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ENDORSED
FILED
ALAMEDA COUNTY
AUG 29 2018
CLERK OF THE SUPERIOR COURT
By PAM WILLIAMS
Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ALAMEDA

CENTER FOR ENVIRONMENTAL HEALTH,) Case No. RG 17-872872
Plaintiff,)
v.) Related to Case Nos. RG 17-872866,
FANTASY COOKIE CORPORATION, *et al.*,) RG 17-881931, and RG 17-881932
Defendants.) ASSIGNED FOR ALL PURPOSES TO:
The Hon. Ioana Petrou, Dept. 17
~~PROPOSED~~) CONSENT JUDGMENT
AS TO PURE'S FOOD SPECIALTIES,
LLC)

1. DEFINITIONS

- 1.1 The "Complaint" means the operative complaint in the above-captioned matter.
- 1.2 "Covered Products" means animal crackers.
- 1.3 "Effective Date" means the date on which notice of entry of this Consent Judgment by the Court is served upon Settling Defendant.

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2. INTRODUCTION

2.1 The Parties to this Consent Judgment are the Center for Environmental Health, a California non-profit corporation (“CEH”) and Pure’s Food Specialties, LLC (“Settling Defendant”). CEH and Settling Defendant (the “Parties”) enter into this Consent Judgment to settle certain claims asserted by CEH against Settling Defendant as set forth in the Complaint.

2.2 On or about June 2, 2017, CEH provided a 60-day Notice of Violation of Proposition 65 to the California Attorney General, the District Attorneys of every county in California, the City Attorneys of every California city with a population greater than 750,000, and to Settling Defendant, alleging that Settling Defendant violated Proposition 65 by exposing persons in California to acrylamide contained in Covered Products without first providing a clear and reasonable Proposition 65 warning (the “Notice”).

2.3 Settling Defendant is a corporation or other business entity that manufactures, distributes, sells, or offers for sale Covered Products that are sold in the State of California or has done so at times relevant to the Complaint.

2.4 On August 24, 2017, CEH filed the Complaint in the above-captioned matter, naming Settling Defendant as an original defendant.

2.5 For purposes of this Consent Judgment only, the Parties stipulate that this Court has jurisdiction over the allegations of violations contained in the Complaint and personal jurisdiction over Settling Defendant as to the acts alleged in the Complaint, that venue is proper in the County of Alameda, and that this Court has jurisdiction to enter and enforce this Consent Judgment as a full and final resolution of all claims which were or could have been raised in the Complaint based on the facts alleged therein and in the Notice with respect to Covered Products manufactured, distributed, and/or sold by Settling Defendant.

2.6 Nothing in this Consent Judgment is or shall be construed as an admission against interest by the Parties of any fact, conclusion of law, issue of law, or violation of law, nor shall compliance with the Consent Judgment constitute or be construed as an admission against interest by the Parties of any fact, conclusion of law, issue of law, or violation of law. Nothing in this

1 Consent Judgment shall prejudice, waive or impair any right, remedy, argument, or defense the
2 Parties may have in any other pending or future legal proceedings. This Consent Judgment is the
3 product of negotiation and compromise and is accepted by the Parties solely for purposes of
4 settling, compromising, and resolving issues disputed in this action.

5 **3. INJUNCTIVE RELIEF**

6 **3.1 Reformulation of Covered Products.** Commencing on the Effective Date, and
7 subject to the provisions of Section 4.2.2 herein, Settling Defendant shall not purchase,
8 manufacture, ship, sell, or offer for sale Covered Products that will be sold or offered for sale in
9 California that exceed the following acrylamide concentration limits (the “Reformulation
10 Levels”), such concentration to be determined by use of a test performed by an accredited
11 laboratory using either GC/MS (Gas Chromatograph/Mass Spectrometry), LC-MS/MS (Liquid
12 Chromatograph-Mass Spectrometry), or any other testing method agreed upon by the Parties:

13 **3.1.1** The average acrylamide concentration shall not exceed 75 parts per
14 billion (“ppb”) by weight (the “Average Level”). The Average Level is determined by randomly
15 selecting and testing at least 1 sample each from 5 different lots (a lot is a single production run
16 on a single production line) of Covered Products (or the maximum number of lots available for
17 testing if less than 5) during a testing period of at least 60 days.

18 **3.1.2** The acrylamide concentration of any individual unit of Covered Products
19 shall not exceed 100 ppb by weight (the “Unit Level”), based on a representative composite
20 sample taken from the individual unit (e.g. package, bag or box of Covered Products) being
21 tested.

22 **4. ