Illinois Supreme Court in *Connick.* Direct notice is not required when (1) the seller has actual knowledge of the defect of the particular product; or, (2) the seller is deemed to have been reasonably notified by the filing of the buyer's complaint. *Connick*, 174 Ill. 2d 482, 492.

The actual knowledge exception requires that a seller have knowledge of a product defect. *Connick*, 174 Ill. 2d 482, 492. The *Connick* Court expressly states that the seller must have actual knowledge of the defect. *Id. Connick* does not state that a mere allegation of a product defect satisfies the actual knowledge exception. The *Connick* Court cited three

cases when discussing the actual knowledge exception. In all three cases, the buyer was notified of the defect and had an opportunity to observe the defect. In *Malawy v. Richards Manufacturing Co*., 150 Ill. App. 3d 549 (5th Dist. 1986*)*, the Court invoked the actual knowledge exception because the seller hospital removed the defective medical device from plaintiff and had an opportunity to observe the defect. In *Crest Container Corp. v. R.H. Bishop,* 111 Ill. App. 3d 1068 (5th Dist. 1982), the court applied the actual knowledge exception because the seller's employee visited plaintiff to determine why the product was malfunctioning. Finally, in *Overland Bond & Investment Corp.*, 9 Ill. App. 3d 348 (1st Dist. 1972), the Court found that the actual knowledge exception applied because the car was towed to the seller's auto dealership to repair the defect.

In our case, Martin cannot rely on the allegations in the personal injury complaints to satisfy the actual knowledge exception to the UCC notice requirement. According to the Appellate Court, the mere allegation of a product defect is sufficient to satisfy the actual knowledge exception. However, *Connick* states in unequivocal language that this exception requires actual knowledge of a defect. *Connick* does not allow the actual knowledge exception to be satisfied by the mere pleading allegation of a defect. Martin did not present any evidence that Jack Tuchten had actual knowledge of a defect or an opportunity to inspect the product defect similar to the sellers in *Malawy, Crest Container*, and *Overland*.

II. Martin Cannot Rely On The Personal Injury Complaints To Satisfy The Actual Knowledge Exception Because Only A Personal Injury Plaintiff Can Satisfy The UCC Notice Requirement By Filing A Complaint

The second exception in *Connick* relieves a buyer from providing direct notice under the UCC when the seller is deemed to have been reasonably notified of the defect by the filing of the buyer's complaint. *Connick*, 174 Ill. 2d 482, 494-5. In determining whether notice is adequate, courts divide plaintiffs into three categories: (1) merchant buyers; (2)

consumer buyers who did not suffer personal injuries; and, (3) consumer buyers who suffered personal injuries. *Id.* at 494-5. The *Connick* Court made clear that the second exception can only be invoked by consumer buyers who suffered personal injuries. *Id.* at 495. In the Illinois Supreme Court's own words:

> "Only a consumer plaintiff who suffers personal injury may satisfy the section 2-607 notice requirement by filing a breach of warranty action against the seller." *Id.*

Allowing Martin to rely on filing of personal injury complaints to satisfy the actual knowledge exception to the UCC notice requirement is contrary to the holding in *Connick.* In our case, the Appellate Court recognized that only a consumer buyer who suffers personal injuries may satisfy the UCC's notice requirement by filing a lawsuit. The Appellate Court conflated the first and second exceptions to the notice requirement, finding that the filing of complaints by personal injury plaintiffs was a proper basis for Martin to satisfy the actual knowledge exception. On this point, the Appellate Court stated:

> "The circuit court failed to realize that although the personal injury lawsuit exception did not apply here, the consumer lawsuits could still be the vehicle by which the wholesalers in this case received actual pre-suit knowledge of the defective product."

The Appellate Court's ruling renders meaningless the limitation of *Connick's* second exception that only allows consumer buyers who suffer personal injuries to satisfy the UCC notice requirement by filing a complaint. Under the Appellate Court's decision, a merchant buyer cannot avoid providing direct notice by filing its own complaint alleging a breach, but it can avoid providing direct notice by relying on a personal injury plaintiff filing a complaint alleging a breach. Such a result is directly contrary to the holding in *Connick*. Under *Connick*, a buyer that did not suffer personal injuries cannot rely upon the filing of a complaint as a substitute for satisfying the notice requirement. See also, *Perona*

v. Volkswagen, 292 Ill. App. 3d 59, 64 (1st Dist. 1997). In *Perona*, the Appellate Court, consistent with *Connick*, refused to allow buyers that did not suffer personal injuries to rely upon the filing of their complaint as a basis for establishing UCC notice. *Id.* If a buyer that did not suffer personal injuries cannot rely upon the filing of its own complaint as a basis for establishing UCC notice it surely cannot rely on the filing of a complaint by another for establishing UCC notice. Martin, as a merchant buyer, cannot rely upon the filing of personal injury complaints by consumer buyers to satisfy the actual knowledge exception enunciated by the Illinois Supreme Court in *Connick.*[1]

III. Martin Cannot Rely Upon The Filing Of Personal Injury Complaints To Satisfy The Actual Knowledge Exception Because The Notice Must Come From The Buyer

Connick makes clear that the buyer must provide notice of the breach to satisfy the UCC notice requirement. The UCC notice must come directly from the buyer. In discussing the UCC notice requirement, the *Connick* Court cited Judge Learned Hand as follows:

> "The notice 'of the breach' required is not of the facts, which the seller presumably knows quite as well as, if not better than, the buyer, but of *buyer's claim* that they constitute a breach." *Connick,* 174 Ill.2d 482, 493-4 quoting *American Manufacturing Co. v. United States Shipping Board Emergency Fleet Corp.*, 7 F.2d 565, 566 (2nd Cir. 1925).

A Northern District of Illinois trial court decision addressed the requirement that the notice come from the buyer, stating as follows:

> Plaintiffs' claims for breach of express warranty are dismissed because, despite their arguments to the contrary, plaintiffs do not allege that they provided defendants with pre-suit notice. They allege that someone else did,

[1] The Appellate Court makes reference to Martin's counsel suggestion at oral argument to a subpoena that Martin claims to have served on wholesalers in January 2017. (A 122, ¶ 40.) Martin waived the issue because it never presented any evidence that a subpoena was served and never raised in briefing that issuance of a subpoena somehow satisfied the actual knowledge exception during briefing in the trial court or appellate court. *Britamco Underwriters, Inc. v. J.O.C. Enterprises, Inc.*, 252 Ill. App. 3d. 96, 99 (2nd Dist. 1993).

> and they give no information on where that person bought the product or his relationship to plaintiffs. Plaintiffs cite to two cases for the proposition that sufficiency of pre-suit notice is usually a question of fact reserved for the jury. *See In re Rust-Oleum Restore Mktg., Sales Practices & Products Liab. Litig.*, 155 F.Supp.3d 772, 801 (N.D. Ill. 2016); *Maldonado v. Creative Woodworking Concepts, Inc.*, 296 Ill.App.3d 935, 940 (3rd Dist. 1998). But the sufficiency of notice is not an issue if plaintiffs do not allege notice in the first place. The letter here was no notice at all because it was not from plaintiffs. One purpose of the pre-suit notice requirement is to facilitate settlement of the buyer's claim.

Porter v. NBTY, Inc., 2016 WL 6948379, at *7 (N.D. Ill. Nov. 28, 2016) (emphasis added).

Under *Connick*, Martin was required to provide notice to Jack Tuchten to satisfy the UCC notice requirement. Martin never did. It is undisputed that Martin never provided UCC notice to Jack Tuchten of a claim for breach of implied warranty or a product defect. To the contrary, Martin has denied and continues to deny that any its suppliers, including Jack Tuchten, breached the implied warranty of merchantability or sold a defective product.

The Appellate Court did not consider that the UCC notice must come from the buyer when it allowed the filing of the personal injury complaints to satisfy the actual knowledge exception. The Appellate Court stated that "[w]e see no reason why actual knowledge must be more definitive than what direct notice of a purported defect would provide, since it is meant to stand in lieu of it." (A 123, ¶ 44.) But, by allowing the personal injury complaints filed by others to satisfy the actual knowledge exception, the Appellate Court has made it easier for a buyer to satisfy the actual knowledge exception than the direct notice requirement. Under the Appellate Court's decision, a buyer does not have to be the source of notice to meet the actual knowledge exception, but the buyer does have to be the source to establish direct notice under 2-607(3(a). It should not be easier to establish the actual knowledge exception than to satisfy the direct notice requirement.

The notice to establish meet the actual knowledge exception must come from the buyer, as was the case for each of the buyers in *Malawy*, *Crest Container*, and *Overland*. In those cases, the court found that the buyers provided a different, but heightened form of notice than a notice letter contemplated under the UCC. The notice to the sellers in those cases was more meaningful that a UCC notice letter because the sellers had an opportunity to observe and inspect the product after being notified by the buyers of a defect. Nothing of the sort happened in our case. Under the Appellate Court's interpretation of *Connick's* actual knowledge exception, Martin is being relieved of its obligation to be the source of notice of a defect. Martin's breach of implied warranty claim fails because Martin did not provide UCC notice of a breach to Jack Tuchten and did not otherwise notify Jack Tuchten of the defect and provide an opportunity to inspect the product defect as the buyers did in *Malawy*, *Crest Container,* and *Overland*.

IV. The Allegations In The Personal Injury Complaints Do Not Satisfy The Actual Knowledge Exception Because They Only Convey Generalized Knowledge About Safety Concerns

A seller's generalized knowledge about the safety concerns of third parties is insufficient to satisfy a buyer's UCC notice requirement. *Connick*, 174 Ill. 2d 482, 493. The seller must be notified by the buyer that the particular transaction is troublesome. Under this standard, a seller's knowledge of unfavorable reports and settlement agreements with several states regarding safety issues of the model vehicle did not meet the UCC notice requirement. *Id.*

In our case, the personal injury complaints cannot be used as a basis to establish actual knowledge because they merely provided generalized knowledge of an alleged defect. The personal injury complaints asserted claims against the restaurant for improper

food handling practices, Martin, and five different wholesalers. The personal injury plaintiffs do not point to a specific transaction that was troublesome and needed to be watched. To the contrary, they simply made generalized allegations that cilantro was contaminated without any reference to any particular transaction involving Jack Tuchten or any other wholesaler for that matter. The complaints also raised the issue that the cilantro may have become contaminated after reaching the restaurant. These general pleading allegations are insufficient to satisfy the actual knowledge exception.

V. Martin Should Not Be Allowed To Invoke The Actual Knowledge Exception Because It Thwarts The Purpose Of The UCC Notice Requirement Of Allowing A Seller An Opportunity To Timely Investigate

The intention and purpose of the UCC requiring Martin to provide direct notice to Jack Tuchten was to afford Jack Tuchten a pre-suit opportunity to investigate, address, and/or settle the claim of Martin, as the buyer of the product. *Branden v. Gerbie*, 62 Ill. App. 3d 138, 141 (1st Dist. 1978). Notice must be made within a reasonable time of delivery to comply with Section 2-607. *Id.* The Appellate Court noted that reasonableness of notice was not addressed in the appellate court briefing. However, the issue of the reasonableness of notice and its impact of the ability to conduct an investigation was addressed in the appellate briefing. (A 078.) Martin's failure to provide pre-suit notice as required by the UCC directly resulted in Jack Tuchten being unable to conduct a timely and thorough investigation into any claims that it sold contaminated cilantro to Martin. Moreover, the first personal injury complaint filed against Jack Tuchten nearly two years after the outbreak did not allow Jack Tuchten an opportunity to conduct a timely investigation. Under these circumstances, Martin should not be allowed to pursue a claim for breach of implied warranty of merchantability against Jack Tuchten.

CONCLUSION

For the reasons set forth above, the Court should reverse the Appellate Court's decision reversing summary judgment in favor of Jack Tuchten and affirm the trial court's order granting summary judgment in favor of Jack Tuchten.

Respectfully submitted,

JACK TUCHTEN WHOLESALE PRODUCE, INC.

By: /s/ Nicholas J. Parolisi, Jr.

Nicholas J. Parolisi, Jr. (#6201759)
Phillip G. Litchfield (#6317818)
LITCHFIELD CAVO LLP
303 W. Madison, Suite 300
Chicago, Illinois 60606
Phone: 312-781-6665 (direct-Parolisi)
Phone: 312-781-6584 (direct Litchfield)
Fax: 312-781-6630
Email: parolisi@litchfieldcavo.com
Email: litchfieldp@litchfieldcavo.com
Attorney for Third-Party Defendant/Appellant, Jack Tuchten Wholesale Produce, Inc.

RULE 341(C) CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 15 pages.

By: ***/s/ Nicholas J. Parolisi, Jr.***
One of the attorneys for Third-Party Defendant/Appellant Jack Tuchten Wholesale Produce, Inc.

By: ***/s/ Phillip G. Litchfield***
One of the attorneys for Third-Party Defendant/Appellant Jack Tuchten Wholesale Produce, Inc.

Nicholas J. Parolisi, Jr. (#6201759)
Phillip G. Litchfield (#6317818)
LITCHFIELD CAVO LLP
303 West Madison, Suite 300
Chicago, Illinois 60606
Phone: 312-781-6665 (direct-Parolisi)
Phone: 312-781-6584 (direct Litchfield)
Fax: 312-781-6630
Email: parolisi@litchfieldcavo.com
Email: litchfieldp@litchfieldcavo.com
Attorney for Third-Party Defendant/Appellant Jack Tuchten Wholesale Produce, Inc.

APPENDIX

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First Judicial District

MARTIN PRODUCE, INC.,

Counter-Defendant/Third-Party Plaintiff/Appellant,

v.

JACK TUCHTEN WHOLESALE PRODUCE, INC. and
LA GALERA PRODUCE, INC.,

Third-Party Defendants/Appellees.

Appeal from the Circuit Court of Cook County, Illinois,
County Department, Law Division, No. 16 L 6628.
The Honorable Daniel J. Kubasiak, Judge Presiding.

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT

DANIEL J. ARNETT
MARK R. BENNETT
ARNETT LAW GROUP, LLC
223 West Jackson Boulevard
Suite 750
Chicago, Illinois 60606
(312) 561-5660
darnett@arnettlawgroup.com
mbennett@arnettlawgroup.com

Counsel for Counter-Defendant/Third-Party Plaintiff/Appellant Martin Produce, Inc.

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NATURE OF THE CASE

This case is about whether the lower court erred by failing to apply the exceptions to the notice requirement of Section 2-607(3)(a) of the Uniform Commercial Code ("UCC"), as established by the Illinois Supreme Court in the case of *Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 492 (1996).

Section 2-607(3)(a) of the UCC provides that a buyer who accepted goods must notify the seller of any breach or be barred from claiming breach of warranty. Notice of breach is not required, however, where: (1) the seller has actual knowledge of the defect of the particular product; or (2) the seller is deemed to have been reasonably notified by the filing of the buyer's complaint alleging breach of UCC warranty. *Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 492 (1996).

The matter involves breach of warranty of merchantability claims related to allegedly defective cilantro, which is claimed to have caused an outbreak of a foodborne illness, E. coli O157:H7, at a restaurant, injuring 55 of the restaurant's customers in late June of 2016. As a result of the E. coli outbreak, the 55 injured consumers filed various personal injury claims against the restaurant ("Carbon"), the cilantro distributor ("Martin Produce"), and the two cilantro suppliers (the "Vendors"). These personal injury claims were consolidated and litigated until March of 2020, when all parties involved reached a global settlement as to fault allocation. (C 963-964).

Within the consolidated personal injury action, the restaurant, Carbon, filed breach of implied warranty claims against Martin Produce, seeking compensation for the economic losses resulting from the E. coli outbreak. While denying the alleged breach,

Martin Produce filed contingent, third-party breach of implied warranty claims against the cilantro Vendors, Jack Tuchten Wholesale Produce, Inc. and La Galera Produce, Inc.

On May 16, 2023, the trial court granted Summary Judgment against Martin Produce, in favor of the Vendors, holding that the Vendors did not have notice of the allegedly defective cilantro, even though the Vendors had previously answered and defended against the personal injury claims centered around the very same allegedly defective cilantro, clearly falling within the two notice exceptions provided by the Illinois Supreme Court in *Connick,* 174 Ill. 2d at 492.

The trial court's granting of Summary Judgment was in error, as a matter of law, based on its erroneous interpretation of Section 2-607(3)(a) of the UCC. Martin Produce, Inc. now seeks review in this Court *de novo* and reversal.

ISSUES PRESENTED FOR REVIEW

1. Whether the trial court erred in granting Summary Judgment against Martin Produce, Inc. based on a purported lack of notice under Section 2-607(3)(a) of the UCC, without considering the exceptions to notice, provided by the Illinois Supreme Court in the case of *Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 492 (1996).

2. Whether the *Connick* exceptions to notice apply to the case at bar, thereby dictating reversal of the Circuit Court's orders of May 16, 2023, and June 6, 2023, and reversal of Summary Judgment granted against Martin Produce, Inc.

3. Whether Section 2-607(3)(a) of the UCC applies to breach of implied warranty claims where the alleged breach resulted in personal injury.

4. Whether Section 2-607(3)(a) of the UCC applies to breach of implied warranty claims where the alleged breach involved consumable, perishable goods with latent defects.

STATEMENT OF JURISDICTION

This matter was voluntarily dismissed, in its entirety, on July 5, 2023, thereby disposing of all matters pending before the Circuit Court and rendering all orders which were final in nature, but which were not previously appealable, immediately final and appealable. (C 4467-8); *See Dubina v. Mesirow Realty Dev.*, 178 Ill. 2d 496, 503 (1997). As such, this Appellate Court has jurisdiction pursuant to Illinois Supreme Court Rule 303.

STATEMENT OF FACTS

Counter-Defendant/Third-Party Plaintiff, Martin Produce, Inc. ("Martin Produce"), is a distributor of fresh produce and food products, which it purchases from wholesalers, and sells to restaurants across the Chicagoland area. Third-Party Defendants, Jack Tuchten Wholesale Produce, Inc. ("Jack Tuchten") and La Galera Produce, Inc. ("La Galera"), are wholesale sellers of fresh produce that do business with Martin Produce. (C 3440-3472; C 3610-3645). (Collectively, Jack Tuchten and La Galera are also referred to herein as the "Vendors").

In June of 2016, the Vendors each sold and shipped cilantro to Martin Produce, which Martin Produce then sold to Counter-Plaintiffs, Carbon on Chicago, LLC and Carbon on 26th, LLC (collectively "Carbon"), a fast-casual Mexican restaurant. (C 3440-3472; C 3610-3645). On July 1, 2016, Carbon closed due to an alleged E. coli O157:H7 outbreak involving at least 55 of Carbon's customers. (C 3440-3472; C 3610-3645). The Chicago Department of Public Health investigated the E. coli outbreak and issued a

Foodborne Final Report and Supplement to the Foodborne Report, identifying contaminated cilantro as the most likely cause of the outbreak, based on epidemiological evidence. (C 2086-2106; C 2569-2571).

As a result of the outbreak, 55 separate personal injury lawsuits were filed and consolidated, naming Carbon, Martin Produce, Jack Tuchten, and La Galera as direct defendants, led by a consumer, personal injury plaintiff Melissa Andrews. (C 3610-3645). Carbon, Martin Produce, and the Vendors litigated the personal injury claims for over five years, up to and through jury selection, before all defendants reached a global settlement as to fault allocation in March of 2020, leading ultimately to the settlement of all personal injury claims. (C 963-964).

During the same personal injury litigation, Carbon sought to recover its economic damages from the suppliers of the cilantro that allegedly caused the E. coli outbreak, by way of various counterclaims and third-party claims brought against Martin Produce and the Vendors, alleging, among other things, breach of warranty of merchantability relative to the cilantro Carbon had purchased. (C 173-190; C 3440-3472; C 3568-3572). While Martin Produce denied, and continues to deny, that the cilantro was contaminated and/or the cause of the E. coli outbreak, Martin Produce filed a contingent Third-Party Complaint for Contribution against Jack Tuchten and La Galera, as necessary third-parties, alleging that if Martin Produce was found to have breached its warranty of merchantability by way of selling contaminated cilantro, the Vendor's also breached their warranties of merchantability by providing that same tainted cilantro to Martin Produce. (C 3562-3567). The effective dismissal of Martin Produce's third-party claims against Jack Tuchten and

La Galera, by way of Summary Judgment granted in favor of the Vendors, removed these necessary parties on the eve of trial, and forms the basis of this appeal.

As argued below, it is Martin Produce's position that the Circuit Court erred by granting Summary Judgment in favor of the Vendors, based on its erroneous ruling, as set forth in its May 16, 2023, Order, that Martin Produce failed to meet the notice requirement of 810 ILCS 5/2-607, thereby precluding its third-party breach of warranty claims against the Vendors. (C 4057-4058; C 4408). After the voluntary dismissal of Carbon's Amended Count IX to Second Amended Supplemental Counterclaim against Martin Produce, all previous Orders became final and appealable, hence this appeal. (C 4467-4468).

Procedural History

On October 27, 2017, following multiple personal injury complaints directed against Carbon, Carbon filed a Third-Party Complaint against Martin Produce and Jack Tuchten, pleading counts of strict products liability, negligence, contribution, and breach of express and implied warranty, with regard to the allegedly contaminated cilantro sold by Jack Tuchten and Martin Produce. (C 3404-3433). Carbon's Third-Party Complaint identified and incorporated by reference 54 personal injury complaints filed under the same case caption. (C 3404-3405). Carbon further alleged that Jack Tuchten sold defective cilantro to Martin Produce, which Martin Produce sold to Carbon on June 13, 2016 and June 16, 2016, and which allegedly resulted in an E. coli outbreak and personal injury at Carbon's restaurants in June of 2016, thereby causing Carbon to suffer economic losses. (C 3404-3407). On January 29, 2018, Jack Tuchten moved to dismiss Carbon's Third-Party Complaint, based on a lack of privity, but without raising the issue of notice under Section 2-607 of the UCC. (C 3434-3439).

On March 1, 2018, Carbon filed an Amended Third-Party Complaint repleading the counts of strict products liability, negligence, contribution, and breach of express and implied warranty against Martin Produce, Jack Tuchten, and adding La Galera. (C 3440-3472). Carbon's Amended Third-Party Complaint once again identified and incorporated by reference 54 personal injury complaints filed under the same case caption. (C 3441-3442). Carbon further alleged that Jack Tuchten and La Galera sold defective cilantro to Martin Produce, which Martin Produce sold to Carbon on June 13, 2016 and June 16, 2016, and which allegedly resulted in an E. coli outbreak and personal injury at Carbon's restaurants in June of 2016, thereby causing Carbon to suffer economic losses. (C 3440-3442). While the record fails to reflect that Jack Tuchten filed an Answer to Carbon's Amended Third-Party Complaint, on June 4, 2018, La Galera filed its Answer to Carbon's Amended Third-Party Complaint, denying that it breached its express and implied warranties. (C 3473-3521; C 3496-3499). La Galera's Answer did not raise the issue of notice in response to Carbon's Amended Third-Party Complaint. (C 3473-3521).

On June 20, 2018, Carbon filed its Second Amended Third-Party Complaint, removing its claims brought against Jack Tuchten and La Galera, due to lack of privity, and leaving Martin Produce as the sole economic loss defendant. (C 3523-3536). As a result, Martin Produce was compelled to bring Jack Tuchten and La Galera back into the case as necessary third-parties. Accordingly, nine months later, on March 25, 2019, Martin Produce filed its Third-Party Complaint for Contribution against Jack Tuchten and La Galera, asserting contingent third-party claims that were identical to those of Carbon and dependent on the success of Carbon's economic damages action. (C 3562-3567). Critically, however, prior to the filing of Martin Produce's Third-Party Complaint, Jack Tuchten and

La Galera participated extensively in the personal injury litigation regarding the allegedly defective, E. coli contaminated, cilantro. Of course, the purchase, sale, and distribution of the cilantro at issue in the personal injury litigation involved the exact same transactions that formed the basis of Carbon's breach of warranty claims, as well as Martin Produce's third-party breach of warranty claims against the Vendors. (C 3440-3472; C 3610-3645).

The Personal Injury Complaints

In June of 2018, ten months before Martin Produce's Third-Party Complaint was filed, Melissa Andrews, followed shortly by 54 other personal injury plaintiffs, filed a personal injury complaint regarding the E. coli outbreak, against Carbon, Martin Produce, Jack Tuchten, and La Galera. (C 3610-3644). Melissa Andrews was Carbon's customer and a consumer of the allegedly contaminated cilantro; as such, Ms. Andrews' Third Amended Complaint alleged causes of action sounding in negligence, strict liability, and breach of express and implied warranties, each of which were alleged and/or incorporated into counts directed against La Galera and Jack Tuchten. (C 3610-3644). Ms. Andrews' Third Amended Complaint further contained a detailed Statement of Facts regarding the E. coli outbreak in June of 2016, including identifying the allegedly contaminated cilantro, the Chicago Department of Public Health's investigation, the plaintiffs' injuries, and the relevant transactions between the Vendors, Martin Produce, and Carbon. (C 3610-3617). Additionally, Ms. Andrews' personal injury complaint cited to and restated allegations directly from Carbon's previously filed Amended Third-Party Complaint, to further support and clarify that the cilantro at issue was sold by the Vendors to Martin Produce and, then, from Martin Produce to Carbon. (C 3616-3617).

Melissa Andrews alleged, among other facts, that Jack Tuchten and La Galera "manufactured, distributed, and sold the adulterated food that injured the plaintiff and caused the plaintiff to become infected with E. coli O157:H7." (C 3627-3628; C 3630-3631). Further, the personal injury complaint alleged that Jack Tuchten and La Galera "designed, manufactured, distributed, and sold food products that were adulterated with E. coli O157:H7 bacteria, a potentially deadly pathogen . . . unfit for human consumption, and were not reasonably safe as designed, constructed, manufactured, and sold." (C 3636-3638; C 3640-3642).

In response, Jack Tuchten filed its Answer to Melissa Andrew's Third Amended Complaint, in which Jack Tuchten admitted that Carbon's allegations were accurately incorporated, including the allegation that Jack Tuchten sold cilantro to Martin Produce, which Martin Produce sold to Carbon during the relevant time period. (C 4270-4288; C 4278-4279). Jack Tuchten's Answer denied that the cilantro was contaminated or defective. (C 4279). Similarly, La Galera's Answer to Melissa Andrew's Complaint admitted that La Galera sold cilantro to Martin Produce in the summer of 2016 and denied all other material allegations. (C 4290-4293). At this point, it is obviously undisputed that Jack Tuchten and La Galera were on notice that the cilantro they sold to Martin Produce in June of 2016 was allegedly contaminated with E. coli, resulting in personal injury, and, further, was alleged to have caused Carbon's economic damages.

Personal Injury Written and Oral Discovery

Carbon, Martin Produce, Jack Tuchten, and La Galera then began to litigate the various personal injury and economic damages claims revolving around the E. coli outbreak.

On November 19, 2018, Jack Tuchten served verified Responses to Carbon's Requests for Production of Documents, in which Jack Tuchten identified and produced documents "relating to the June 14, 2016 and June 16, 2016 sales of cilantro to Martin Produce." (C 2808-2824; C 2808-2809). These documents included Invoice No. 504129 and Invoice 503589. (C 2798-2799). Jack Tuchten further responded that "documents relating to Jack Tuchten's propriety food safety practices in effect in June 2016 will be produced upon entry of a protective order." (C 2809). La Galera also served Responses to Carbon's Requests for Production, attaching five invoices identifying the relevant shipments of cilantro to Martin Produce in May and June of 2016. (C 2801-2806; C 2826-2831). Moreover, La Galera's Responses stated that "La Galera was unaware of any outbreak until the instant lawsuit was filed." (C 2828). These discovery responses and invoices were attached as exhibits to Jack Tuchten's Motion for Summary Judgment and available for consideration by the trial court. (C 2705-2831; C 2798-2831).

Then, on January 10, 2019, counsel for Jack Tuchten and La Galera attended and participated in the deposition of Chicago Department of Public Health's ("CDPH's") infectious disease investigator, Stephanie Black, Ph.D., who testified as to her investigation, findings, and reports regarding the E. coli outbreak, which CDPH attributed to the cilantro present at Carbon. (C 2560-2561). During the deposition, CDPH's Foodborne Final Report and Supplement to the Foodborne Report, which summarized CDPH's investigation and conclusions, were marked and attached as exhibits, thereby demonstrating that Jack Tuchten and La Galera were aware of, and/or in possession of, the CDPH's Reports on or before January of 2019. (C 2562; C 2631-2650).

On February 28, 2019, counsel for Jack Tuchten and La Galera attended and participated in the deposition of Martin Produce's Co-Manager, Alexander Maciel. (C 2652). On March 1, 2019, the Vendors' counsel participated in the deposition of Martin Produce's Warehouse Manager Ugo Llorente. (C 2675). On March 1, 2019, counsel for Jack Tuchten and La Galera also participated in the deposition of Martin Produce's Co-Manager, Griscel Maciel (C 2880). Each of the aforementioned depositions involved extensive questioning and information gathering regarding the E. coli outbreak, the allegedly defective cilantro, Martin Produce's shipping and receiving practices, and the relationships between the cilantro at issue and the Vendors. (C 2652-2673; C 2675-2693; C 2880-2888; C 2971-3040).

Moreover, each of the aforementioned deposition transcripts were attached to Jack Tuchten's and/or La Galera's Motions for Summary Judgment, again clearly demonstrating that the Vendors were acutely aware that their cilantro, the allegedly defective produce, was at the core of the personal injury claims filed by the consumers and the economic damages claims filed by Carbon and Martin Produce. (C 2651-2673; C 2674-2793; C 2856-2878; C 2879-2888; C 2892-2968; C 2969-3040).

Next, on March 25, 2019, to confirm the exact transactions of cilantro at issue, Martin Produce served Requests to Admit upon Jack Tuchten, which identified the delivery date, invoice number, cost, and quantity of each crate of cilantro shipped to Martin Produce in June of 2016, immediately prior to the E. coli outbreak. (C 4303-4309). The Requests to Admit served on Jack Tuchten attached copies of the invoices that Jack Tuchten included with each shipment of cilantro that it delivered to Martin Produce during the relevant time period. (C4303-4309; C 4307-4309). As set forth in the Requests to Admit, Jack Tuchten's

relevant transactions included three shipments of cilantro, identified by Invoice No. 1294243, delivered on June 14, 2016; Invoice No. 1295229, delivered on June 16, 2016; and Invoice No. 1295509, delivered on June 17, 2016. (C 4307-4309). The admissions of Jack Tuchten were consistent with their response to Carbon's document production requests. (C 2464-2473; C 2799-2800; C 4303-4309).

On March 25, 2019, to confirm the exact transactions at issue, Martin Produce served Requests to Admit upon La Galera, which identified the delivery date, order number, cost, and quantity of each crate of cilantro shipped to Martin Produce in June of 2016, immediately prior to the E. coli outbreak. (C 4319-4325). The Requests to Admit served on La Galera also included copies of the customers ticket that La Galera sent with each shipment of cilantro that it delivered to Martin Produce in the relevant time period. (C 4319-4325; C 4323-4325). As set forth in the Requests to Admit, La Galera's relevant transactions included three shipments of cilantro, identified by Order No. 00304912, delivered on June 3, 2016; Order No. 00306240, delivered on June 10, 2016; and Order No. 00306541, delivered on June 13, 2016. (C 4323-4325). The admissions of La Galera were consistent with their responses to Carbon's document requests and the documents produced therewith. (C 2482-2487; C 2801-2806; C 4319-4325).

Martin Produce's Third-Party Complaint

Finally, on April 16, 2019, while Carbon, Martin Produce, and the Vendors were litigating the myriad of personal injury claims, Martin Produce filed its Third-Party Complaint for Contribution against Jack Tuchten and La Galera, alleging breach of warranty of merchantability against Jack Tuchten and La Galera - the subject of the Vendors' Motions for Summary Judgment and this appeal. (C 3562-3567). On May 10,

2019, Jack Tuchten filed its Answer to Martin Produce's Third-Party Complaint, denying that it breached the implied warranty of merchantability, without raising the issue of lack of notice. (C 4349-4356; C 4354-4355). On June 5, 2019, La Galera filed its Answer to Martin Produce's Third-Party Complaint, denying that it breached the implied warranty of merchantability, without raising the issue of notice. (C 4358-4372; C 4368).

In light of the volume and complexity of the pending personal injury claims, Carbon's economic damages claims were stayed, and the parties proceeded to litigate the consolidated personal injury claims, participating in additional written discovery, oral discovery, and expert discovery regarding the allegedly defective cilantro and E. coli outbreak at the Carbon restaurants. Eventually, the personal injury claims were set for a bifurcated trial as to liability, and a jury was selected on February 27, 2020. On the eve of trial, the parties reached a global settlement as to fault allocation, which included contributions from Carbon, Martin Produce, Jack Tuchten, and La Galera, thereby facilitating the resolution of Melissa Andrews' and all other personal injury claims several months thereafter. (C 964).

Carbon's economic damages claim then proceeded against Martin Produce, with Jack Tuchten and La Galera named as Third-Party Defendants. On June 29, 2022, with leave of court, Carbon filed its Amended Count IX to Second Amended Supplemental Counterclaim, reasserting its breach of warranty claim against Martin Produce. (C 3568-3572). On July 1, 2022, with leave of court, Martin Produce filed an Amended Third-Party Complaint against Tuchten and La Galera, reasserting its breach of warranty claim against the Vendors. (C 3573-3589; C 3584-3589). On July 13, 2022, both Jack Tuchten and La Galera filed Answers to Martin Produce's Amended Third-Party Complaint, denying that

they breach the implied warranty of merchantability, without raising the issue of notice. (C 3590-3598; C 3599-3609).

The Summary Judgment Motions at Issue

On March 20, 2023, Jack Tuchten and La Galera filed separate Motions for Summary Judgment, arguing, for the first time, that the Vendors had insufficient notice of the allegedly defective cilantro, pursuant to 810 ILCS 5/2-607. (C 2705-2719; C 2527-2540). In response, and among other arguments, Martin Produce asserted that the Vendors had actual knowledge and sufficient notice, consistent with the Illinois Supreme Court's ruling in *Connick v. Suzuki Motor Co.*, as a result of the numerous personal injury complaints and subsequent related litigation. (C 3370-3644; C 3645-3920).

Initially, the Circuit Court denied the Vendors' Motions, finding that "the court cannot ignore its common sense, nor ignore the over five years of litigation, to apply Section 2-607 without considering the E. coli outbreak that injured over 70 of Carbon's customers;" and, therefore, held that notice was a question of fact reserved for the trier of fact. (C 3999-4006). The Vendors then filed a joint Motion to Reconsider, arguing, inaccurately, that Section 2-607 of the UCC creates a strict, direct notice requirement, without any exceptions or possibility of a question of fact. (C 4007-4013). In its Response, Martin Produce identified the inaccurate conclusions of law and, again, argued that the Vendors were put on notice of the allegedly defective cilantro by and through the personal injury complaints and resulting litigation. (C 4026-4035). In its May 16, 2023, Order, the Circuit Court relied, at least in part, on the Vendors' erroneous declarations regarding Section 2-607, going so far as to even quote the Vendor's misstatements of law, when it

granted their Motion to Reconsider on May 16, 2023, and, as a result, granted Summary Judgment in favor of Jack Tuchten and La Galera. (C 4057-4058).

Martin Produce then filed its own Motion to Reconsider the Court's May 16, 2023, Order, calling attention to the Circuit Court's misapplication of *Connick* and failure to consider the two exceptions to direct notice. (C 4062-4072). On June 6, 2023, the Circuit Court denied Martin Produce's Motion to Reconsider, standing on its interpretation of *Connick*. (C 4408). On June 8, 2023, the Circuit Court denied Martin Produce's Motion for Illinois Supreme Court Rule 304(a) Language. (C 4409). On July 5, 2023, Carbon voluntarily dismissed its Amended Count IX to Second Amended Supplemental Counterclaim against Martin Produce, in its entirety, rendering all prior orders final and appealable. (C 4467-4468); *Dubina v. Mesirow Realty Dev.*, 178 Ill. 2d 496, 503 (1997). This appeal follows.

STANDARD OF REVIEW

This is an appeal from Summary Judgment, which was initially denied but, subsequently, granted, based upon a Motion to Reconsider. (C 4057-8) The Appellate Court reviews an order granting summary judgment *de novo*. *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 154 Ill. 2d 90, 102 (1992). Summary judgment is a drastic measure and should only be granted if there are no genuine issues of material fact and if the movant's right to judgment is clear and free from doubt. *Id*. Summary judgment is reviewed in the light most favorable to the nonmoving party. *Gillespie v. Edmier*, 2020 IL 125262, ¶ 9.

In terms of reconsideration, a Motion to Reconsider that is based on the trial court's application of the law is reviewed *de novo*, while a Motion to Reconsider that raises new facts or arguments is reviewed for an abuse of discretion. *Harleysville Insurance Co. v.*

Mohr Architecture, Inc., 2021 IL App (1st) 192427, ¶ 28. Where a motion to reconsider does both, and where the trial court rules on the merits of the motion, review is *de novo*. *Id*.

The appeal at bar is of the two circuit court orders that ruled on separate motions to reconsider, entered on May 16, 2023 and June 6, 2023. (C 4057; C 4408). The Circuit Court's May 16, 2023, Order, granted Jack Tuchten's and La Galera's Motion to Reconsider, thereby granting summary judgment in their favor, based on the trial court's application of Illinois law, 810 ILCS 5/2-607, the notice requirements contained therein, and its failure to apply the Illinois Supreme Court exceptions to Section 2-607 in *Connick*. (C 4057-4058). The Circuit Court's June 6, 2023, Order denied Martin Produce's Motion to Reconsider the May 16, 2023, Order, standing on the court's interpretation and application of Section 2-607 and *Connick*. (C 4408). Therefore, the Appellate Court's review of the Court's Orders of May 16, 2023, and June 6, 2023, is *de novo*.

ARGUMENT

I. The Circuit Court Erred by Failing to Consider or Apply the Well-Established Exceptions to 810 ILCS 5/2-607, of Reasonable Notice and Actual Knowledge.

In light of the trial court's failure to consider or apply the exceptions to notice established by the Illinois Supreme Court in *Connick v. Suzuki Motor Co.*, as set forth in detail below, this Court should reverse the Circuit Court's Orders of May 16, 2023 and June 6, 2023.

The Circuit Court Judge erred in entering summary judgment against Martin Produce when it erroneously held that La Galera and Tuchten did not receive or have notice of the allegedly defective cilantro, as required under 810 ILCS 5/2-607(3)(a). (C 4057-4058). Pursuant to Section 2-607, under which Illinois adopted the Uniform Commercial

Code, notice is required for claims of breach of warranty, so that the seller is aware that a particular transaction is troublesome and must be watched. *Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 492 (1996). The purpose of pre-suit notice is to allow the seller the opportunity to cure the alleged breach, without a lawsuit, if the breach did not result in personal injury. *Id*. at 495. An evaluation of whether the notice requirement has been satisfied must be based on the factual setting of each case and the circumstances of the parties involved. *Wagmeister v. A.H. Robins Co.*, 64 Ill.App.3d 964, 966 (1st Dist. 1978); *Malawy v. Richards Mfg. Co.*, 150 Ill. App. 3d 549, 561 (5th Dist. 1989). When delay in notification does not result in prejudice to the defendant, it is generally viewed as reasonable. *Maldonado v. Creative Woodworking Concepts, Inc.*, 296 Ill. App. 3d 935, 939 (3rd Dist. 1998).

Connick v. Suzuki Motor Co., is the predominate Illinois Supreme Court case controlling Illinois' notice requirement under Section 2-607. 174 Ill. 2d 482 (1996). *Connick* was also the only case cited by the trial court in granting Summary Judgment in favor of the Vendors. (C 4057-4058). In *Connick*, consumer plaintiffs brought a class action suit for breach of implied warranty against a car manufacturer, Suzuki, alleging that each plaintiff had purchased the same model of vehicle, which was allegedly defective due to an increased risk of rollover. *Id*. at 489. Significantly, *Connick* did not involve any claims of personal injury, nor any actual rollover accidents, as the class action plaintiffs sought purely economic losses related to diminution of the vehicles' resale value. *Id*. at 489. In terms of notice, the plaintiffs alleged that Suzuki had received general information regarding safety concerns relating to the vehicle model's product line; however, there were

no allegations that Suzuki had received notice directly from the plaintiffs nor regarding the particular vehicles purchased by those plaintiffs. *Id*. at 493.

Under those facts, the Illinois Supreme Court examined what constitutes sufficient notice under 810 ILCS 5/2-607(3)(a), considering that the purpose of notice in economic loss claims is to encourage pre-suit resolutions between the product buyer and seller. *Id*. at 493-5. In doing so, the Court found that Suzuki's "generalized knowledge" regarding the entire product line was insufficient, as that line had produced many different vehicles involved in many different transactions *Id*. As such, the Court ruled that "the notice requirement is satisfied only where the manufacturer is somehow apprised of the trouble with the particular product purchased by a particular buyer." *Id*. At the same time, the Illinois Supreme Court clarified that a defendant is not required to list specific claims of breach of warranty in giving notice, so as long as the defendant knows a *particular transaction* is troublesome and must be watched. *Id*. (emphasis in original).

The Illinois Supreme Court went on to clarify that, "Direct notice is **not** required for a breach of implied warranty of merchantability claim where: (1) the seller has actual knowledge of the defect of the particular product; or (2) the seller is deemed to have been reasonably notified by the filing of the buyer's complaint alleging breach of UCC warranty." *Connick*, 174 Ill. 2d at 492 (Emphasis added).

In the case at bar, the Circuit Court failed to follow the Illinois Supreme Court holding in *Connick*, specifically by failing to apply, or even consider, the exceptions established therein, as related to the extensive, complex, and lengthy history of this litigation, all of which focused on the exact same allegedly contaminated cilantro at issue in both the personal injury and economic damages claims brought against Martin Produce,

Jack Tuchten, and La Galera. (C 4057-4058; C 4408). In doing so, contrary to Illinois law, the Circuit Court created a strict, direct, notice requirement, without any exceptions, based, at least in part, on inaccurate and/or incomplete legal conclusions set forth in the Vendors' Motion to Reconsider. (C 4007-4022; C 4057-4058; C 4408). Particularly, the Circuit Court's Order May 16, 2023, Order the following legal conclusions that completely disregard and ignore the clear exceptions to direct notice established by the Illinois Supreme Court in *Connick*:

> A buyer is barred from pursuing an implied warranty of merchantability claim unless it directly notified the seller of the troublesome nature of the transaction. (C 4057).
>
> * * *
>
> Illinois law is clear that the defendant-seller must be provided with direct notice from plaintiff-buyer or that buyer cannot pursue a claim for breach of implied warranty. (C 4058) (This is a direct quote from the Vendors' Motion to Reconsider).
>
> * * *
>
> The court even cited this exact holding from *Connick* in its Opinion, which as a matter of law, requires Martin to give direct notice of a potential breach of warranty to La Galera and Tuchten. (C 4058) (This is a direct quote from the Vendors' Motion to Reconsider).

Respectfully, the foregoing is simply wrong, incomplete, and misstates Illinois law. As discussed above, the Illinois Supreme Court, in *Connick*, established two exceptions to direct notice, both of which clearly apply to this case, including actual knowledge and reasonable notice by the filing of a buyer's complaint. *Connick*, 174 Ill. 2d at 492. The Circuit Court Judge's erroneous conclusions that direct notice is an absolute requirement, which it is not, led to the May 16, 2023, Order and erroneous granting of Summary Judgment, by way of a Motion to Reconsider, thereby removing necessary and critical parties from the litigation at great prejudice to Martin Produce, as the exceptions to direct

notice were not considered or applied to the case at bar, as required by Illinois law. (C 4057-4058; C 4408).

Accordingly, due to the Circuit Court's errors and the Vendors' misrepresentations, the Motion to Reconsider was granted and the Vendors were effectively dismissed from the litigation by way of Summary Judgment. (C 4057-4058; C 4408). If the Circuit Court had properly applied the exceptions to 2-607, the Motion to Reconsider would have been denied. The failure to do so was error. Martin Produce asks this Court to rectify that error by overturning the Circuit Court's May 16, 2023, Order granting the Motion to Reconsider and Summary Judgment in favor of Jack Tuchten and La Galera.

A. Jack Tuchten and La Galera Were Reasonably Notified of the Allegedly Defective Cilantro, Thereby Meeting the Second *Connick* Exception.

In Connick, an exception to direct notice is "reasonable notice" by way of a personal injury complaint filed against the seller. *Connick*, 174 Ill. 2d at 492-5. The plain language of the exception allows for a breach of warranty claim to proceed where "the seller is deemed to have been reasonably notified by the filing of the buyer's complaint alleging breach of UCC warranty." *Id*. (C 3838-3843). The Illinois Supreme Court clarified that only a consumer plaintiff who suffers personal injury may provide notice through a lawsuit, and those exact circumstances occurred here. *Id*. On June 13, 2018, Melissa Andrews' filed her Third Amended Complaint, naming Jack Tuchten and La Galera as direct defendants, which the Vendors received and answered over seven months prior to Martin Produce's Third-Party Complaint. (C 3838-3843). Further, as set forth in Ms. Andrews' Third Amended Complaint, her personal injury claims were consolidated with 54 other cases involving the same Defendants, for purposes of discovery. (C 3610).

As required under *Connick*, Ms. Andrews was a consumer plaintiff who suffered personal injury purportedly caused by contaminated cilantro originating from Jack Tuchten and La Galera, and her complaint alleged breach of warranty. (C 3610-3644; C 3624). Moreover, Ms. Andrews' complaint incorporated its breach of warranty claims into counts directed against La Galera and Jack Tuchten, and the complaint contained detailed allegations regarding the allegedly defective cilantro, sold by the Vendors to Martin Produce, which was then sold to Carbon and claimed to have caused the E. coli outbreak. (C 3610-3644). In accordance with the plain language of *Connick*, Jack Tuchten and La Galera, upon the filing of Ms. Andrews' Third Amended Complaint, had been reasonably notified of the particular product defective, the E. coli tainted cilantro. *Connick*, 174 Ill. 2d at 492-5. This was asserted in Martin Produce's Amended Third-Party Complaint and, further, argued in Martin Produce's Responses to the Vendors' Motions for Summary Judgment as well as its Response to the Vendors' Motion to Reconsider. (C 3587; C 3379-3380; C 4030-4032). Therefore, consistent with *Connick*, Martin Produce was not required to provide direct notice to the Vendors, as notice had already been provided by the consumer plaintiffs claiming personal injury.

The Circuit Court, however, refused to consider this exception altogether, holding that the court "cannot find that Martin is excused from its notice requirement because someone else sued La Galera and Tuchten for breach of implied warranty." (C 4058). The Circuit Court's holding is legally and logically flawed, as there is no justifiable reason that Martin Produce would be required to provide superfluous, duplicative, notice to the Vendors of that which the Vendors already knew and had been notified of in writing via court filed documents with notice to their attorneys of record. Similarly, the trial court did

not provide a legitimate basis, factually or legally, for the proposition that Melissa Andrews' Third Amended Complaint did not, and cannot, provide reasonable notice to the Vendors of the allegedly defective cilantro, thereby allowing Martin Produce's Third-Party Claims to proceed. In other words, Judge Kubasiak did not even apply the personal injury complaint exception to the 2-607 notice requirement, as required by the Illinois Supreme Court. (C 4057-4058; C 4408).

The Circuit Court seemed to have made its decision to grant the Vendors' Motion to Reconsider, at least in part, on a critical misstatement of law contained in the Vendors' Motion. (C 4057-4058; C 4007-4022). Adopting the Vendors' misstatement, the Trial Court reasoned that Melissa Andrews' Third-Party Complaint cannot constitute pre-suit notice for Martin Produce because "Illinois law is clear that only a consumer plaintiff that suffers personal injury can satisfy **their** Section 2-607 notice requirement by filing a lawsuit against a seller." (C 4011) (emphasis added). The Circuit Court's use and reliance on the word "**their**," which is a misstatement of *Connick*, infers that each breach of warranty claimant must satisfy **their own**, individual, notice requirement, and, as a result, no other party can satisfy pre-suit notice on behalf of another claimant. This is simply not true and contrary to the basic principles of notice and actual knowledge, as clearly established in *Connick*. *Connick*, 174 Ill. 2d at 495

The Illinois Supreme Court's actual holding in *Connick* was that, "only a consumer plaintiff who suffers a personal injury can satisfy **the** Section 2-607 notice requirement by filing a complaint." *Connick*, 174 Ill. 2d at 492 (Emphasis added). The Illinois Supreme Court's use of the word "**the**" is significant because, logically, there need be only one instance of notice to the seller to satisfy **the** notice requirement under Section 2-607; this

is consistent with the purpose of Section 2-607, to advise the seller that a particular transaction is troublesome. *Id*. at 494-5. As such, and contrary to the Circuit Court's ruling, *Connick* does not stand for the proposition that Section 2-607 imposes a separate and unique notice requirement on each individual claimant, such as Ms. Andrews and Martin Produce, regarding the same alleged product defect. *Connick* clearly did not and would not require Martin Produce to provide duplicative, redundant notice to Jack Tuchten and La Galera, the sellers/Vendors, after the Vendors had received abundant notice regarding the same product, the same defect, and the same transactions involving Martin Produce, by way of Ms. Andrews' personal injury claims and subsequent litigation.

The Illinois Supreme Court's plain language is clear that a consumer plaintiff may satisfy "the" notice requirement of buyers to sellers, not "their" notice requirement, by filing a complaint alleging breach of warranty. *Connick*, 174 Ill. 2d at 492. Moreover, the Illinois Supreme Court confirmed that only one instance of notice is required under Section 2-607 by establishing that actual knowledge is an exception to direct notice. *Connick*, 174 Ill. 2d at 492. The actual knowledge exception applies where the manufacturer is "somehow apprised of the trouble with the particular product purchased by a particular buyer," because there is no need to notify a seller of that which it already knows. *Id*. at 495. Accordingly, once a seller receives notice, it has actual notice and/or actual knowledge of the alleged defect, and the law does not, and should not, require additional, duplicative notice regarding the very same defect. *Id*. Additionally, in *Connick*, Justice McMorrow, joined by Justice Freeman, concurring in part and dissenting in part, observed that requiring notice from every claimant regarding the same defect would be both redundant and impractical, even in instances with multiple transactions. *Id*. at 512 (McMorrow, J.,

dissenting); *See also Board of Educ. Of City of Chicago v. A, C and S, Inc.*, 131 Ill. 2d 428, 462-463 (1989) (Finding that notice may occur when a consumer sues a product seller for personal injuries).

Therefore, if the sellers of the defective cilantro, Jack Tuchten and La Galera, are found to have been reasonably notified of the defective cilantro by Ms. Andrews' personal injury complaint, and the many others that followed shortly thereafter, Martin Produce would not be required, pursuant to Illinois case law, to provide duplicative, superfluous notice to these Vendors of that same defect. The Circuit Court Judge, by way of his May 16, 2023, Order, however, appeared to create a strict, duplicative, direct notice requirement that is unrealistic, impractical, and contrary to Illinois law, as well as to the basic principles and intended purpose of Illinois' statutory notice requirement. *See Wagmeister*, 64 Ill. App. 3d at 966. Martin Produce now asks this Appellate Court to reverse the lower court's May 16, 2023, Order, granting of the Vendors' Motion to Reconsider, consistent and in line with the Illinois Supreme Court's holding in *Connick*, the Court's dicta, and the spirit of Section 2-607 of the UCC and related case law.

Therefore, Martin Produce asks this Appellate Court to vacate the lower Court's May 16, 2023, order; reinstate the denial of the Vendors' Motions for Summary Judgment; and, hold that Martin Produce was not obligated to provide superfluous, direct notice to Jack Tuchten and La Galera, as reasonable notice had already occurred by way of personal injury plaintiff, Melissa Andrews', Third Amended Complaint, and/or any other relief this Court deems just and equitable.

B. Jack Tuchten and La Galera Obtained Actual Knowledge of the Product Defect by Participating in the Personal Injury Litigation, Thereby Meeting the First *Connick* Exception.

As previously stated, under *Connick*, another exception to direct notice is where the seller has actual knowledge of the defect of the particular product. *Connick*, 174 Ill. 2d at 492. This exception requires the seller to be "somehow apprised of the trouble with the particular product purchased by a particular buyer." *Connick*, 174 Ill. 2d at 495. In the case at bar, prior to the filing of Martin Produce's Third-Party Complaint on April 19, 2019, the Vendors, Jack Tuchten and La Galera, had received multiple personal injury pleadings and economic loss complaints, they had filed responses to those pleadings and participated in extensive discovery, all of which focused on the very same allegedly defective cilantro that was consumed by Carbon's customers in June of 2016. (C 173-190; C 3440-3472; C 3568-3572; C 3610-3644; C 2464-2480; C 2482-2487; C 2508-2511; C 4130-4167; C 2514-2524; C 2560-2629; C 2652-2673; C 2675-2693; C 2880-2888; C 4349-4356; C 4358-4372). As a result of the Vendors' investigation into the E. coli outbreak, and their legal defenses against the resulting claims, the Vendors had obvious, actual knowledge regarding the allegedly defective cilantro years before the filing of Martin Produce's Third-Party Complaint for breach of warranty. Therefore, the second exception to direct notice was met, as actual knowledge was provided to the sellers/Vendors by way of years of litigation and discovery exchanges, dictating that Martin Produce was not obligated to provide direct notice of same, as erroneously declared by the lower court.

In reality, every party involved in the distribution chain of the allegedly defective cilantro, the buyers and sellers, were made aware of the allegedly tainted produce when those injured customers filed suit against Carbon, Martin Produce, Jack Tuchten, and La Galera. (C 4229-4268). Moreover, the Vendors cannot reasonably claim they were ignorant

to the allegedly defective cilantro after attending the deposition of Stephanie Black, Ph.D., Chicago Department of Public Health's ("CDPH") lead investigator into the E. coli outbreak, on January 10, 2019. (C 2560-2561). During her deposition, Dr. Black testified that she was "involved right at the beginning" of the E. coli outbreak and went to the restaurant on July 1, 2016, to investigate the cause of the reported illnesses. (C 2566). Dr. Black further confirm that CDPH's conclusion was "that cilantro was the most likely food vehicle cause of the outbreak based on the strong statistical association of raw cilantro with illness." (C 2570-2571).

Counsel for the defendant, Jack Tuchten, Nicholas Parolisi, examined Dr. Black and questioned her bases for asserting that the cilantro consumed at Carbon was the source of the E. coli. (C 2598-2605). Again, Martin Produce, along with Jack Tuchten and La Galera, continue to dispute whether the cilantro was actually the source of the E. coli outbreak. (C 3573-3589). With that said, the Vendors' knowledge regarding the allegedly defective cilantro is evident throughout Dr. Black's deposition, based on the detailed questions and answers presented therein. (C 2598-2605). Moreover, Dr. Black's Foodborne Final Report and Supplement to the Foodborne Report were marked and attached as exhibits during her deposition, indicating that Jack Tuchten and La Galera had possession of these Reports on or before January 10, 2019, and were familiar with the conclusions contained therein well before the taking of her deposition. (C 2562).

In addition, in February and March of 2019, counsel for Jack Tuchten and La Galera took the depositions of multiple fact witnesses with first-hand knowledge of the E. coli outbreak and the handling of the cilantro at issue, including four Martin Produce employees. (C 2652-2673; C 2675-2693; C 2880-2888). At Alexander Maciel's deposition,

Manager of Martin produce, Mr. Maciel testified that Jack Tuchten and La Galera were Martin Produce's vendors of cilantro. (C 2656). Further, Mr. Maciel discussed in detail Martin Produce's shipping and receiving process relative to cilantro in 2016. (C 2657-2661; C 2665-2666). Mr. Maciel also answered questions regarding the E. coli outbreak and its alleged connection to cilantro sold by Martin Produce. (C 2663). Counsel for Jack Tuchten, specifically, inquired as to whether Martin Produce inspected the shipments of cilantro from Jack Tuchten, as well as Martin Produce's relationship with Jack Tuchten, and potential evidence showing that Jack Tuchten's cilantro was distributed to Carbon. (C 2665-2670).

During Ugo Llorente's deposition, another Martin Produce employee, counsel for Jack Tuchten confirmed that Martin Produce used a "first in, first out inventory procedure for cilantro," which Mr. Parolisi understood to mean that Martin Produce "would ship out the door the cilantro that was at the warehouse the longest to [Martin Produce's] customers." (C 2689). Based on the Vendors' attorneys' questions, it is reasonable to conclude that Jack Tuchten and La Galera had apparent knowledge of the allegations that the cilantro they sold to Martin Produce was an alleged cause of the E. coli outbreak, resulting in personal injuries to those plaintiffs who had eaten at Carbon.

Additionally, if there was any question as to which transactions, which cilantro, Jack Tuchten and La Galera should be aware of as having potential defects, Jack Tuchten and La Galara's Response to Carbon's Requests for Production resolved those questions conclusively. (C 2808-2824; C 2801-2806; C 2798-2806). The Invoices produced by the Vendors back in 2018, and further confirmed by Martin Produce's Requests to Admit, specified the particular invoices, dates of delivery, costs, and quantities pertaining to each

transaction sold by Jack Tuchten and La Galera to Martin Produce involving the allegedly defective cilantro. (C 2798-2806; C 4303-4309; C 4319-25). In the context of the ongoing personal injury litigation regarding the E. coli outbreak, the Vendors' produced documents, Martin Produce's Requests to Admit, and the deposition testimony all provided the Vendors with actual, specific knowledge of the alleged product defect, in accordance with Section 2-607. Therefore, since the Vendors were "apprised of the trouble with the particular product purchased by a particular buyer," the first *Connick* exception has been met, alleviating Martin Produce from any additional notice obligations. *Connick*, 174 Ill. 2d at 495.

Critically, the facts at bar are vastly different from those in *Connick*, as Jack Tuchten and La Galera possessed far more than generalized knowledge regarding the allegedly defective cilantro. Here, unlike in *Connick*, the exceptions to direct notice clearly apply, as the Vendors were apprised of the particular product, the particular defect (E. coli), and the particular transactions that formed the basis of the plaintiffs', Carbon's, and Martin Produce's breach of warranty claims, as those same transactions formed the basis of the personal injury litigation that the Vendors had participated in for years. This Honorable Court should not allow Jack Tuchten and La Galera to belatedly claim that they had not received pre-suit notice of Martin Produce's breach of warranty third-party claims, because they clearly had, over and over again. Notice must be evaluated based upon the factual settings of each case and the circumstances of the parties involved. *Wagmeister v. A.H. Robins Co.*, 64 Ill. App. 3d 964, 966 (1st Dist. 1978). At a minimum, based simply on the pleadings filed by the Vendors, a reasonable person could conclude that La Galera and Jack Tuchten were reasonably notified and/or had actual knowledge of their potentially

defective cilantro, satisfying the exceptions to notice under Section 2-607, and alleviating Martin Produce of same.

Accordingly, when taking into considering *Connick's* holding and exceptions, the trial court clearly erred in granting summary judgment in favor of the Vendors, as it is undisputed that Jack Tuchten and La Galera already had more than sufficient and reasonable notice, but also actual knowledge that the cilantro they sold to Martin Produce in June of 2016 was allegedly defective. As such, the initial denial of the Vendors' Motions for Summary Judgment was proper and their Motion to Reconsider should have been denied. Therefore, Martin Produce asks this Court to reverse the trial court's Order of May 16, 2023; and reinstate the denial of the Vendors' Motions for Summary Judgment.

II. Even if this Court Finds that the *Connick* Exceptions Do Not Apply, the Intent and Purpose of the Section 2-607 Notice Requirement Has Been Met and/or is Not Required Under the Circumstances At Bar.

The UCC's notice requirement has a well-defined purpose, to advise a product seller of a defect before engaging in legal action, in order to encourage negotiations and settlement, by allowing the parties to investigate the breach, cure defects, and mitigate damages. *Maldonado v. Creative Woodworking Concepts, Inc.*, 296 Ill. App. 3d 935, 939 (3rd Dist. 1998); *See Connick*, 174 Ill. 2d 482 (1996); *See also Muehlbauer v. Gen. Motors Corp.*, 431 F.Supp.2d 847, 858-61 (N.D. Ill. 2006) (Examining the purpose of notice under Illinois law). In the case at bar, "notice" was undoubtedly afforded to the Vendors, well before the filing of Martin Produce's Third-Party Complaint. As early as 2017, the record demonstrates that Jack Tuchten and La Galera were fully aware of the fact that their cilantro may be involved in an E. coli outbreak, thereby allowing the Vendors to investigate, potentially correct, and then defend against the alleged breach of warranty claims, without suffering any prejudice. (C 4234-4268; C 2808-2824; C 2801-2806; C 2798-2806).

Therefore, the Section 2-607 notice requirement, and its exceptions, are simply not at issue as it pertains to distributor, Martin Produce.

Alternatively, the intended goals of pre-suit notice simply do not apply to the circumstances on appeal because the allegedly defective cilantro caused extensive personal injury claims. The seminal *Connick* case did not involve personal injury claims. This is significant as the Illinois Supreme Court clarified that cases involving personal injuries are the exception when it held that, "where a breach has **not** resulted in personal injury, the UCC indicates a preference that the breach be cured without a lawsuit." *Connick*, 174 Ill. 2d at 495. (Emphasis added). The Court in *Connick* went on to hold that notice was not satisfied in that case because the there were no allegations of personal injury, only economic loss. *Id*. It follows, therefore, that direct notice is intended for pure economic damage claims, as found in *Connick*, to encourage the seller and merchant buyer to resolve the dispute on their own, without litigation. *Id*. Arguably, and consistent with Illinois law, the very fact that the produce at issue resulted in extensive personal injury litigation, resolved or negated the notice requirement of Section 2-607 from the onset of the case.

While *Connick* did not involve personal injury, the case at bar was born out of extensive, alleged, personal injuries; namely an E. coli outbreak allegedly caused by contaminated cilantro that resulted in over 55 injured consumers. (C 3610-3644). This case is not about widgets or poorly manufactured products, it involves perishable goods; a latent, invisible defect; and a significant personal injury event. The Vendors, as well as Martin Produce, could not have simply cured the alleged defect with a new shipment of cilantro, in line with the spirit of the UCC, because there was no evidence of a defect, nor could there ever been. In fact, the Vendors and Martin Produce still dispute and deny that the

cilantro was defective, instead pointing to the unsafe and unsanitary practices of the restaurant from which the consumers purchased the food. (C 3573-3589). Therefore, there was, and still is, no defect of which Martin produce is required to give notice of, dictating that the issue of "notice" is not ripe, and would never be ripe, until a jury were to determine, as the fact finder, that the cilantro at issue had actually been contaminated with E. coli.

Furthermore, compelling Martin Produce to provide pre-suit notice under these circumstances would serve no purpose. "The purpose of enabling the seller to cure the defect has significance in a commercial setting but has no significance in a personal injury case because the defect has already caused the harm and the seller can do nothing to remedy the situation that has already occurred." *§ 2-607:7 Personal injury claim, 4 Anderson U.C.C. § 2-607:7 (3d. ed.)* Further, "Notice to the seller is required in order to defeat commercial bad faith, not to deprive a good faith consumer of his remedy." *810 ILCS 5/2-607, Comment No. 4*. Notice under Section 2-607 is not intended to establish a strict, nonpractical requirement that defeats its own purpose and prejudices claimants. *See Muehlbauer v. Gen. Motors Corp.*, 431 F. Supp. 2d 847 (N.D. Ill. 2006) (finding notice where the purpose of Section 2-607 was met).

In this case, days had passed between ingestion and the alleged illness, and the cilantro at issue was either consumed or destroyed, well before Carbon, Martin Produce, Jack Tuchten, or La Galera could have been made aware of the alleged contamination or their connection to the E. coli outbreak. Therefore, there was no way that the purpose of the notice requirement of 2-607, as discussed above, could ever have been met.

To elaborate further, this alleged defect, that of E. coli contaminated cilantro, could not have been cured immediately, as with a defective widget, for example, because the

defect, the E. coli, could not be detected until ingested by the consumer, who then became ill, as produce is not, and generally cannot be, tested for toxic pathogens. Other courts have similarly dealt with the practicality of UCC's notice requirement relative to food sold for human consumption.

> The reason for the rule has no relevant application to the circumstances of such a case. That section apparently has to do with the sales of goods whose inspection or use discloses a defect of quality, lack of conformance to sample, failure to comply with description, or other cognate circumstances, which causes money damage to the vendee. To require a complaint which, whatever its nomenclature of form, is really grounded on tortious elements, to indicate a notice of rejection or claim of damage within a reasonable time on account of defect of edible goods in a retail transaction, would strain the rule beyond a breaking point of sense or proportion to its intended object. *Fischer v. Mead Johnson Lab'ys*, 41 A.D.2d 737, 341 N.Y.S.2d 257, 259 (1973).

For these reasons, and consistent with the reasoning of the New York Appellate Division, Second Department, notice under Section 2-607 should not be required in situations involving consumable, perishable goods, as the defect is latent, not apparent, and could not be identified by the purchaser before its consumption and/or distribution. In other words, since the spirit and purpose of notice cannot be met when applied to perishable goods, such a notice requirement should not apply.

Finally, as briefly mentioned above, Martin Produce has always denied, and continues to deny, that there was anything wrong with the cilantro provided by the third-party Vendors. There remain questions of fact regarding the existence of the alleged defect and breach, so Martin Produce would never have provided notice of a defect that it emphatically denies ever existed. Logically, Martin Produce could and would only provide notice if it is determined at trial that the cilantro was, in fact, tainted, but that has obviously not yet occurred. Therefore, notice under Section 2-607 is not applicable to this situation,

as there is no defect of which to give notice; and, therefore, it is not ripe to do so, nor is it required at this point in time.

As this is a case of first impression, Martin Produce asks that this Appellate Court hold that the UCC's notice requirement was never meant to apply to perishable produce and/or consumable food products. Accordingly, the Court's Order of May 16, 2023, should be overturned and the Vendors' Motion for Summary Judgment denied.

III. Jack Tuchten Wholesale Produce and La Galera Produce Waived Their Defense of Insufficient Notice.

Even if this Court determines that Section 2-607 does apply to perishable goods, and that the *Connick* exceptions were not met, Jack Tuchten and La Galera waived their insufficient notice defenses, dictating the denial of their Motions for Summary Judgment.

Jack Tuchten and La Galera did not raise the issue of "notice" until March 20, 2023, five years after being named personal injury defendants and four years after filing Answers to Martin Produce's Third-Party Complaint. (C 2705-3331; C 2527-2693; C 3610-3645; C 3562-3597). During that time, Jack Tuchten and La Galera defended against the personal injury claims, participated in extensive written discovery, took depositions, disclosed expert witnesses, filed motions in *limine*, and even went to trial, up to the point of picking a jury; and not once did either Tuchten or La Galera ever raise the issue of lack of notice, nor assert any affirmative defenses regarding same.

In 2018, the Vendors answered Carbon's Amended Third-Party Complaint and denied a claim for breach of implied warranty of merchantability, without raising the issue of notice. (C 3473-3522). In May and June of 2019, Tuchten and La Galera answered Martin Produce's Third-Party Complaint, without arguing notice. (C 3590-3598; C 3599-3609). On September 27, 2019, Jack Tuchten filed a Motion for Summary Judgment

against the personal injury plaintiffs, which did not address notice in any way. (C 1011-1016). In its own Motion, Jack Tuchten provided a comprehensive summary of the facts related to the allegedly defective cilantro, the particular transactions at issue, the E. coli outbreak, and resulting economic damages claims. (C 1011- 1013). Jack Tuchten's Motion for Summary Judgment even attached as an exhibit the CDPH's Foodborne Final Report and cited to the deposition of Stephanie Black. (C 1030-1036; C 1024-1029). Never was notice or lack thereof ever even mentioned.

If the Vendors wanted to argue that they were prejudiced by a lack of notice, that argument should have been raised at the onset, at a minimum in their Affirmative Defenses, and certainly four years prior to their Motions for Summary Judgment. To sit back and wait until the last moment, shortly before trial, to drop the "no notice" defense is extremely prejudicial and absolutely contrary to 735 ILCS 5/2-613(d), requiring "any affirmative defense, including that a claim cannot be recovered upon by reason of any statute, or any other affirmative matter that seeks to avoid the legal effect of or defeat the cause of action set forth in a complaint, counterclaim, or third-party-complaint, in whole or in part, on any ground or defense, whether affirmative or not, which, if not expressly stated in the pleading, would be likely to take the opposite party by surprise, must be plainly set forth in the answer or reply." 735 ILCS 5/2-613(d).

Accordingly, since Jack Tuchten and La Galera failed to plead insufficient notice as an affirmative defense, and further failed to assert this purported defense at any time prior to March 20, 2023, the Vendors waived their lack of notice defense. *See Edwards v. Lombardi*, 2013 IL App (3d) 120518, ¶ 15 (holding that ordinarily, if a party fails to plead an affirmative defense, that defense is waived and cannot be considered even if the

evidence suggests the existence of the defense); *See also Malaway v. Richards Mfg. Co.*, 150 Ill. App. 3d 549, 569-70 (1st Dist. 1989) (citing *Berry v. G. D. Searle & Co.*, 56 Ill. 2d 548, 556 (1974). Third-Party Defendants are pointing to the notice requirement of 810 ILCS 5/2-607 solely in an attempt to escape culpability in this case, not because they were deprived of an opportunity to cure a defect or because they were prejudiced in any way. Therefore, Martin Produce asks that this Appellate Court find, as a matter of law, that the Vendors waived their notice defenses, thereby denying their Motions for Summary Judgment.

CONCLUSION

For the reasons set forth above, the Counter-Defendant/Third-Party Plaintiff/Appellant, MARTIN PRODUCE, INC., respectfully requests that this Honorable Court reverse the Circuit Court's, Orders of May 16, 2023, and June 6, 2023; grant Martin Produce's Motion to Reconsider; and, thereby, reinstate the denial of Jack Tuchten's and La Galera's Motions for Summary Judgment; and/or for any other relief that this Appellate Court deems just and equitable.

Respectfully submitted,

ARNETT LAW GROUP, LLC

/s/ Daniel J. Arnett

Daniel J. Arnett
Mark R. Bennett
ARNETT LAW GROUP, LLC
223 West Jackson Boulevard
Suite 750
Chicago, Illinois 60606
(312) 561-5660
darnett@arnettlawgroup.com

Attorneys for the Appellant

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 34 pages.

/s/ Daniel J. Arnett
Daniel J. Arnett

APPENDIX

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1-23-1369 Martin Produce, Inc., v.
Jack Tuchten Wholesale Produce, Inc., *et al.*

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

Carbon on 26th, LLC & Carbon on Chicago, LLC,	)	
Plaintiff,	)	No. 2016 L 6628
v.	)	
	)	Commercial Calendar T
Martin Produce, Inc.,	)	
	)	Judge Daniel J. Kubasiak
Defendant.	)	

OPINION AND ORDER

This cause is before the court on Third-Party Defendants, La Galera Produce, Inc. ("La Galera") and Jack Tuchten Wholesale Produce, Inc.'s ("Tuchten") (collectively, "Third-Party Defendants"), Motion to Reconsider the Court's March 20, 2023, Opinion denying Third-Party Defendants' Motions for Summary Judgment, and the court being fully advised in the premises,

IT IS ORDERED:

(1) Third-Party Defendants' Motion to Reconsider the Court's March 20, 2023, Opinion denying their Motions for Summary Judgment is granted.

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Third-Party Defendants seek this Court to reconsider its March 20, 2023, Opinion denying their Motions for Summary Judgment by arguing that although the Court set forth the law and undisputed facts correctly, it incorrectly ruled that a question of fact existed concerning Martin's Uniform Commercial Code ("UCC") notice requirements in order to proceed with a breach of implied warranty claim against La Galera and Tuchten. Upon review of the Opinion, the court finds that it erred in holding that Martin provided requisite notice to Third-Party Defendants before bringing a claim against them for breach of implied warranty. The court instead held that whether "reasonable notice" was given to Third-Party Defendants is a question of fact for the jury to decide in this case; however, based on Illinois law, to which the Court correctly cited, the court finds that there is no question of fact that Martin did not provide direct notice to Third-Party Defendants as expressly required by the UCC.

Again, a buyer of goods must satisfy the notice requirements of Section 2-607(3)(a) of the UCC in order to pursue a breach of implied warranty of merchantability claim. *Connick v. Suzuki Motor Co.*, Ltd., 174 Ill. 2d 482, 492 (1997). Section 2-607(3)(a) states that "[w]here a tender has been accepted…(a) the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy." A buyer is barred from pursuing an implied warranty of merchantability claim unless it directly notified the seller of the troublesome nature of the transaction. *Id.* Whether a buyer provided proper notice under Section 2-607 may be decided as a matter of law. *Id.* Additionally, the filing of a complaint by a merchant buyer against a seller is insufficient to satisfy the notice requirements of Section 2-607. *Id.* at. 494. Notice must also be made within a reasonable time after delivery to comply with Section 2-607. *Id.*

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In the Opinion, the Court found that it "cannot ignore its common sense nor ignore the over five years of litigation, to apply Section 2-607 without considering the E.coli outbreak that injured over 70 of Carbon's customers." The court finds that it erroneously failed to hold that the law does not allow a defendant-seller to receive "reasonable notice" from third-parties via the filing of a lawsuit as the Court suggested. Rather, Illinois law is clear that the defendant-seller must be provided with "direct notice" from the plaintiff-buyer or that buyer cannot pursue a claim for breach of implied warranty. *See Connick v. Suzuki Motor Co., Ltd.*, 174 Ill. 3d 482, 293 (1997). The court even cited this exact holding from *Connick* in its Opinion, which as a matter of law, requires Martin to give direct notice of a potential breach of warranty to La Galera and Tuchten, and Martin even admitted in its response brief that it did not provide any notice to Third-Party Defendants.

As such, the Court finds that it erred in essentially creating a new exception to the UCC notice requirements. As Third-Party Defendants argue, Illinois law is clear that only consumer plaintiffs that suffer a personal injury can satisfy their Section 2-607 notice requirement by filing a lawsuit against a seller. *Connick,* 174 Ill. 2d at 494-5. The court therefore cannot find that Martin is excused from its notice requirements because someone else sued La Galera and Tuchten for breach of implied warranty.

Accordingly, based on Supreme Court case law, a strict reading of the UCC, and the undisputed fact that Martin never provided direct notice to La Galera and Tuchten, the Court grants Third-Party Defendants' Motion to Reconsider the Court's denial of their Motions for Summary Judgment, and finds that summary judgment is warranted in Third-Party Defendants' favor as to Martin's claim for breach of implied warranty.

(2) La Galera and Tuchten's Motions for Summary Judgment pursuant to 735 ILCS 5/2-1005 are granted in their favor and against Martin; 4280

(3) Third-Party Defendants La Galera and Tuchten are therefore dismissed from the matter as defendants in their entirety; 4261

(4) This matter is sent to Courtroom 2005 for trial assignment. 4372

Judge Daniel J. Kubasiak
MAY 16 2023
Circuit Court-2072

ENTERED,

Judge Daniel J. Kubasiak, No. 2072

A-2

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT – LAW DIVISION

CARBON ON 26TH, LLC & CARBON ON CHICAGO, LLC, Counter-Plaintiffs, v. MARTIN PRODUCE, INC., Counter-Defendant.	CASE NO: 2016 L 6628
MARTIN PRODUCE, INC., Third-Party Plaintiff, v. JACK TUCHTEN WHOLESALE PRODUCE, INC. & LA GALERA PRODUCE, INC. Third-Party Defendants.	

ORDER

This cause is before the Court on Defendant/Third Party Plaintiff, Martin Produce Inc.'s (Martin) Motion to Reconsider the court's Order of May 16, 2023. Martin's motion argues that the court's order is contrary to Illinois law and to the Illinois Supreme Court case of *Connick v. Suzuki Motor Co., Ltd.* 174 Ill. 2d 482 (1996).

The court has considered Martin's motion, reviewed the court's order of May 16th, and reexamined *Connick*. Having done so, the court concludes that Martin incorrectly argues the holdings of *Connick* and that the court's order of May 16, 2023, was properly entered.

IT IS ORDERED:

Defendant/Third Party Plaintiff, Martin Produce Inc.'s (Martin) Motion to Reconsider is Denied.

ENTERED
Judge Daniel J. Kubasiak-2072
JUN - 6 2023
IRIS Y. MARTINEZ
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL

ENTERED:

Judge

A-3

This form is approved by the Illinois Supreme Court and is required to be accepted in all Illinois Appellate Courts.

Instructions

Check the box to the right if your case involves parental responsibility or parenting time (custody/visitation rights) or relocation of a child.

Just below "Appeal to the Appellate Court of Illinois," enter the number of the appellate district that will hear the appeal and the county of the trial court.

If the case name in the trial court began with "In re" (for example, "In re Marriage of Jones"), enter that name. Below that, enter the names of the parties in the trial court, and check the correct boxes to show which party is filing the appeal ("appellant") and which party is responding to the appeal ("appellee").

To the far right, enter the trial court case number, the trial judge's name, and the Supreme Court Rule that allows the appellate court to hear the appeal.

☐ **THIS APPEAL INVOLVES A MATTER SUBJECT TO EXPEDITED DISPOSITION UNDER RULE 311(a).**

APPEAL TO THE APPELLATE COURT OF ILLINOIS

FIRST **District**

from the Circuit Court of

Cook **County**

MELISSA ANDREWS, et al.,
Plaintiffs,

v.

CARBON ON 26TH, LLC & CARBON ON CHICAGO, LLC, et al.,
Defendants,

CARBON ON 26TH, LLC & CARBON ON CHICAGO, LLC,
Counter-Plaintiffs,

v.

MARTIN PRODUCE, INC.,
Counter-Defendant/Third-Party Plaintiff/Appellant,

☒ **Appellants** ☐ **Appellees**

v.

JACK TUCHTEN WHOLESALE PRODUCE, INC. & LA GALERA PRODUCE, INC.

Third-Party Defendants *(First, middle, last names)*

☐ **Appellants** ☒ **Appellees**

Trial Court Case No.:
2016 L 006628

Honorable
Daniel J. Kubasiak
Judge, Presiding

Supreme Court Rule:
303

NOTICE OF APPEAL (CIVIL)

In 1, check the type of appeal.

For more information on choosing a type of appeal, see *How to File a Notice of Appeal.*

1. Type of Appeal:

- ☑ Appeal
- ☐ Interlocutory Appeal
- ☐ Joining Prior Appeal
- ☐ Separate Appeal
- ☐ Cross Appeal

In 2, list the name of each person filing the appeal and check the proper box for each person.

2. Name of Each Person Appealing:

Name: Daniel J. Arnett, Arnett Law Group, LLC, on behalf of Martin Produce, Inc.
First *Middle* *Last*

☐ Plaintiff-Appellant ☐ Petitioner-Appellant

OR

☑ Third-Party Defendant-Appellant ☐ Respondent-Appellant

A-4

Name: _____
First *Middle* *Last*

☐ Plaintiff-Appellant ☐ Petitioner-Appellant

OR

☐ Defendant-Appellant ☐ Respondent-Appellant

In **3**, identify every order or judgment you want to appeal by listing the date the trial court entered it.

3. List the date of every order or judgment you want to appeal:

05/16/2023
Date

06/06/2023
Date

_____
Date

In **4**, state what you want the appellate court to do. You may check as many boxes as apply.

4. State your relief:

☑ reverse the trial court's judgment *(change the judgment in favor of the other party into a judgment in your favor)* and ☐ send the case back to the trial court for any hearings that are still required;

☑ vacate the trial court's judgment *(erase the judgment in favor of the other party)* and ☐ send the case back to the trial court for a new hearing and a new judgment;

☐ change the trial court's judgment to say: _____

☐ order the trial court to: _____

☐ other: _____

and grant any other relief that the court finds appropriate.

If you are completing this form on a computer, sign your name by typing it. If you are completing it by hand, sign by hand and print your name. Fill in your address, telephone number, and email address, if you have one.

/s/ Daniel J. Arnett
Your Signature

Daniel J. Arnett
Your Name

223 W. Jackson Blvd., Suite 750
Street Address

Chicago, IL 60606
City, State, ZIP

darnett@arnettlawgroup.com
Email

(312) 561-5660
Telephone

33265
Attorney # (if any)

All appellants must sign this form. Have each additional appellant sign the form here and enter their complete name, address, telephone number, and email address, if they have one.

Additional Appellant Signature

/s/
Signature

_____
Street Address

_____
Name

_____
City, State, ZIP

_____
Email

_____
Telephone

_____
Attorney # (if any)

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      First *Middle* *Last*
      Address: 35 E. Wacker Drive, Suite 650, Chicago, IL 60601
      Street, Apt # *City* *State* *ZIP*
      Email address: schiller@gtv-ip.com

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         ☐ The party's lawyer's office
      ☐ Mail or third-party carrier

   c. On: 07/26/2023
      Date
      At: 5:30 ☐ a.m. ☑ p.m.
      Time

2. I sent this document:
   a. To:
      Name: Nicholas J. Parolisi, Jr, Litchfield Cavo, LLP
      First *Middle* *Last*
      Address: 303 West Madison Street, Suite 300, Chicago, IL 60606
      Street, Apt # *City* *State* *ZIP*
      Email address: parolisi@litchfieldcavo.com

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   c. On: 07/26/2023
      Date
      At: 5:30 ☐ a.m. ☑ p.m.
      Time

In 3, if you sent the document to more than 1 party or lawyer, fill in a, b, and c. Otherwise leave 2 blank.

3. I sent this document:

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Name: Thomas Wolf, Lewis Brisbois Bisgaard & Smith LLP
First *Middle* *Last*

Address: 550 W. Adams Street, Suite 300, Chicago, Illinois 60661
Street, Apt # *City* *State* *ZIP*

Email address: Thomas.Wolf@lewisbrisbois.com

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- ☐ The party's lawyer's office

☐ Mail or third-party carrier

c. On: 07/26/2023
Date

At: 5:30 ☐ a.m. ☑ p.m.
Time

Under the Code of Civil Procedure, 735 ILCS 5/1-109, making a statement on this form that you know to be false is perjury, a Class 3 Felony.

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/s/ Daniel J. Arnett
Your Signature

Daniel J. Arnett
Print Your Name

33265
Attorney # (if any)

TABLE OF CONTENTS OF RECORD ON APPEAL

VOLUME 1 OF 3 **Page Numbering**

NOTICE OF FILING and PROOF OF SERVICE

In the Appellate Court of Illinois
First Judicial District

MARTIN PRODUCE, INC.,	)	
	)	
Counter-Defendant/Third-Party Plaintiff/Appellant,	)	
	)	
v.	)	No. 1-23-1369
	)	
JACK TUCHTEN WHOLESALE PRODUCE, INC., et al.,	)	
	)	
Third-Party Defendants/Appellees.	)	

The undersigned, being first duly sworn, deposes and states that on October 31, 2023, there was electronically filed and served upon the Clerk of the above court the Brief and Appendix of Plaintiff-Appellant. Service of the Brief will be accomplished electronically through the filing manager, Odyssey EfileIL, to the following counsel of record:

Thomas M. Wolf
Timothy J. Young
Lewis Brisbois Bisgaard & Smith LLP
tim.young@lewisbrisbois.com
thomas.wolf@lewisbrisbois.com
megan.duffy@lewisbrisbois.com

Phillip Litchfield
Nicholas J. Parolisi, Jr
Litchfield Cavo LLP
litchfieldp@litchfieldcavo.com
parolisi@litchfieldcavo.com
hamilton@litchfieldcavo.com

Jeffrey E. Schiller
Kevin H. Vanderleeden
Lee E. Farbman
Grogan, Tuccillo & Vanderleeden, LLP
schiller@gtv-ip.com
gtvsec@gtv-ip.com
farbman@gtv-ip.com

Within five days of acceptance by the Court, the undersigned states that 6 paper copies of the Brief bearing the court's file-stamp will be sent to the above court.

/s/ Daniel J. Arnett
Daniel J. Arnett

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

/s/ Daniel J. Arnett
Daniel J. Arnett

E-FILED
Transaction ID: 1-23-1369
File Date: 1/5/2024 2:02 PM
Thomas D. Palella
Clerk of the Appellate Court
APPELLATE COURT 1ST DISTRICT

No. 1-23-1369
APPEAL TO THE ILLINOIS APPELLATE COURT
FIRST JUDICIAL DISTRICT

MARTIN PRODUCE, INC. Third-Party Plaintiff/Appellant, v. JACK TUCHTEN WHOLESALE PRODUCE, INC.; & LA GALERA PRODUCE, INC. Third-Party Defendants/Appellees	Appeal from the Circuit Court Cook County, Illinois, Law Division Circuit Court No. 2016 L 006628 Honorable Judge Daniel J. Kubasiak Trial Judge

RESPONSE BRIEF OF THIRD-PARTY DEFENDANT/APPELLEE JACK TUCHTEN WHOLESALE PRODUCE, INC.

Nichols J. Parolisi, Jr. (#6201759)
Phillip G. Litchfield(#6317818)
LITCHFIELD CAVO LLP
303 West Madison Street, Suite 300
Chicago, IL 60606
Phone: (312) 781-6584
Fax: (312) 781-6630
Email: parolisi@ltichfeidlcavo.com
Email: litchfieldp@litchfieldcavo.com

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS AND POINTS OF AUTHORITIES

NATURE OF THE ACTION

This appeal arises out of a commercial dispute between the Third-Party Plaintiff/Appellant, Martin Produce, Inc. ("Martin") and its suppliers, Third-Party Defendants/Appellees, Jack Tuchten Wholesale Produce, Inc. ("Tuchten") and La Galera Produce, Inc. ("La Galera") (collectively, the "Distributors").

Martin was sued by Plaintiffs, Carbon on 26th, LLC and Carbon on Chicago, LLC (collectively, "Carbon"), for economic damages it sustained due to a 2016 *E. coli* outbreak at their restaurants, which Carbon alleges was caused by cilantro purchased from Martin. Martin, in turn, sought contribution from both Tuchten and La Galera for their alleged roles in supplying contaminated cilantro. The Distributors were successful in obtaining summary judgment on Martin's contribution claim under the economic loss doctrine.

In response to summary judgment entered in favor of the Distributors on Martin's contribution claim, Martin filed an amended third-party complaint, asserting a claim for breach of implied warranty of merchantability against the Distributors. The Distributors were also successful in obtaining summary judgment on Martin's amended third-party complaint based on Martin's failure to satisfy the notice requirement set forth in Section 2-607 of the UCC. The orders granting summary judgment to the Distributors on the breach of implied warranty of merchantability claim and denying Martin's motion to reconsider granting of summary judgment are the subject of the present appeal.

SUPPLEMENTAL STATEMENT OF FACTS

While Martin devotes nearly eleven pages of its brief to recounting the lengthy litigation history of this case, it omits important facts regarding its claims against the Distributors. Martin's recitation of facts is a distraction from the glaring reality that it failed

to pursue breach of implied warranty of merchantability claims against the Distributors for more than six years after the outbreak. In reading Martin's recitation, one would wrongly conclude that Martin has asserted breach of implied warranty of merchantability claims from the outset of the litigation. Nothing could be further from the truth.

Martin answered personal injury complaints relating to the outbreak as early as March 2017. (C 16) During litigation of the personal injury cases, Martin filed a claim for contribution against the Distributors on April 16, 2019. (C 3562). While Martin repeatedly attempts to characterize its original claim against the Distributors as some sort of warranty claim, it is unequivocally not a breach of implied warranty of merchantability claim. Martin's initial pleading is captioned a "Third-Party Complaint for Contribution" and sought contribution under the Illinois Joint Tortfeasors Contribution Act from the Distributors for their alleged tortious conduct in causing Carbon's claimed lost profits. Martin sought contribution from Jack Tuchten to the extent Martin was found liable under the strict product liability, negligence, and/or breach of warranty claims Carbon asserted against Martin.

Jack Tuchten moved for summary judgment on Martin's Third-Party Complaint for Contribution. (C 154). Jack Tuchten sought summary judgment on Martin's Third-Party Complaint for Contribution on the basis that Carbon's underlying tort claims were barred by the economic loss doctrine. Jack Tuchten also argued that Martin could not seek contribution on Carbon's breach of warranty claim because it sounds in contract. On June 29, 2022, the trial court granted Jack Tuchten's motion for summary judgment on Martin's Third-Party Complaint for Contribution for Carbon's underlying tort claims that were barred by the economic loss doctrine. (C 2429).

On June 29, 2022, the trial court also granted Martin's motion for leave to file an amended third-party complaint to assert a breach of implied warranty of merchantability claim against Jack Tuchten and La Galera. (C 2429). On July 1, 2022, Martin filed its Amended Third-Party Complaint against Jack Tuchten and La Galera. (C 2442). Unlike Martin's prior third-party complaint for contribution, Martin's amended third-party complaint for the first time asserted a breach of implied warranty of merchantability claim against Jack Tuchten. As a basis to satisfy the notice requirement of Section 2-607 of the UCC, Martin alleged that "Jack Tuchten had actual notice of the alleged defect of the cilantro in or around June 2018 as a result of being named a defendant in the Individual [Personal Injury] Complaints." (C2445, ¶19.) Martin makes no allegations in its amended third-party complaint of notice it provided to Jack Tuchten at any time.

No matter how much Martin recites to the facts, Martin cannot extricate itself from the unavoidable fact that it failed to ever provide notice of an alleged defect to Jack Tuchten or even assert a breach of implied warranty of merchantability claim for more than six years after the outbreak. On July 13, 2022, Jack Tuchten promptly moved for summary judgment on Martin's amended third-party complaint, asserting that Martin failed to provide requisite notice as an element of its breach of implied warranty of merchantability claim. (C 2705). It is undisputed that Martin never provided direct notice of an alleged defect to Jack Tuchten. In support of its motion, Jack Tuchten cited to the deposition testimony of Alexander Maciel of Martin, who testified that Martin never provided notice to Jack Tuchten of allegedly defective cilantro. (C 2708) Martin also admitted in its responses to the Distributors' motions for summary judgment that it did not provide notice of an alleged defect because it believed no defect existed. (C 3370, C 3645) Furthermore,

according to Martin's allegations, Jack Tuchten's first notice of any alleged defects with its cilantro was when it was served with the personal injury plaintiff complaints in June 2018. (C2445, ¶19.)

On May 16, 2023, the trial court granted Jack Tuchten's motion to reconsider the denial of its summary judgment. (C 4057) The trial court found that Martin was required under the Illinois Supreme Court holding in *Connick v. Suzuki* to provide direct notice of an alleged defect to Jack Tuchten and failed to do so. On June 6, 2023, the trial court denied Martin's motion to reconsider, again finding that Martin failed to satisfy the direct notice requirements set forth in and *Connick v. Suzuki*. (C 4408). The trial court also denied Martin's request for Rule 304(a) language to appeal the interlocutory order granting Jack Tuchten's motion for summary judgment and motion to reconsider. (C4409). After losing on the motion for Rule 304(a) language, Martin and Carbon crafted a detailed agreed order, which resulted in Carbon non-suiting its claims so Martin could seek to pursue this appeal. (C 4467)

ARGUMENT

The trial court correctly granted summary judgment to Jack Tuchten. After reconsideration, the trial court correctly applied Illinois law in determining that Martin never supplied the Distributors with pre-suit notice of an alleged product defect or its purported breach of warranty claim, despite the fact that the parties were engaged in litigation for a number of years relating to the subject outbreak.

1. Standard of Review

Summary judgment is appropriate when the pleadings, depositions, admissions and affidavits, viewed in a light most favorable to the nonmovant, fail to establish a genuine

issue of material fact, thereby entitling the moving party to judgment as a matter of law. 735 ILCS 5/2-1005; *Progressive Universal Ins. Co. v. Liberty Mut. Fire Ins. Co.*, 215 Ill. 2d 121, 127-128 (2005).

Martin was charged with presenting admissible evidence that would entitle to a judgment in its favor to avoid summary judgment in favor of Jack Tuchten. As stated by the Illinois Appellate Court, "even though a plaintiff is not required to prove her case at the summary judgment stage, [it] must present a factual basis that would arguably entitle [it] to a judgment in [its] favor." *Churkey v. Rustia*, 329 Ill.App.3d 239, 245 (2nd Dist. 2002); *Heiden v. Cummings*, 337 Ill.App.3d 584, 586-7 (2nd Dist. 2003). A plaintiff may not resist a motion for summary judgment on an issue on which [it] has the burden of proof by arguing that it is up to the movant to negate [its] case. *Heiden*, 337 Ill.App.3d 584, 586-7; *Benner v. Bell*, 236 Ill.App.3d 761, 769 (4th Dist. 1992). This motion for summary standard applies to third-party contribution claims. *Henderson v. Lofts at Arlington Towne Condominium Association*, 2018 IL App (1st) 162744 *16.

Summary judgment is an important tool in the administration of justice. Its use is to be encouraged and its benefits inure not only to the litigants in the saving of time and expenses, but also to the community in avoiding congestion of trial calendars and the expenses of unnecessary trial. *Kimbrough v. Jewel Companies, Inc.*, 92 Ill.App.3d 813, 816-17 (1st Dist. 1981).

2. Martin Failed To Provide Jack Tuchten With Direct Notice Of An Alleged Product Defect As Required Under Well-Settled Illinois Law Governing Warranty Claims

A buyer of goods must satisfy the notice requirements of Section 2-607(3)(a) of the UCC in order to pursue a breach of implied warranty of merchantability claim. *Connick v. Suzuki Motor Co., Ltd*., 174 Ill. 2d 482, 492 (1997). Section 2-607(3)(a) states as follows:

> "(3) Where a tender has been accepted
>
> (a) the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy." See 810 ILCS 5/2-607(3)(a)(1994).

A buyer is barred from pursuing an implied warranty of merchantability claim unless it directly notified the seller of the troublesome nature of the transaction. *Id.* The buyer must show that it complied with the notice requirements of Section 2-607. *Id.* at 495. Whether a buyer provided proper notice under Section 2-607 may be decided as a matter of law. *Id.*

The filing of a complaint by a merchant buyer against a seller is insufficient to satisfy the notice requirements of Section 2-607. *Id.* at 494-5. In *Connick*, plaintiffs filed a complaint alleging various claims, including breach of implied warranty of merchantability, relating to the purchase of vehicles that allegedly presented a safety hazard due to the potential for rollover accidents. The Illinois Supreme Court held that the defendant was entitled to dismissal of the implied warranty of merchantability claim because the plaintiffs failed to satisfy the direct notice requirements of Section 2-607. The Court found that the plaintiffs did not directly notify the seller of the troublesome nature of the transaction.

The plaintiffs in *Connick* argued that the filing of their lawsuit complaints was a viable substitute for the requirement of giving direct notice of the alleged defect to the defendant. The Court, in rejecting the plaintiffs' argument, stated:

> "Only a consumer plaintiff who suffers a personal injury may satisfy the Section 2-607 notice requirement by filing a complaint alleging a breach of implied warranty action against the seller." *Id.* at 495.

Direct notice must also be made within a reasonable time after delivery to comply with Section 2-607. A fifteen-month delay in providing notice is inadequate under Section 2-607 and bars a claim for breach of implied warranty of merchantability. *Branden v. Gerbie*, 62 Ill.App.3d 138, 141 (1st Dist. 1978). This holding is consistent with holdings in other jurisdictions that found lack of reasonable notice under Section 2-607. *San Antonio v. Warwick Club Ginger Ale Co.*, 104 R.I. 700, 708 (1968) (notice one year after purchase and eight months after becoming aware of the accident was not reasonable under Section 2-607).

Jack Tuchten was properly granted summary judgment because Martin failed to provide direct notice of an alleged product defect or establish application of the direct notice exceptions. It is undisputed that Martin never provided direct notice of an alleged product defect or its purported breach of implied warranty of merchantability claim to Jack Tuchten. The trial court expressly noted in its opinion order that "Martin even admitted in its response brief that it did not provide any notice to Third-Party Defendants." (C 4057) The holding in *Connick* is controlling and requires affirmation of summary judgment entered in favor of Jack Tuchten because Martin admittedly failed to provide direct notice of an alleged defect to Jack Tuchten to preserve its claim for breach of implied warranty of merchantability.

3. Martin Cannot Use The Personal Injury Suits Served On Jack Tuchten As A Substitute For Providing Direct Notice To Jack Tuchten

Martin argues that it was relieved of its obligation to provide direct notice when Jack Tuchten was served with the personal injury complaints in June 2018. Martin cites to *Connick,* where plaintiffs sued a defendant car manufacturer without providing a pre-suit notice. As clearly addressed in *Connick*, only a personal injury plaintiff is allowed to satisfy the notice requirement by filing suit against the seller. *Connick* held that the plaintiffs' lawsuit did not satisfy the requisite notice requirement because they did not sustain any personal injuries. *Connick* makes clear the distinction between personal injury and economic damages claims. While a personal injury plaintiff is not beholden to the direct notice requirements contained in Section 607(3)(a), a plaintiff who did not sustain personal injuries must comply with the notice requirement. "Only a consumer plaintiff who suffers a personal injury may satisfy the section 2–607 notice requirement by filing a complaint stating a breach of warranty action against the seller." *Connick*, 174 Ill. 2d 482, 495. Failure to provide pre-suit notice is a bar to a claim for breach of implied warranty of merchantability as a matter of law. *Microsoft Corp. v. Logical Choice Computers, Inc.*, 2000 U.S. Dist. LEXIS 10972 (N.D. Ill July 21, 2000); *Porter v. NBTY, Inc.*, 15 CV 11459, 2016 WL 6948379, at *7 (N.D. Ill. Nov. 28, 2016). Like the plaintiffs in *Porter*, Martin cannot rely on others to provide the statutory notice because it violates both the plain language of the statute and the very purpose of the notice provision.

The personal injury complaints do not constitute requisite notice under Section 2-607 to Jack Tuchten. Martin and Carbon did not sustain personal injuries. Martin expressly pleaded in its amended third-party complaint that it sought damages in the event it is found liable for Carbon's lost profits as a result of the *E. coli* outbreak. Based on these facts, the

holding in *Connick* is controlling and requires that Martin provide direct notice of the alleged product defect to Jack Tuchten, which it admittedly failed to do.

Martin cites case law in an effort to support its argument that the prior lawsuits by personal injury plaintiffs constitute proper notice to Jack Tuchten. Martin cites *Bd. of Educ. of City of Chicago v. A, C & S, Inc.*, 131 Ill. 2d 428 (1989). However, in *Bd. of Educ. Of City of Chicago*, the Illinois Supreme Court expressly held that the filing of a lawsuit did not constitute notice because the plaintiffs "[were] a body politic and not typical consumers" and because no personal injuries were alleged. Martin also cites to *Wagmeister v. A. H. Robins Co*., 64 Ill. App. 3d 964 (1st Dist. 1978). *Wagmeister* does not support Martin's argument. In *Wagmeister*, the plaintiff's complaint was dismissed for failure to give sufficient notice of a breach of warranty claim when the plaintiff notified defendants 30 months after the plaintiff knew or should have known of the breach.

Here, the intention and purpose of the UCC requiring Martin to provide direct notice to Jack Tuchten was to afford it a pre-suit opportunity to investigate, address, and/or settle the claim of Martin, as the buyer of the product. This is wholly different than the underlying plaintiffs' personal injury claims.

A Northern District of Illinois trial court decision succinctly adopts Jack Tuchten's arguments, and explains the rationale behind the strict notice requirement:

> Plaintiffs' claims for breach of express warranty are dismissed because, despite their arguments to the contrary, plaintiffs do not allege that they provided defendants with pre-suit notice. They allege that someone else did, and they give no information on where that person bought the product or his relationship to plaintiffs. Plaintiffs cite to two cases for the proposition that sufficiency of pre-suit notice is usually a question of fact reserved for the jury. *See In re Rust-Oleum Restore Mktg., Sales Practices & Products Liab. Litig.*, 155 F.Supp.3d 772, 801 (N.D. Ill. 2016); *Maldonado v. Creative Woodworking Concepts, Inc.*, 296 Ill.App.3d 935, 940 (3d Dist. 1998). **But the sufficiency of notice is not an issue if plaintiffs do not**

> **allege notice in the first place.** The letter here was no notice at all because it was not from plaintiffs. One purpose of the pre-suit notice requirement is to facilitate settlement of the **buyer's** claim.

Porter v. NBTY, Inc., 15 CV 11459, 2016 WL 6948379, at *7 (N.D. Ill. Nov. 28, 2016) (emphasis added).

4. Martin Failed To Establish The Actual Knowledge Exception To The Direct Notice Requirement

Martin argues that Jack Tuchten had "actual notice" of its claim through the parties' litigation of the personal injury matters. Martin cannot use a third-party's litigation to satisfy the notice requirement for Martin's own breach of implied warranty of merchantability claim against Jack Tuchten. Martin goes to great lengths to discuss the significant litigation of issues that have no bearing on the issues presented in this appeal. Martin must show that Jack Tuchten had actual knowledge of Martin's claim that Jack Tuchten breached the implied warranty of merchantability to satisfy the actual knowledge exception. The Illinois Supreme Court in *Connick* cited to the following statement from Judge Learned Hand, when discussing Section 2-607's predecessor:

> "The notice of the breach required is not of the facts, which the seller presumably knows quite as well as, if not better than, the buyer, but of *buyer's claim* that they constitute a breach." *Connick*, 174 Ill. 2d 482, 493-4.

Nowhere in Martin's brief does it present any evidence that Jack Tuchten had actual knowledge of Martin's claim for breach of implied warranty of merchantability. And, how could it be otherwise? Martin's breach of implied warranty of merchantability claim was an after-thought and a direct reaction to the trial court's order granting Jack Tuchten's motion for summary judgment on Martin's contribution claim more than six years after the ourbreak and the product sale. The prior order granting summary judgment to Jack Tuchten

on Martin's contribution claim was quite literally Martin's ah-ha moment that it best try and pursue a breach of implied warranty of merchantability claim. Only then did it first dawn on Martin that it should even attempt to pursue a breach of implied warranty of merchantability claim. The problem for Martin, however, is that it failed to provide the requisite direct notice under Section 2-607 six years prior to preserve a breach of implied warranty of merchantability claim against Jack Tuchten. Martin has failed to present any evidence that Jack Tuchten had actual knowledge of Martin's breach of implied warranty of merchantability claim or notice of an alleged produce defect.

5. Martin Is Not Excused From Providing Direct Notice

Martin argues that it should be excused from the notice requirement of Section 2-607 because "the intent and purpose of the…notice requirement has been met and/or is not required." Martin cites no legal authority in support of its excuse argument. The best Martin can muster is to cite a federal district court case applying Maine state law for the proposition that it need not follow the clear requirements laid out in Section 2-607. Martin also suggests, without any legal support, that the notice requirement of Section 2-607 should not apply to the sale of edible goods. The Illinois legislature has articulated no such exception to the bright line rule requiring notice of Section 2-607. Martin fails to articulate any legally supported argument that it was not required to satisfy the direct notice requirement addressed in *Connick.*

6. Martin Waived Its Waiver Argument

Martin argues, for the first time on appeal, that Jack Tuchten waived its lack of notice defense for the failure to raise it during this litigation. "[C]ircuit courts 'should not permit litigants to stand mute, lose a motion, and then frantically gather evidentiary

material to show that the court erred in its ruling.'" *Caywood v. Gossett*, 382 Ill. App. 3d 124, 133–34 (1st Dist. 2008). In other words, "[t]he trial court proceeding is not a practice round." *Liceaga v. Baez*, 2019 IL App (1st) 181170, ¶ 28. Therefore, when a plaintiff fails to raise an argument in her response to a defendant's motion to dismiss, "she waived her right to assert this issue." *Id.* at 134; *see also Nw. Illinois Area Agency on Aging v. Basta*, 2022 IL App (2d) 210234, ¶ 94. A party may not raise a new legal theory for the first time in a motion to reconsider or an appeal. *Triumph Cmty. Bank v. IRED Elmhurst, LLC*, 2021 IL App (2d) 200108, ¶ 48; *Dineen v. City of Chicago*, 125 Ill. 2d 248, 260 (1988)*; Liceaga* at ¶ 28 ("A motion to reconsider is not the place for the inclusion of new arguments that could have been raised earlier. Actions like that simply waste everyone's time and money…").

Martin never argued that Jack Tuchten waived its notice argument in the trial court. This argument is therefore improperly brought and should be disregarded.

7. Jack Tuchten Did Not Waive A Lack Of Notice Defense

In addition to Martin's failure to raise Jack Tuchten's purported waiver of its lack of notice defense in the trial court, Martin's argument has no merit. It is questionable at best for Martin to argue that Jack Tuchten waived its right to assert a notice defense when it was Martin that waited more than six years to even assert a claim for breach of implied warranty of merchantability and Jack Tuchten that moved for summary judgment less than two weeks after the Martin's breach of implied warranty of merchantability claim was first filed.

Moreover, lack of notice is not an affirmative defense to Martin's breach of implied warranty of merchantability claim. Instead, it is an essential element of Martin's claim that

it failed to substantiate through the course of litigation. 810 ILCS 5/2-607(3) mandates that a buyer must notify the seller of a breach or be barred from any remedy. Notice to the seller of an alleged breach of warranty is an integral party of the cause of action that the seller must plead and prove. *Carey v. I.J. Kales and Associates*, 122 Ill.App.3d 403, 407 (1st Dist. 1970). *Maldonado v. Creative Woodworking Concepts, Inc*., 296 Ill. App. 3d 935, 939 (3rd Dist. 1998), as modified on denial of reh'g (June 12, 1998) ("In every action for breach of warranty, notice is an essential element…"). Martin's failure to allege that it gave Jack Tuchten direct notice is akin to a personal injury plaintiff failing to establish that a defendant owed him a duty of care. Lack of notice is not an affirmative defense, it is an element of Martin's claim that it must allege and prove. It failed to do so.

CONCLUSION

WHERFORE, for the reasons set forth above, Third-Party Defendant/Appellee, Jack Tuchten Wholesale Produce, Inc., respectfully prays that this Honorable Court affirm summary judgment of the Circuit Court of Cook County entered in its favor on May 16, 2023, affirm the order of the Circuit Court of Cook County of June 6, 2023 denying Third-Party Plaintiff/Appellant, Martin Produce, Inc.'s motion to reconsider the May 16, 2023 order granting summary judgment entered in favor of Third-Party Defendant/Appellee, Jack Tuchten Wholesale Produce, Inc., and award such other relief as the Court deems just and proper.

Respectfully submitted,

LITCHFIELD CAVO LLP

By: _____

By: _____
Phillip G. Litchfield

Nicholas J. Parolisi (6201759)
Phillip G. Litchfield (6317818)
Litchfield Cavo LLP
303 West Madison, Suite 300
Chicago, Illinois 60606
Phone: 312-781-6584
Email: Parolisi@LitchfieldCavo.com
Email: LitchfieldP@LitchfieldCavo.com
Attorney for Third-Party Defendant/Appellee Jack Tuchten Wholesale Produce, Inc.

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 14 pages.

By: ***/s/ Nicholas J. Parolisi, Jr.***
One of the attorneys for Third-Party Defendant-Appellee Jack Tuchten Wholesale Produce, Inc.

By: ***/s/ Phillip G. Litchfield***
One of the attorneys for Third-Party Defendant-Appellee Jack Tuchten Wholesale Produce, Inc.

Nicholas J. Parolisi (6201759)
Phillip G. Litchfield (6317818)
Litchfield Cavo LLP
303 West Madison, Suite 300
Chicago, Illinois 60606
Phone: 312-781-6584
Email: Parolisi@LitchfieldCavo.com
Email: LitchfieldP@LitchfieldCavo.com
Attorney for Third-Party Defendant/Appellee Jack Tuchten Wholesale Produce, Inc.

No. 1-23-1369
APPEAL TO THE ILLINOIS APPELLATE COURT
FIRST JUDICIAL DISTRICT

MARTIN PRODUCE, INC. Third-Party Plaintiff/Appellant, v. JACK TUCHTEN WHOLESALE PRODUCE, INC.; & LA GALERA PRODUCE, INC. Third-Party Defendants/Appellees	Appeal from the Circuit Court Cook County, Illinois, Law Division Circuit Court No. 2016 L 006628 Honorable Judge Daniel J. Kubasiak Trial Judge

NOTICE OF FILING AND PROOF OF SERVICE

TO: SEE ATTACHED SERVICE LIST

PLEASE TAKE NOTICE that on **January 5, 2024**, we filed with the Clerk of the Appellate Court of Illinois, First Judicial District, via File & Serve Illinois, the attached, **RESPONSE BRIEF OF THIRD-PARTY DEFENDANT/APPELLEE, JACK TUCHTEN WHOLESALE PRODUCE, INC.** in the above-referenced action, copies of which are hereby served upon you.

Dated: January 5, 2024

By:____/s/ Nicholas J. Parolisi, Jr.__
One of Defendants Attorneys

Nichols J. Parolisi, Jr. (#6201759)
Phillip G. Litchfield(#6317818)
LITCHFIELD CAVO LLP
303 West Madison Street, Suite 300
Chicago, IL 60606
Phone: (312) 781-6677/ Fax: (312) 781-6630
Email: parolisi@LitchfieldCavo.com
Email: litchfieldp@litchfieldcavo.com

CERTIFICATE OF SERVICE

Under penalties as provided by law under 735 ILCS 5/1-109, of the Code of Civil Procedure I certify that on January 5, 2024, I electronically filed a copy of the above Notice and **RESPONSE BRIEF OF THIRD-PARTY DEFENDANT/APPELLEE, JACK TUCHTEN WHOLESALE PRODUCE, INC.** f referred to therein with the Clerk of the Court for the United States Court of Appeals for the First District by using the Odyssey, and further certify that I served each party via email to the attorneys of record listed below:.

Martin Produce Inc.'s Attorney:
Daniel J. Arnett
Mark Bennett
Arnett Law Group, LLC
223 West Jackson Boulevard, Suite 750
Chicago, IL 60606
Telephone: (312) 561-5660
Email: darnett@arnettlawgroup.com
mbennett@arnettlawgroup.com
bpiet@arnettlawgroup.com

La Galera Produce's Attorney:
Thomas M. Wolf
Timothy J. Young
Lewis Brisbois Bisgaard & Smith LLP
550 West Adams Street, Suite 300
Chicago, IL 60601
Telephone: (312) 345-1718
Email: tim.young@lewisbrisbois.com
thomas.wolf@lewisbrisbois.com
megan.duffy@lewisbrisbois.com

/s/Nicholas J. Parolisi, Jr.

Nichols J. Parolisi, Jr. (#6201759)
Phillip G. Litchfield(#6317818)
LITCHFIELD CAVO LLP
303 West Madison Street, Suite 300
Chicago, IL 60606
Phone: (312) 781-6677/ Fax: (312) 781-6630
Email: parolisi@LitchfieldCavo.com
Email: litchfieldp@litchfieldcavo.com

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No. 1-23-1369

In the

Appellate Court of Illinois

First Judicial District

MARTIN PRODUCE, INC.,

Counter-Defendant/Third-Party Plaintiff/Appellant,

v.

JACK TUCHTEN WHOLESALE PRODUCE, INC. and
LA GALERA PRODUCE, INC.,

Third-Party Defendants/Appellees.

Appeal from the Circuit Court of Cook County, Illinois,
County Department, Law Division, No. 16 L 6628.
The Honorable Daniel J. Kubasiak, Judge Presiding.

REPLY BRIEF OF PLAINTIFF-APPELLANT TO RESPONSE BRIEFS OF APPELLEES

DANIEL J. ARNETT
MARK R. BENNETT
ARNETT LAW GROUP, LLC
223 West Jackson Boulevard
Suite 750
Chicago, Illinois 60606
(312) 561-5660
darnett@arnettlawgroup.com
mbennett@arnettlawgroup.com

Counsel for Counter-Defendant/Third-Party Plaintiff/Appellant Martin Produce, Inc.

ORAL ARGUMENT REQUESTED

COUNSEL PRESS · (866) 703-9373 PRINTED ON RECYCLED PAPER

INTRODUCTION

Martin Produce is asking this Appellate Court to find that the UCC's pre-suit notice requirement cannot, and should not, preclude Martin Produce's breach of warranty claims against the Vendors, Jack Tuchten and La Galera, as (1) Section 2-607 notice should not apply to perishable food products with alleged latent defects, that cannot be detected upon inspection or easily cured pre-suit; (2) Section 2-607 notice cannot apply to contingent, third-party claims where the claimant, itself, denies the breach; and, (3) Section 2-607 notice is not intended for claims arising out of personal injury that cannot be resolved pre-suit. Simply put, the UCC's intended purpose for requiring pre-suit notice – to cure a defect without litigation – can never be met when perishable goods with latent defects are at issue. Therefore, since the pre-suit notice requirement could not have been complied with in this case, as the alleged defect was latent, in that it could not be seen, felt, or tasted, Martin Produce's legal remedies should not have been taken away based on an antiquated and inapplicable notice technicality.

As detailed below, extensive litigation involving the allegedly tainted cilantro did, in fact, occur before Martin Produce's breach of warranty claims were filed, although pre-suit resolution between the Vendors and Martin Produce was never possible anyway because Martin Produce still denies that its cilantro, received from the Vendors, was ever defective or tainted. Under these circumstances, because of the litigation and latency of the alleged defect, any additional notice provided to the Vendors would have been duplicative, meaningless, and irrelevant. Martin Produce's third-party claims against the Vendors should not be precluded based on an inapplicable and impractical UCC notice standard, which was enacted for run-of-the-mill breach of warranty claims that involve easily curable defects and no personal injuries.

For these reasons, Martin Produce asks this Appellate Court to hold that the intent and purpose of the Section 2-607 notice requirement is not applicable to Martin Produce's breach of warranty claims or, in the alternative, the notice requirement has been met in accordance with the plain language of the Illinois Supreme Court's notice exceptions.

ARGUMENT

Martin Produce and the Vendors recognize that this is a case of first impression relative to 810 ILCS 5/2-607. This Appeal is an opportunity for this Appellate Court to dictate that direct notice is not a strict, rigid requirement that should be applied blindly and without consideration of the underlying facts at issue. *Malawy v. Richards Mfg. Co.*, 150 Ill. App. 3d 549, 561 (1st Dist. 1989) ("An evaluation of whether the notice requirement has been complied with must be based upon the factual setting of each case and the circumstances of the parties involved."). Further, this Court has the chance to reaffirm that the existing notice exceptions, declared by the Illinois Supreme Court, serve an important purpose, which is to ensure the fair and just application of the UCC rule, that it serves a practical purpose, and that it must be applied on a case-by-case basis. *Id*.; *See Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 494-95 (1996); *See also Maldonado v. Creative Woodworking Concepts, Inc.*, 296 Ill. App. 3d 935, 939 (3rd Dist. 1998).

Martin Produce fully acknowledges that it has not identified a case that encompasses and directly addresses the unique set of circumstances at bar. That said, Martin Produce has provided ample, instructive case law regarding the intent and purpose of pre-suit notice, as well as the notice exceptions established by the Illinois Supreme Court, to support the finding that the trial court erred in granting summary judgment in favor of the Vendors. *Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482 (1996). Furthermore, despite the Vendors' arguments to the contrary, Jack Tuchten and La Galera have not, and

cannot, point to any legal precedent that supports the rejection of Martin Produce's Appeal and request for new law and guidance by this Court; nor have the Vendors provided any case law, facts, or reasoning to explain why pre-suit notice should be required of Martin Produce's contingent breach of warranty claims, other than relying solely on a legal technicality, when a latent defect is at issue and notice simply cannot be given pre-suit.

The lack of explicit case law is unsurprising, as the uniqueness of the underlying facts cannot be overstated. This Appeal involves the evaluation of summary judgment and Section 2-607 notice, in a case with widespread personal injury, extensive pre-suit litigation, a latent defect that is denied by the claimant, and a contingent breach of warranty claim, all of which revolves around the same alleged products sold by the Vendors to Martin Produce. This is not a standard breach of warranty claim, and the lower court erred by considering it as such, thereby giving this Appellate Court the opportunity to refine the law by clarifying the application of 810 ILCS 5/2-607 to latent defects and perishable goods.

I. THE UCC CANNOT AND DOES NOT APPLY TO MARTIN PRODUCE'S BREACH OF WARRANTY CLAIMS.

In the breach of warranty claims at bar, the alleged product defect is alleged E.coli tainted cilantro, which was consumed by Carbon's customers and alleged to have caused an E.coli outbreak at the Carbon restaurants, resulting in significant personal injuries, as well as economic and reputation damage to the Carbon restaurants. As a result, Carbon, Martin Produce, Jack Tuchten, and La Galera were all co-defendants in multiple, consolidated, personal injury lawsuits regarding the E.coli outbreak, all of which involved the very same product, the same alleged defect, the same parties, and the same transactions

that gave rise to the breach of warranty claims at bar, brought within the very same consolidated personal injury actions.

Furthermore, Martin Produce's breach of warranty claims against the Vendors are secondary to, and contingent upon, Carbon's breach of warranty claims against Martin Produce, which allege extensive lost profits, lost business opportunities, and reputation damage due to E.coli outbreak. (C 173-190; C 3440-3472; C 3568-3572). Carbon's alleged damages are directly related to, and result from, the personal injuries alleged against Martin Produce and the Vendors regarding the E.coli outbreak. Martin Produce is not alleging its own economic damages against the Vendors, only those recovered by Carbon at trial, if any. (C 3562-3567). Martin Produce is certainly not seeking replacement costs for the cilantro purchased from the Vendors, as would be the situation in a typical breach of warranty claim, in which the purpose of the Section 2-607 notice provision would make sense as a pre-suit resolution would be preferred.

Critically, Martin Produce, along with the Vendors, has consistently denied that the cilantro was contaminated and/or the cause of the E.coli outbreak. This is based on several facts, including Carbon's own food handling practices; the fact that no other restaurant that purchased cilantro from Martin Produce experienced an E.coli incident; and the fact that, immediately following the E.coli outbreak, the Chicago Department of Public Health tested the cilantro at Martin Produce's facility and found it negative for E.coli. (C 2631-2650; C 2571-2572). Therefore, absent any evidence of E.coli contaminated cilantro, there was nothing to notify its Vendors of. This is why Section 2-607's notice provision simply cannot apply to perishable goods and certainly would not, and should not, have been applied by the lower court in this case.

At trial, Martin Produce will first argue that there is no evidence that the cilantro that was delivered to Carbon was tainted with E coli. Then, if the jury finds the cilantro was tainted, Martin Produce will argue it became tainted at Carbon, due to contaminated cutting boards. Finally, if the jury finds the cilantro was tainted when it left Martin Produce's control, then the cilantro must have been contaminated when it left the control of Jack Tuchten and La Galera, as Martin Produce does not repackage cilantro. Therefore, if the jury finds that Martin Produce breached its warranty of merchantability, the jury must also find the Vendors breached their warranties, thereby causing the E.coli outbreak and, ultimately, Carbon's alleged economic damage.

Since Martin Produce denies any defect, and because its breach of warranty claims are dependent on Carbon's claims, Martin Produce and the Vendors could never have negotiated a settlement, cured the defect, or otherwise resolved the alleged breach (the purpose behind Section 2-607) without litigation. The UCC's notice requirement has no practical purpose under these circumstances. To the contrary, the notice requirement, in this instance, has effectively let the culpable parties off the hook, potentially causing great injustice to an innocent party.

It is telling that neither of the Vendors' Response Briefs contain a single statement that explains how receiving additional notice from Martin Produce would have altered their behavior or assisted in their ability to investigate, address, or resolve the alleged breach. Despite filing thirty combined pages arguing the need for notice, Jack Tuchten and La Galera do not once claim that they were unaware of Martin Produce's breach of warranty claims pre-suit, nor do they claim to have suffered any negative impact, any harm, or any prejudice, whatsoever, as a result of the purported lack of notice at issue on appeal. Rather,

the Vendors rely solely on a technicality that simply would not apply to this situation, that of notice of an unknown defect.

The Vendors even admit that the purpose of notice is to allow the opportunity to "to investigate, address, and/or settle" Martin Produce's claims pre-suit and, yet, offer no explanation as to how that could have happened. (See La Galera Response, p. 17; See Jack Tuchten Response, p. 9). Why not? Because it simply could not have occurred, as there was nothing to investigate, as there were no defects to warn about (and there still are none). The Vendors' Responses conveniently ignore the fact that Martin Produce's breach of warranty claims are contingent upon Carbon's breach of warranty claim that remains unresolved and at issue. (C 173-190; C 3440-3472; C 3568-3572). Arguably, not until a jury finds that the cilantro sold to Carbon by Martin Produce was tainted with E.coli, would Martin Produce have to give notice to its Vendors.

Jack Tuchten, La Galera, and Martin Produce are all aligned in their position that there was no breach, because the cilantro was not contaminated. The Vendors had to be brought into the litigation as necessary parties in case the jury found otherwise and had to determine the source – Carbon or the Vendors. There is, quite literally, no possible way that the Vendors and Martin Produce could have resolved Martin Produce's third-party claims pre-suit, as preferred by the UCC. *Connick*, 174 Ill. 2d at 495. Therefore, litigation regarding the alleged latent defect was required, thereby defeating the purpose of notice, and, thus, pre-suit notice should not be required by the UCC in this case.

Accordingly, this Appellate Court has the opportunity to create a direct notice exception that ensures the fair and just application of Section 2-607 moving forward, such as:

- Pre-suit notice is not required for alleged latent defects; and/or,
- Pre-suit notice is not required for perishable food products.

Martin Produce asks that this Appellate Court reverse the Circuit Court's Orders of May 16, 2023, and June 6, 2023, as the UCC's notice requirement, pursuant to Section 2-607, was never intended to, and does not, apply to latent defects and perishable goods.

II. IF THIS COURT FINDS THAT SECTION 2-607 OF THE UCC PERTAINS TO LATENT DEFECTS, THE *CONNICK* EXCEPTIONS APPLY.

In the event that this Appellate Court declines to create a more encompassing exception to direct notice under of Section 2-607, the trial court's granting of Summary Judgment was still in error, as a matter of law, based on the plain language of the existing notice exceptions, as established in *Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482 (1996).

In *Connick*, the Illinois Supreme Court held that, "Direct notice is not required for a breach of implied warranty of merchantability claim where: (1) the seller has actual knowledge of the defect of the particular product; or (2) the seller is deemed to have been reasonably notified by the filing of the buyer's complaint alleging breach of UCC warranty." *Connick*, 174 Ill. 2d at 492. As argued at length in Martin Produce's Appellate Brief, when applying the plain language of these exceptions to the case at bar, notice is not required.

A. The First Exception to Notice Under *Connick*, Actual Knowledge, Applies.

Martin Produce's Third-Party Complaint was filed on April 19, 2019, and the record shows that La Galera and Jack Tuchten were both fully aware of the product (cilantro), the transactions, and the alleged breach that formed the basis of Martin Produce's breach of warranty claims, prior to April 19, 2019, in accordance with *Connick's* actual knowledge exception to notice. (C 3562-3567). Surprisingly, the Vendors'

Responses both argue that Martin Produce did not bring its breach of warranty claims until July 1, 2022. While Martin Produce does not agree, if this were true, it only supports the existence of pre-suit notice and the application of the actual knowledge exception. Prior to July 1, 2022, the Vendors had received and answered Martin Produce's Third-Party Complaint alleging breach of warranty, the Vendors had also litigated the personal injury claims regarding the E.coli outbreak all the way through jury selection, and they had filed dispositive motions regarding the very economic damages claims of which they now claim a lack of notice. (C 3590-3598; C 3599-3609; C 2705-2719; C 2527-2540). Notice pursuant to Section 2-607 undoubtedly occurred over and over again "pre-suit," before April 19, 2019, and certainly prior to July 1, 2022.

In addition, as initially argued by Martin Produce, the Vendors also had actual knowledge of Martin Produce's breach of warranty claims, prior to April 19, 2019, in accordance with the actual knowledge exception. Neither Jack Tuchten nor La Galera dispute the applicable actual knowledge standard, "where the manufacturer is somehow apprised of the trouble with the particular product purchased by the particular buyer." *Connick.* 174 Ill. 2d at 494. As with the personal injury complaint exception, the actual knowledge exception, consistent with the intended purpose of notice, is to facilitate a pre-suit resolution between the particular buyer and seller. *Id*. Accordingly, even though a pre-suit resolution was not possible in this case, the relevant question presented here is whether the Vendors were "apprised of the trouble" with the cilantro that was purchased by Martin Produce, prior to April 19, 2019, the date that Martin Produce filed its Third-Party Complaint. The answer is, undeniably, yes.

Prior to April 19, 2019, Jack Tuchten and La Galera were inundated with information, documents, and testimony regarding the allegedly tainted cilantro purchased by Martin Produce in June of 2016: the Vendors received Melissa Andrew's Third-Amended Complaint at Law, along with 54 other personal injury complaints, containing detailed allegations regarding the E.coli outbreak, as discussed at length in subsections B and C, below (C 3610-3644); the Vendors received and/or answered Carbon's Amended Third-Party Complaint for economic damages, alleging breach of warranty regarding their cilantro (C 3440-3472; C 3473-3521); the Vendors served discovery responses and produced documents identifying the particular transactions involving the allegedly tainted cilantro (C 2464-2480; C 2482-2487); the Vendors took the depositions of Martin Produce's own employees regarding the allegedly tainted cilantro (C 2652-2673; C 2675-2693; C 2880-2888); the Vendors received Martin Produce's Requests to Admit regarding the allegedly tainted cilantro and further confirming the particular transactions at issue (C 4294-4306; C 4319-4322); the Vendors deposed the lead investigator of the E.coli outbreak, Stephanie Black (C 2560-2629); and the Vendors received the Chicago Department of Public Health's Reports regarding the allegedly tainted cilantro (C 2631-2650). With each event, the Vendors' awareness and understanding of the alleged defective products grew. By the time Martin Produce filed its Third-Party Complaint, the Vendors were acutely aware of the nature of the alleged breach of warranty, the transactions at issue, the parties involved, and the purported damages.

Moreover, the Vendors' Responses do not address, mention, or attempt to explain away the aforementioned, overwhelming facts that demonstrate their actual knowledge regarding the allegedly tainted cilantro. Why would they fail to do so? Because they had,

and have had for many years, actual knowledge of the purportedly tainted cilantro, falling squarely within the first *Connick* exception.

Ironically, the majority of Jack Tuchten's argument regarding actual knowledge focuses on Martin Produce's claims being brought on July 1, 2022, rather than April 19, 2019, which, again, only supports the finding of actual knowledge, but which is not accurate. Jack Tuchten's argument also references a lack of direct notice, which is irrelevant to this exception; and, while Jack Tuchten infers that notice must advise of the buyer's claim that the facts constitute a breach, that argument obviously fails because Jack Tuchten, once sued, would have immediately known that the only party to which it sold the cilantro at issue was Martin Produce. Therefore, it had notice of the buyer's potential claim upon receipt of the personal injury complaints, alleging breach of warranty, and, further, upon receipt of Carbon's Third-Party Complaint for economic damages, alleging breach of warranty. (C 3610-3644; C 3404-3433).

La Galera, on the other hand, remarkably argues that, "Martin cannot point to any evidence that La Galera had even generalized knowledge that there was some issue with its cilantro pre-suit." (See La Galera Response, p. 12). Presuming that the "suit" is Martin Produce's April filing, this is simply untrue, and Martin Produce refers this Court to Section I, Subsection B, of its Appellate Brief (p. 21-28), which details the timeline and events of actual knowledge, also briefly discussed above. The evidence of actual knowledge at bar is far greater, and far more specific, than the purported evidence of actual knowledge present in *Connick*, and La Galera's argument to the contrary is without logic or merit.

Finally, La Galera argues that actual knowledge occurs only when the allegedly defective product is observed by the seller or returned to the seller. La Galera cites to three cases that merely provide examples of actual knowledge. *See Malawy*, 150 Ill. App. 3d 549; *Crest Container Corp. v. R.H. Bishop Co.,* 111 Ill. App. 3d 1068; *Overland Bond & Investment Corp. v. Howard*, 9 Ill. App. 3d 348 (1972). There is no need to address the three cases cited by La Galera, as they all involve a tangible interaction with an allegedly, observable, defective product, which was not possible in this case because, if the cilantro at issue was tainted with E.coli, such a defect was latent, as it could not be seen, smelled, felt, or tasted, and which was only considered after the cilantro was consumed by Carbon's customers who became ill days later. The cases cited by La Galera only demonstrate exactly why Section 2-607 cannot apply to latent defects and perishable food products, and the need for guidance by this Appellate Court.

If La Galera thinks that actual knowledge can only be found in exceptional or unique circumstances, as it seems to be claiming, the case at bar is both an exceptional and unique circumstance. Specifically, the cilantro sold to Martin Produce had an alleged latent defect and was consumed at Carbon's restaurants. As a result, it was literally impossible to identify this alleged defect upon physical inspection, or to return the cilantro after the alleged breach. La Galera's Response demonstrates why its motion for summary judgment was denied in the first place, as it contains broad factual and legal declarations that are, frankly, not supported by the case law or a rational assessment of the facts contained in the record.

In sum, the Vendors do not actually dispute that they had actual knowledge of the allegedly tainted cilantro or Martin Produce's breach of warranty claims, as a result of the

preceding litigation. The Vendors do not argue that Martin Produce's claims were a surprise, nor do they explain how or why they needed more information to resolve the breach of warranty claims pre-suit. Rather, the Vendors attempt to avoid a fair and complete trial of the economic damages/breach of warranty claims by resorting to a notice requirement technicality in the UCC that is clearly inapplicable to the case at bar.

For these reasons, the initial denial of the Vendors' Motions for Summary Judgment was proper and their Motion to Reconsider should have been denied. Therefore, Martin Produce asks this Court to reverse the trial court's Order of May 16, 2023; and reinstate the denial of the Vendors' Motions for Summary Judgment.

B. It is Undisputed That Both Vendors Were Named Defendants in Personal Injury Complaints Alleging Breach of Warranty. Therefore, the Second Exception to Notice Under *Connick* is Satisfied.

The Illinois Supreme Court held that direct notice is not required if "the seller is deemed to have been reasonably notified by the filing of the buyer's complaint alleging breach of UCC warranty." *Connick.* 174 Ill. 2d at 492. Only a consumer plaintiff who suffers personal injury may satisfy notice through a lawsuit, and that exact circumstance occurred here. *Connick.* 174 Ill. 2d at 492. On June 13, 2018, Melissa Andrews filed her Third-Amended Complaint at Law against Jack Tuchten, La Galera, Martin Produce, and Carbon. (C 3610). Melissa Andrews was a consumer plaintiff who suffered a personal injury, and her complaint alleged breach of warranty regarding the purportedly tainted cilantro sold by the Vendors to Martin Produce. Therefore, the second *Connick* exception was clearly satisfied, and the Section 2-607 notice requirement is met.

C. In Addition to Satisfying the Plain Language of the Second *Connick* Exception, Melissa Andrew's Personal Injury Complaint, Filed on June 13, 2018, Undeniably "Reasonably Notified" The Vendors of the Allegedly Tainted Cilantro, in Accordance with *Connick*.

As a preliminary matter, Martin Produce's Amended Third-Party Complaint alleges that the Vendors received pre-suit notice by way of the personal injury complaints, and the sufficiency of that pleading was not challenged. (C 3587-3588). Additionally, Martin Produce asserted this exact argument in both its Response to the Vendor's Motions for Summary Judgment and its Response to the Vendors' Motion to Reconsider. (C 3370-3383; C 3645-3660; C 4026-4035). As such, La Galera's claim that Martin Produce is improperly raising this issue for the first time in this Appeal is patently false. Additionally, La Galera's statement that Martin Produce "chose to misstate the second exception by failing to mention" that it applies to personal injury complaints is untrue, as Martin Produce's entire argument revolves around the personal injury plaintiffs and complaints. (See La Galera Response, p. 13); (See Appellate Brief, p. 23).

It is undisputed that the personal injury complaints and subsequent breach of warranty claims filed against the Vendors on April 19, 2019, are inexorably intertwined, and the Vendors' Responses make no attempt to distinguish these two matters. The personal injury and breach of warranty claims arise out of the same E.coli outbreak at the Carbon restaurants and involve the same cilantro, the same parties, and the same transactions. In fact, Martin Produce's Third-Party Complaint refers to the personal injury complaints and, further, was filed under the personal injury case caption and case number. (C 3562-3567). Reasonable notice is simply not an issue.

Notably, the Vendors' Responses do not address the detailed allegations contained within the personal injury complaints regarding the relevant facts of the E.coli outbreak,

the allegedly tainted cilantro, and the transactions at issue. (C 3610-3617). Jack Tuchten and La Galera cannot reasonably argue that, after receiving and answering multiple personal injury complaints regarding the E.coli outbreak and allegedly defective cilantro, they were blindsided by Martin Produce's contingent, third-party breach of warranty claim regarding the very same cilantro. The Vendors were fully aware of Martin Produce's claims, including the particular product and transactions at issue, *well before* receiving Martin Produce's Third-Party Complaint on April 19, 2019, or its Amended Third-Party Complaint on July 1, 2022. As a result, any additional, pre-suit notice received by the Vendors would have been redundant and irrelevant.

Rather than addressing the obvious fact that the personal injury complaints "reasonably notified" the Vendors of Martin Produce's claims, Jack Tuchten and La Galera attempt to win by technicality, arguing that Martin Produce cannot rely on another person to provide pre-suit notice, regardless of the nature or substance of that notice. Of course, this sweeping conclusion is without basis, as it inherently disregards Section 2-607's purpose, the basic principles of notice, and the requirement that notice must be evaluated based on the particular facts of each. *See Maldonado v. Creative Woodworking Concepts, Inc.*, 296 Ill. App. 3d 935, 939 (3rd Dist. 1998); *See Malawy*, 150 Ill. App. 3d at 561. In addition, this purported bright line rule directly contradicts the Illinois Supreme Court's plain language of "reasonably notified," as well as the purpose and function of the Supreme Court's actual knowledge exception. *Connick.* 174 Ill. 2d at 492.

The Vendors then attempt to support their broad legal conclusions by citing to an out-of-context quotation from the unreported U.S. District case of *Porter v. NBTY, Inc.*,

which is easily distinguished from the case at bar, should this Court choose to consider it. 15 CV 11459, 2016 WL 6948379 (N.D. Ill. Nov. 28, 2016).

To be clear, the court in *Porter v. NBTY, Inc.* did not involve personal injuries or personal injury complaints, and the breach of warranty claims in *Porter* were not brought against co-defendants within an already existing personal injury action regarding the exact same product and defect. *Id*. Furthermore, the court in *Porter* was tasked with determining the sufficiency of a complaint's allegations regarding notice, pursuant to a motion to dismiss, at the initial pleading stage; the court was not analyzing pre-suit notice for purposes of summary judgment, based on the facts that will be presented to the jury. *Id*. at *1. The case at bar is well past the pleading stage, and the questions of law and fact regarding whether the personal injury complaints "reasonably notified" the Vendors of the alleged breach, is squarely at issue, pursuant to the *Connick* exception. 174 Ill. 2d at 492.

In addition, *Porter* was a multi-state class action lawsuit regarding three different protein products, involving multiple, unrelated transactions across different states. *Id*. at *1-2. In terms of notice, the plaintiffs merely alleged that a single letter, sent by a non-party to the defendants, provided notice "on behalf of the entire class" and regarding all transactions and alleged defects at issue. *Id*. at *7. The court noted that the letter, attached to the complaint as an exhibit, did not explicitly identify the product at issue, and the complaint did not provide any information as to where the non-party bought the product or his relationships to the plaintiffs. *Id*. For these reasons, the court upheld the dismissal of the class of plaintiffs' breach of warranty claims. *Id*.

Porter v. NBTY, Inc. did not, in any way, create a blanket rule that pre-suit notice can never be satisfied by or through a third-party. To the contrary, the court in *Porter* took

issue with the substance and nature of the alleged notice from the third-party, finding that the letter did not advise the seller of the particular product defect and parties at issue. *Id*. Here, on the other hand, the personal injury complaints were extremely detailed and specific regarding the alleged product defect and parties at issue. (C 3610-3644). This is not in dispute. Additionally, the court in *Porter* emphasized that notice is intended to facilitate settlement negotiations of a claim pre-suit, and the seller in *Porter* was not afforded that opportunity. *Id*. That reasoning does not apply to the case at bar, as the complaints clearly advised all sellers of the cilantro, Martin Produce and the Vendors, that claims were being made that their product was defective, even when there was, and remains, no evidence of said defects. (C 3610-3644).

Separately, the Vendors' Response Briefs, and particularly that of La Galera, take issue with Martin Produce's reliance on the phrase "reasonably notified," despite that being the Illinois Supreme Court's plain language in *Connick*. 174 Ill. 2d at 492. In addition, La Galera's Response implies that the personal injury complaints were required to provide "actual notice," which is simply untrue. (See La Galera Response, p. 13). Even if this was true, as discussed above, the personal injury complaints clearly apprised the Vendors of the alleged breach.

Therefore, Martin Produce asks this Appellate Court to vacate the lower Court's May 16, 2023, order; reinstate the denial of the Vendors' Motions for Summary Judgment; and hold that Martin Produce was not required to provide direct notice to the Vendors, as Melissa Andrews' Third Amended Complaint, along with the other personal injury complaints, reasonably notified the Vendors of the allegedly tainted cilantro, as allowed via the Illinois Supreme Court's reasonable notice exception.

III. IN LIGHT OF THE VENDORS' ARGUMENTS THAT MARTIN PRODUCE DID NOT FILE A BREACH OF IMPLIED WARRANTY CLAIM UNTIL JULY 1, 2022, DIRECT NOTICE OCCURRED.

The Vendors' Responses both argue repeatedly that Martin Produce's Third-party Complaint, filed in April of 2019, did not plead breach of warranty, and, therefore, Martin Produce first alleged breach of warranty on July 1, 2022, by way of its Amended Third-Party Complaint. This is not actually at issue, despite the Vendors' arguments. The Vendors already attempted this argument and failed. Martin Produce was granted leave to file its Amended Third-Party Complaint, and the Vendors answered Martin Produce's Amended Third-Party Complaint. (3590-3598; C 3599-3609). The Vendors then moved for summary judgment, claiming that Martin Produce's Amended Third-Party Complaint violated the statute of limitations and laches, and the trial court denied the Vendors' motion. (C 4004). This ruling is not up on appeal.

Moreover, while Martin Produce does not agree that its Third-Party Complaint did not allege breach of warranty, which it did, Martin Produce would be happy to accept the Vendors' version of events, as this would mean that direct notice occurred well before its July 1, 2022 filing, pursuant to 810 ILCS 5/2-607. Prior to July 1, 2022, on April 19, 2019, Martin Produce served the Vendors with its Third-Party Complaint, which set forth the relevant facts and details of Martin Produce's eventual, re-filed breach of warranty claim, even going as far as to assert that the Vendors "breached the implied warranty of merchantability." (C 3566). This document, served by Martin Produce directly on Jack Tuchten and La Galera, constitutes direct, pre-suit notice of Martin Produce's breach of warranty claims. *See* 810 ILCS 5/2-607, cmt. 4 ("The content of the notification need merely be sufficient to let the seller know that the transaction is still troublesome and must

be watched."). Therefore, by way of the Vendors' own arguments, the notice provision of Section 2-607 was met and the Motion to Reconsider should have been denied.

CONCLUSION

The only issue before this Appellate Court is whether the Circuit Court erred when ordering, on May 16, 2023 and June 6, 2023, that its denial of the Vendors' Motions for Summary Judgment was in error, and then denying Martin Produce's Motion to Reconsider, as the lower court failed to consider and apply the exceptions to direct notice established by the Illinois Supreme Court in *Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 494-95 (1996).

The trial court erred when it effectively dismissed, by way of summary judgment, Martin Produce's claims, because of lack of pre-suit notice, when Section 2-607 does not, and cannot, apply to latent defects or perishable goods, nor can the notice requirement apply to contingent breach of warranty claims where the claimant, itself, denies the breach. Requiring pre-suit notice under such circumstances would serve no practical purpose, other than to allow culpable parties to avoid justice based on a needless technicality. Even in the event that Section 2-607 is found to apply to the case at bar, the plain language of the direct notice exceptions apply.

Therefore, third-party plaintiff/appellant, MARTIN PRODUCE, INC., respectfully requests that this Honorable Court reverse the Circuit Court's Orders of May 16, 2023, and June 6, 2023; and, thereby, reinstate the denial of Jack Tuchten's and La Galera's Motions for Summary Judgement; and for any other relief that this Appellate Court deems just and equitable.

Respectfully submitted:

ARNETT LAW GROUP, LLC

/s/ Daniel J. Arnett

Daniel J. Arnett
Mark R. Bennett
ARNETT LAW GROUP, LLC
223 West Jackson Boulevard
Suite 750
Chicago, Illinois 60606
(312) 561-5660
darnett@arnettlawgroup.com
mbennett@arnettlawgroup.com
Attorneys for the Appellant

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this reply brief, excluding the pages or words containing the Rule 341(d) cover, the Rule 341(c) certificate of compliance and the certificate of service is 19 pages.

/s/ Daniel J. Arnett
Daniel J. Arnett

NOTICE OF FILING and PROOF OF SERVICE

In the Appellate Court of Illinois
First Judicial District

MARTIN PRODUCE, INC.,	)	
	)	
Counter-Defendant/Third-Party Plaintiff/Appellant,	)	
	)	
v.	)	No. 1-23-1369
	)	
JACK TUCHTEN WHOLESALE PRODUCE, INC., et al.,	)	
	)	
Third-Party Defendants/Appellees.	)	

The undersigned, being first duly sworn, deposes and states that on January 19, 2024, there was electronically filed and served upon the Clerk of the above court the Reply Brief of Plaintiff-Appellant. Service of the Reply Brief will be accomplished electronically through the filing manager, Odyssey EfileIL, to the following counsel of record:

Thomas M. Wolf
Timothy J. Young
Lewis Brisbois Bisgaard & Smith LLP
tim.young@lewisbrisbois.com
thomas.wolf@lewisbrisbois.com
megan.duffy@lewisbrisbois.com

Phillip Litchfield
Nicholas J. Parolisi, Jr
Litchfield Cavo LLP
litchfieldp@litchfieldcavo.com
parolisi@litchfieldcavo.com
hamilton@litchfieldcavo.com

Jeffrey E. Schiller
Kevin H. Vanderleeden
Lee E. Farbman
Grogan, Tuccillo & Vanderleeden, LLP
schiller@gtv-ip.com
gtvsec@gtv-ip.com
farbman@gtv-ip.com

Within five days of acceptance by the Court, the undersigned states that 6 paper copies of the Reply Brief bearing the court's file-stamp will be sent to the above court.

/s/ Daniel J. Arnett
Daniel J. Arnett

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

/s/ Daniel J. Arnett
Daniel J. Arnett

2024 IL App (1st) 231369

FIFTH DIVISION
June 7, 2024

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

No. 1-23-1369

MELISSA ANDREWS, Plaintiff, v. CARBON ON 26TH, LLC; CARBON ON CHICAGO, LLC ; MARTIN PRODUCE, INC.; JACK TUCHTEN WHOLESALE PRODUCE, INC.; and LA GALERA PRODUCE, INC., Defendants (Martin Produce, Inc., Third-Party Plaintiff-Appellant, v. Jack Tuchten Wholesale Produce, Inc. and La Galera Produce, Inc., Third-Party Defendants-Appellees).	)	Appeal from the Circuit Court of Cook County. No. 16 L 6628 Honorable Daniel J. Kubasiak, Judge Presiding.

JUSTICE MIKVA delivered the judgment of the court, with opinion.
Justices Lyle and Navarro concurred in the judgment and opinion.

OPINION

¶ 1 In the summer of 2016, fast-casual Mexican restaurants Carbon on 26th, LLC, and Carbon on Chicago, LLC (collectively, Carbon), closed due to an outbreak of Escherichia coli O157:H7 (E. coli) bacteria that sickened a number of the restaurants' customers and was believed by the

Chicago Department of Public Health (health department) to have been caused by contaminated cilantro. Personal injury lawsuits were filed against the restaurant and, ultimately, against other entities within the chain of distribution for the cilantro. Those claims were settled on the eve of trial in March 2020 and are not part of this appeal. A number of related claims were also filed in this litigation, including the one that is now before us—the claim of distributor Martin Produce Inc. (Martin Produce), against wholesalers Jack Tuchten Wholesale Produce, Inc. (Jack Tuchten), and La Galera Produce, Inc. (La Galera) (collectively, the wholesalers), for breach of the implied warranty of merchantability. Martin Produce has and continues to assert that the cilantro at issue was not the source of the outbreak but alleged that, if it was found to have breached its implied warranty of merchantability by selling contaminated cilantro, then the wholesalers it sourced the cilantro from had done so as well. The circuit court granted summary judgment in favor of the wholesalers on that claim, concluding that Martin Produce had failed to provide them with pre-suit notice as required by section 2-607(3)(a) of the Uniform Commercial Code (UCC) (810 ILCS 5/2-607(3)(a) (West 2022)).

¶ 2 Martin Produce now appeals, asking us to hold that the notice requirement does not apply where, as here, the purported breach involves a perishable good with latent defects. If the notice requirement does apply, Martin Produce argues in the alternative that one or both of the exceptions set out by our supreme court in *Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 492 (1996)—actual knowledge of the defect or notification through the filing of the buyer's complaint—relieved it of its duty to provide direct notice under that section.

¶ 3 For the reasons that follow, we conclude that section 2-607(3)(a) does apply but hold that summary judgment based on a lack of notice was not proper here. We cannot say as a matter of law that the wholesalers lacked actual pre-suit knowledge that the cilantro they sold to Martin

Produce was claimed to be defective. We reverse the circuit court's grant of summary judgment in the wholesalers' favor based on a lack of notice and remand for further proceedings on Martin Produce's warranty claim.

¶ 4 I. BACKGROUND

¶ 5 The record in this case is quite lengthy, and the parties have stipulated that only the portion from May 2022—when the wholesalers first moved for summary judgment on Martin Produce's initial claim for contribution against them—to the present is relevant to this appeal. The relevant facts are largely undisputed.

¶ 6 In June 2016, the wholesalers each sold cilantro to Martin Produce, which Martin Produce then sold to Carbon. Beginning in mid-June, a number of cases of E. coli were reported by patrons of the restaurant. The health department investigated, and on July 1, 2016, it issued a foodborne final report concluding that "[c]ilantro was the most likely food-vehicle causing this outbreak," based on both "the strong statistical association of raw cilantro consumption with illness" and the high percentage of cases that could be explained by cilantro consumption. The report noted that the distributor (Martin Produce) obtained cilantro from multiple sources, that no other restaurants serviced by the distributor were linked to the outbreak, and that "it was not possible to perform further traceback to assess for a common source of contamination."

¶ 7 Alexander Maciel, manager of Martin Produce, confirmed at his deposition that produce received from different wholesalers was placed together in Martin Produce's coolers and was not marked to identify its source. He was contacted by the health department following the outbreak and provided it with invoices for the cilantro Martin Produce had purchased in the last month. The health department also tested the cilantro in Martin Produce's warehouse, but Mr. Maciel was never told the results of those tests and had no further involvement with the health department's

investigation. He could not recall if the health department focused only on cilantro or if it also investigated and tested other food products sold to Carbon by Martin Produce.

¶ 8 Dr. Stephanie Black, an epidemiologist with the health department, testified that invoices were requested from Martin Produce not just for cilantro, but for all of its produce items, as the department had not yet "honed in" on a particular food item.

¶ 9 Beginning in July 2016, 55 personal injury lawsuits were filed against Carbon by the restaurant patrons who became ill as a result of the outbreak. Claims were added against Martin Produce on January 19, 2017, and against several wholesale suppliers of cilantro, including Jack Tuchten and La Galera, on June 13, 2018. The restaurant patrons asserted claims against each of these defendants for strict product liability and negligence and an additional claim for breach of warranty against Carbon. They alleged that they were sickened by adulterated cilantro the wholesalers sold to Martin Produce and included in their pleading a detailed statement of facts regarding the E. coli outbreak and the health department's investigation. The personal injury cases were consolidated, with litigation and extensive discovery continuing for a number of years, until just after jury selection, when the plaintiffs reached a global settlement with all defendants in March 2020.

¶ 10 On October 27, 2017, while the personal injury litigation was ongoing, Carbon filed claims for strict products liability, negligence, contribution, and breach of express and implied warranties against Martin Produce and several wholesalers, including Jack Tuchten. It added claims against La Galera on March 1, 2018. The restaurant dropped its claims against both wholesalers in a subsequent amendment to its pleading filed on June 20, 2018, however, apparently due to a lack of privity between the restaurant and the wholesalers.

¶ 11 This prompted Martin Produce, on April 16, 2019, to file contingent claims for contribution

against the wholesalers under the Joint Tortfeasor Contribution Act (740 ILCS 100/0.01 *et seq.* (West 2018)). In the spring of 2022, the wholesalers moved for summary judgment on those claims on the basis that the underlying tort claims were barred by the economic-loss doctrine and contribution was not available for the breach of warranty claim, which sounded in contract. The circuit court granted those motions on June 30, 2022.

¶ 12 Martin Produce amended its complaint against the wholesalers the following day, to assert a claim for breach of the implied warranty of merchantability. It continued to deny that cilantro was the cause of the E. coli outbreak but alleged that if it were found liable to Carbon, then the wholesalers had breached the implied warranty of merchantability by supplying Martin Produce with tainted cilantro and were responsible for a *pro rata* share of any liability. Martin Produce alleged that the wholesalers each "had actual notice of the alleged defect of the cilantro in or around June 2018 as a result of being named as a defendant in the [personal injury complaints]"; that "[a]s a result of the many Individual Complaints, for over three years, all parties ha[d] engaged in extensive written and oral discovery"; and that through that extensive discovery, the wholesalers "had the opportunity to review and consider extensive evidence relating to Carbon's breach of warranty claim against Martin [Produce]."

¶ 13 On July 13, 2022, the wholesalers moved for summary judgment based on, among other things, the fact that they were never provided pre-suit notice under UCC section 2-607. They argued both that the filing of claims against them by the personal injury plaintiffs could not satisfy Martin Produce's notice obligation and, alternatively, that even if it could, that notice did not come within a reasonable time following the alleged breach of implied warranty.

¶ 14 The circuit court at first denied the motion, concluding that a genuine issue of material fact existed. The court said that it "[could not] ignore its common sense nor ignore the over five years

of litigation, to apply Section 2-607 without considering the E. coli outbreak that injured over 70 of Carbon's customers." It further noted that "[l]ogically, Martin [Produce] would never notify [the wholesalers] of a defect that Martin itself denie[d] existed."

¶ 15 On reconsideration, however, the court entered summary judgment in the wholesalers' favor. The court believed it had erroneously suggested in its earlier decision that the law would "allow a defendant-seller to receive 'reasonable notice' from third-parties via the filing of a lawsuit." But Illinois law was clear, the court concluded, "that only consumer plaintiffs that suffer a personal injury can satisfy their Section 2-607 notice requirement by filing a lawsuit against the seller." The court believed that "a strict reading of the UCC" thus required it to grant the wholesalers' motion.

¶ 16 Martin Produce's motion to reconsider the grant of summary judgment was denied, and it now appeals.

¶ 17 II. JURISDICTION

¶ 18 The circuit court granted summary judgment in favor of the wholesalers on May 16, 2023, On July 5, 2023, Carbon voluntarily dismissed its remaining claim against Martin Produce. With that dismissal, all claims brought against all parties in this litigation were fully and finally resolved, and all prior orders were rendered final and appealable. See *Dubina v. Mesirow Realty Development, Inc.*, 178 Ill. 2d 496, 502-03 (1997) (noting that, absent an Illinois Supreme Court Rule 304(a) (eff. Feb. 1, 1994) finding, a final order disposing of fewer than all of the claims in an action is not appealable until all of the claims in the litigation have been resolved). Martin Produce filed a timely notice of appeal on July 26, 2023. This court has jurisdiction pursuant to Illinois Supreme Court Rule 301 (eff. Feb. 1, 1994) and Rule 303 (eff. July 1, 2017), governing appeals from final judgments entered by the circuit court in civil cases.

¶ 19 III. ANALYSIS

¶ 20 At issue in this appeal is whether the wholesalers were entitled to judgment in their favor as a matter of law on Martin Produce's claims against them for breach of warranty, on the grounds that they were not provided with notice under section 2-607(3)(a) of the UCC. 810 ILCS 5/2-607(3)(a) (West 2022). Summary judgment is appropriate where, construed liberally in favor of the party opposing judgment, " 'the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' " *Carney v. Union Pacific R.R. Co.*, 2016 IL 118984, ¶ 25 (quoting 735 ILCS 5/2-1005(c) (West 2012)). Although summary judgment is "encouraged as an aid in the expeditious disposition of a lawsuit," it is "a drastic means of disposing of litigation and, therefore, should be allowed only when the right of the moving party is clear and free from doubt." *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 43 (2004). "[W]here reasonable persons could draw divergent inferences from the undisputed material facts or where there is a dispute as to a material fact, summary judgment should be denied and the issue decided by the trier of fact." *Jackson v. TLC Associates, Inc.*, 185 Ill. 2d 418, 424 (1998). Our review of a circuit court's grant or denial of summary judgment is *de novo*. *Doria v. Village of Downers Grove*, 397 Ill. App. 3d 752, 756 (2009).

¶ 21 Section 2-607(3)(a) of the UCC provides that, "[w]here a tender has been accepted," the "buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy." 810 ILCS 5/2-607(3)(a) (West 2022). The notice need not be a threat to sue; its content need only alert the seller that "the transaction is still troublesome and must be watched." 810 ILCS Ann. 5/2-607, Uniform Commercial Code Comment 4, at 465 (Smith-Hurd 2022). "Whether sufficient notice has been provided is generally

a question of fact to be determined based upon the particular circumstances of each case." *Maldonado v. Creative Woodworking Concepts, Inc.*, 296 Ill. App. 3d 935, 940 (1998). The question can be decided as a matter of law, however, "[w]hen no inference can be drawn from the evidence other than that the notification was unreasonable." *Id.*

¶ 22 Martin Produce argues on appeal that (1) the wholesalers forfeited their notice argument by waiting too long to assert it; (2) the notice requirement in section 2-607(3)(a) does not apply in cases, like this one, that involve a latent defect or a perishable good; and (3) if notice was required, one or both of the exceptions to direct notice recognized by our supreme court in *Connick*, 174 Ill. 2d at 492, applies here. We address each of these arguments in turn.

¶ 23 A. Forfeiture

¶ 24 We first consider Martin Produce's contention that the wholesalers forfeited their argument that section 2-607(3)(a) notice was not provided to them. Martin Produce notes that the wholesalers did not raise a lack of notice until they filed their motion for summary judgment in March 2023, four years after they answered Martin Produce's claim for contribution and made no mention of a lack of notice. The wholesalers argue that Martin Produce's earlier claim for contribution cannot be construed as a contingent claim for breach of implied warranty. Their motion for summary judgment based on a lack of notice thus came less than two weeks after Martin Produce first asserted a breach of warranty claim against them in its July 1, 2022, amended third-party complaint. One of the wholesalers, Jack Tuchten, also argues that Martin Produce itself forfeited this forfeiture argument by failing to raise it below in briefing and argument on the motion for summary judgment. We agree that it did. It is well established that "[i]ssues raised for the first time on appeal will not be considered by the reviewing court." *Britamco Underwriters, Inc. v. J.O.C. Enterprises, Inc.*, 252 Ill. App. 3d 96, 99 (1993).

¶ 25 Martin Produce's forfeiture argument also lacks merit. It is true that "[t]he facts constituting any affirmative defense *** must be plainly set forth in the answer or reply." 735 ILCS 5/2-613 (West 2022); see *Edwards v. Lombardi*, 2013 IL App (3d) 120518, ¶ 15 (noting that "[o]rdinarily, if a party fails to plead an affirmative defense, the defense is [forfeited] and cannot be considered even if the evidence suggests the existence of the defense"). But a lack of pre-suit notice in a breach of warranty case is not an affirmative defense. Rather, compliance with section 2-607(3)(a) is an essential element of a claim for breach of warranty that must be alleged in the complaint. See *Maldonado*, 296 Ill. App. 3d at 939; see also 4 Lawrence's Anderson on the Uniform Commercial Code § 2-607:21 (3d ed. 2014) (noting that "[t]he buyer must plead and prove the giving of notice of breach under U.C.C. § 2-607, as the giving of such notice is a condition precedent to the buyer's cause of action"). The wholesalers did not forfeit their ability to raise this challenge.

¶ 26 We turn next to Martin Produce's arguments concerning the application of the notice requirement in this case.

¶ 27 B. Section 2-607(3)(a) Notice in Cases of Perishable Goods or Latent Defects

¶ 28 Martin Produce first invites us to establish a new rule in Illinois by holding that section 2-607(3)(a) notice is not required to assert a breach of warranty claim involving the sort of goods that are at issue in this case. The scope of the exception that Martin Produce seeks is somewhat unclear; it speaks of perishable goods, of situations where the alleged defect is a latent one, and of the exception recognized by New York courts for goods sold for human consumption. Its point in asserting any of these as exceptions to the notice rule, however, is that in each circumstance there will likely be no real opportunity to cure the defect. Martin Produce points out that the allegedly tainted cilantro at issue here was either consumed or destroyed by the time anyone involved was

or could have been made aware of the alleged contamination. Because an inspection would not have revealed the defect, it argues, there was no opportunity for the wholesalers to cure a breach of the warranty of merchantability by substituting nonconforming goods with conforming ones. Martin Produce insists that pre-suit notice should not be required in such cases.

¶ 29 In support of this argument, it cites *Fischer v. Mead Johnson Laboratories*, 341 N.Y.S.2d 257, 258-59 (App. Div. 1973), in which the New York appellate court held that the notice requirement in section 2-607(3)(a) did not apply in a case where the plaintiff alleged that she had been injured by taking the defendant's oral contraceptive. The court concluded that section 2-607(3)(a) had to do "with the sales of goods whose inspection or use discloses a defect of quality, lack of conformance to sample, failure to comply with description, or other cognate circumstances," and that to apply it in situations involving goods sold for human consumption "would strain the rule beyond a breaking point of sense or proportion to its intended object." (Internal quotation marks omitted.) *Id.* at 259.

¶ 30 We are not persuaded, however, that a broad, court-recognized exception for goods that are perishable, have latent defects, or are intended for human consumption is appropriate here. Martin Produce has cited no decision in which an Illinois court followed the reasoning in *Fischer*. And as counsel for the wholesalers pointed out at oral argument in this appeal, the UCC, which expressly applies to "transactions in goods" (810 ILCS 5/2-102 (West 2022)), defines "Goods" broadly to encompass "all things *** which are movable at the time of identification to the contract for sale," including "growing crops" (*id.* § 2-105). See 810 ILCS Ann. 5/2-105, Uniform Commercial Code Comment 1, at 109 (Smith-Hurd 2022) (noting that "[t]he definition of goods is based on the concept of movability" and "[g]rowing crops are included within the definition of goods since they are frequently intended for sale").

¶ 31 This court has also rejected, albeit in a different context, the argument that the inability to cure a defect, on its own, should relieve the buyer of its notice obligation. The plaintiff in *Baja Foods, LLC v. Spartan Surfaces, Inc.*, 2021 IL App (1st) 201156-U, ¶ 38, argued that notice was futile because the defendant in that case could not have cured the problems with its laminated flooring even if it had been timely notified of a defect, where testimony in the case established that the only solution was to remove and completely replace the flooring. We rejected that argument and held that section 2-607(3)(a) still applied. *Id.* ¶ 39.

¶ 32 Martin Produce quotes a well-known treatise on the UCC for the proposition that "[t]he purpose of enabling the seller to cure the defect has significance in a commercial setting but has no significance in a personal injury case because the defect has already caused the harm and the seller can do nothing to remedy the situation." 4 Lawrence's Anderson on the Uniform Commercial Code § 2-607:7 (3d ed. 2014). That source goes on to note, however, that there are other purposes to the notice requirement in section 2-607(3)(a), including "alerting the seller to the need of gathering evidence" and "the general social purpose of informing the manufacturers of the need for making improvements to avoid further injuries." *Id.*

¶ 33 This court has likewise recognized that the notice requirement serves three distinct purposes: (1) "to provide a seller an opportunity to cure a defect and minimize damages," (2) to "protect his ability to investigate a breach and gather evidence," and (3) "to encourage negotiation and settlement." *Maldonado,* 296 Ill. App. 3d at 939. Where personal injury has occurred, "it also informs the seller of a need to make changes in its product to avoid future injuries." *Id.* Thus the fact that section 2-607 notice may not always enable a seller to remedy a latent defect or replace a perishable item in time for it to be used does not mean that such notice would be pointless.

¶ 34 Martin Produce argues that the wholesalers in this case do not state in their briefs how a

failure to give notice hampered them in their efforts to investigate or settle Martin Produce's contribution claim. But it is not the seller's burden to establish prejudice from a lack of notice. As noted above, pre-suit notice is an element of a claim for breach of warranty that is the plaintiff's burden to allege and prove. *Id.* Moreover, as we discuss below, a seller with actual pre-suit knowledge of a purported defect may be able to investigate and explore the settlement of claims. Absent such actual knowledge, however, the failure to give pre-suit notice might well hamper such investigation, even where perishable goods are involved.

¶ 35 We conclude, in sum, that we are not free to ignore the UCC's notice requirement on a case-by-case basis or to carve out our own broad exceptions for whole categories of goods, as Martin Produce would have us do here.

¶ 36 C. The *Connick* Exceptions

¶ 37 We next consider Martin Produce's argument that one or both of the exceptions to the UCC's notice requirement recognized by our supreme court in *Connick* apply here. When considering the exceptions already recognized by our supreme court, we are inclined to give them a practical, common-sense application. The comments to section 2-607 suggest such an approach. See 810 ILCS Ann. 5/2-607, Uniform Commercial Code Comment 4, at 465 (Smith-Hurd 2022) (observing, with respect to whether notice has been provided within a reasonable time, that the purpose of pre-suit notice is "to defeat commercial bad faith, not to deprive a good faith [buyer] of his remedy").

¶ 38 Section 2-607(3)(a) provides that "the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy." 810 ILCS 5/2-607(3)(a) (West 2022). In *Connick*, 174 Ill. 2d at 492, however, our supreme court recognized two exceptions to this rule. "Direct notice is not required when (1) the

seller has actual knowledge of the defect of the particular product" or "(2) the seller is deemed to have been reasonably notified by the filing of the buyer's complaint alleging breach of UCC warranty." *Id.* Martin Produce argues that both of these exceptions apply here and that the circuit court erred when it ultimately granted the wholesalers' motion for summary judgment. We agree that the wholesalers here had actual knowledge of a purported defect years before Martin Produce's claim for breach of implied warranty was filed and thus Martin Produce may well have been excused by the actual knowledge exception recognized in *Connick* from providing pre-suit notice.

¶ 39 The plaintiffs in *Connick* were owners of sport utility vehicles alleged to be unsafe due to an excessive risk of rollover accidents. *Id.* at 487-88. They unsuccessfully argued that the manufacturer had actual knowledge of the defect because it had received unfavorable reports from consumer safety organizations and settled claims with the attorneys general of several states. *Id.* at 493. The *Connick* court concluded that those reports and settlements provided the manufacturer only with knowledge of "problems with a particular product line," and did not inform it that the plaintiffs' *specific* vehicles were alleged to be defective. See *id.* at 493-94. This led the *Connick* court to conclude that the sellers did not have actual knowledge excusing the plaintiffs in that case from providing direct notice of defects affecting their own transactions. *Id.* at 494. Thus, the first exception to the notice requirement was not applicable.

¶ 40 The *Connick* court also found that the second exception did not apply. The court noted that "[o]nly a consumer plaintiff who suffers a personal injury" may satisfy the UCC's notice requirement simply by filing a lawsuit. *Id.* at 495. The court explained that "[t]he reason for this distinction is that where the breach has not resulted in personal injury, the UCC indicates a preference that the breach be cured without a lawsuit." *Id.* Although the plaintiffs in *Connick* were consumers, they alleged only economic losses. See *id.* Thus, the filing of their lawsuit did not

relieve them of their duty to provide direct, pre-suit notice pursuant to UCC section 2-607. *Id.* The wholesalers here had actual knowledge that the specific shipments of cilantro they supplied to Martin Produce, and which were in turn supplied to Carbon, were alleged to have been contaminated by at least June 2018, when the personal injury plaintiffs first brought claims against them. Counsel for Martin Produce suggested at oral argument in this appeal that they had actual knowledge even sooner because Martin Produce issued the wholesalers subpoenas shortly after Martin Produce was brought into the suit, in January 2017. In either case, the wholesalers had the opportunity to investigate and gather evidence regarding those specific transactions long before Martin Produce sued them for breach of warranty. On these facts, we cannot say as a matter of law that the first *Connick* exception—actual knowledge of the defective product—was not satisfied.

¶ 41 The circuit court here initially understood this, and even noted that common sense permitted no contrary conclusion, given the five years of litigation in which the wholesalers had been involved. On reconsideration, however, the court seems to have had trouble squaring that conclusion with application of the *second* exception articulated by the *Connick* court—notice via the filing of a lawsuit. What troubled the circuit court was the limitation noted in *Connick* that the lawsuit-in-lieu-of-notice exception applies only where the plaintiff has brought a claim for breach of implied warranty *and* a claim for personal injury against the merchant from whom they purchased the goods.

¶ 42 The circuit court failed to realize that although the personal injury lawsuit exception did not apply here, the consumer lawsuits could still be the vehicle by which the wholesalers in this case received actual pre-suit knowledge of the defective product. Those earlier personal injury lawsuits clearly informed all sellers within the chain of distribution, including the wholesalers, that the cilantro they sold was considered defective. The circuit court correctly noted that each buyer

was responsible for providing its own notice specific to its own transaction within the chain of distribution. As the wholesalers echo on appeal: Martin Produce "cannot use a third-party's litigation to satisfy the notice requirement for [its] own breach of implied warranty of merchantability claim." But that does not mean that the lawsuit, cannot be the source of the wholesalers' *actual knowledge* that such a claim may be coming.

¶ 43 By naming everyone in the supply chain, the personal injury suits filed here necessarily gave each of those entities actual knowledge that the cilantro *they* sold was alleged to be defective, *i.e.*, that there was "trouble with [a] particular product purchased by a particular buyer." *Id.* at 494. In our view, this is the sort of actual knowledge that will make it unnecessary for a buyer to separately notify its direct seller that a transaction is considered "troublesome and must be watched."

¶ 44 Counsel for the wholesalers insisted at oral argument in this appeal that allegations alone are insufficient to impart a seller with actual knowledge. The wholesalers cite no authority for this proposition, however. We acknowledge that the examples of actual knowledge cited by the *Connick* court are more concrete. In *Malawy v. Richards Manufacturing Co.*, 150 Ill. App. 3d 549, 561-62 (1986), and *Crest Container Corp. v. R.H. Bishop Co.*, 111 Ill. App. 3d 1068, 1077 (1982), an employee of the seller observed the malfunctioning product firsthand. And in *Overland Bond & Investment Corp. v. Howard*, 9 Ill. App. 3d 348, 359 (1972), the plaintiff had his vehicle towed to the dealer's lot because the engine had fallen out. Nothing in those cases suggests, however, that knowledge of a defect must be absolute knowledge observed firsthand by the seller. Indeed, we see no reason why actual knowledge must be more definitive than what direct notice of a purported defect would provide, since it is meant to stand in lieu of it. The comments to section 2-607 make clear that direct notice need only alert the seller that the transaction is "troublesome and

must be watched" 810 ILCS Ann. 5/2-607, Uniform Commercial Code Comment 4, at 465 (Smith-Hurd 2022).

¶ 45 In sum, we reject the wholesalers' argument that a lawsuit filed by a third-party, though it cannot constitute pre-suit notice under section 2-607 of the UCC for purchasers farther up the chain of supply, can never be what causes a remote seller to have actual knowledge of a defect in the goods at issue. We likewise reject their argument that actual knowledge necessarily means absolute and uncontroverted knowledge of a defect, as opposed to knowledge that a purported defect has been alleged. The circuit court was therefore wrong to conclude as a matter of law that the wholesalers did not have actual knowledge of the defective cilantro in this case, which, if they did, would excuse Martin Produce from providing them with pre-suit notice of its breach of warranty claim. Summary judgment was granted in error.

¶ 46 At oral argument, the wholesalers raised for the first time before this court the argument that any pre-suit knowledge they gained from the personal injury litigation came too late. The UCC pre-suit notice requirement demands that notice be provided to the seller within a reasonable time after the buyer discovers or should have discovered any breach. The wholesalers in this case did not argue in their briefs on appeal that they were drawn into the personal injury suits too late to provide them with actual knowledge within a reasonable time after Martin Produce should have discovered a possible breach. At oral argument they raised this argument, and claimed, for example, that the two-year delay between when the outbreak occurred and when they were first sued denied them the ability to test the cilantro they had growing in the fields.

¶ 47 Whether actual knowledge, like direct notice, must be received within a reasonable time of the buyer's awareness of a breach of warranty claim is an unbriefed question that is simply not before us here. Nor have the parties addressed, if that is a requirement, what is reasonable in this

case, where Martin Produce, as the buyer from the wholesalers, continued to assert that the cilantro that it purchased and resold to Carbon did not breach any warranty. There also appears to be some question as to when the wholesalers gained knowledge. Martin Produce asserted that it issued subpoenas to them months before they were sued that gave them knowledge that the cilantro that they had sold was alleged to be defective. These are questions that may be raised on remand. What we hold here is that summary judgment in favor of the wholesalers because of the lack of notice was improper.

¶ 48 IV. CONCLUSION

¶ 49 We reverse the circuit court's grant of summary judgment in favor of the wholesalers based on a lack of section 2-607(a)(3) notice and remand for further proceedings on Martin Produce's breach of warranty claim.

¶ 50 Reversed and remanded.

No. 1-23-1369

***Andrews v. Carbon On 26th, LLC*, 2024 IL App (1st) 231369**

Decision Under Review:	Appeal from the Circuit Court of Cook County, No. 16-L-6628; the Hon. Daniel J. Kubasiak, Judge, presiding.
Attorneys for Appellant:	Daniel J. Arnett and Mark R. Bennett, of Arnett Law Group, LLC, of Chicago, for appellant Martin Produce, Inc.
Attorneys for Appellee:	Nichols J. Parolisi and Phillip G. Litchfield, of Litchfield Cavo LLP, of Chicago, for appellee Jack Tuchten Wholesale Produce, Inc. Timothy J. Young and Thomas M. Wolf, of Lewis Brisbois Bisgaard & Smith LLP, of Chicago, for appellee La Galera Produce, Inc.

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APPEAL TO THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE COOK JUDICIAL CIRCUIT
COOK COUNTY, ILLINOIS

MELISSA ANDREWS, ET AL
Plaintiff/Petitioner

v.

CARBON ON 26TH, LLC., ET AL.
Defendant/Respondent

Reviewing Court No: 1-23-1369
Circuit Court/Agency No: 2016L006628
Trial Judge/Hearing Officer: DANIEL KUBASIAK

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No. 130862/130863 Consolidated

IN THE SUPREME COURT OF ILLINOIS

MARTIN PRODUCE, INC. Third-Party Plaintiff/Appellee v. JACK TUCHTEN WHOLESALE PRODUCE, INC. and LA GALERA PRODUCE, INC., Third-Party Defendant/Appellants,	Appeal from Appellate Court of Illinois, First Judicial District, Fifth Division Appellate Court No: 1-23-1369 Circuit Court of Cook County, Illinois Court No. 2016L006628

NOTICE OF FILING AND PROOF OF SERVICE

TO: SEE ATTACHED SERVICE LIST

PLEASE TAKE NOTICE that on October 30, 2024, we filed with the Clerk of the Supreme Court of Illinois, via File & Serve Illinois, the attached, **APPELLANT, JACK TUCHTEN WHOLESALE PRODUCE, INC.'S BRIEF AND APPENDIX** in the above-referenced action, copies of which are hereby served upon you.

Dated: October 30, 2024

By:____/s/ Nicholas J. Parolisi, Jr.__

Nicholas J. Parolisi, Jr. (#6201759)
Phillip G. Litchfield (#6317818)
LITCHFIELD CAVO LLP
303 West Madison Street, Suite 300
Chicago, IL 60606
Phone: (312) 781-6665
Fax: (312) 781-6630
Email: parolisi@LitchfieldCavo.com
Email: litchfieldp@litchfieldcavo.com

CERTIFICATE OF SERVICE

Under penalties as provided by law under Section 1-109, of the Code of Civil Procedure the undersigned certifies that the statements set forth herein are true and correct that on October 30, 2024, I electronically filed a copy of the above **APPELLANT, JACK TUCHTEN WHOLESALE PRODUCE, INC.'S BRIEF AND APPENDIX** referred to therein with the Clerk of the United States Supreme Court of Illinois, by using the File & Serve Illinois, and further certify that I served each party via email to the attorneys of record listed below:.

Martin Produce Inc.'s Attorney:
Daniel J. Arnett
Mark Bennett
Arnett Law Group, LLC
223 West Jackson Boulevard, Suite 750
Chicago, IL 60606
Telephone: (312) 561-5660
Email: darnett@arnettlawgroup.com
mbennett@arnettlawgroup.com
bpiet@arnettlawgroup.com

La Galera Produce's Attorney:
Thomas M. Wolf
Timothy J. Young
Lewis Brisbois Bisgaard & Smith LLP
550 West Adams Street, Suite 300
Chicago, IL 60601
Telephone: (312) 345-1718
Email: tim.young@lewisbrisbois.com
thomas.wolf@lewisbrisbois.com
megan.duffy@lewisbrisbois.com

/s/ Nicholas J. Parolisi, Jr.

Nicholas J. Parolisi, Jr. (#6201759)
Phillip G. Litchfield (#6317818)
LITCHFIELD CAVO LLP
303 West Madison Street, Suite 300
Chicago, IL 60606
Phone: (312) 781-6665
Fax: (312) 781-6630
Email: parolisi@LitchfieldCavo.com
Email: litchfieldp@litchfieldcavo.com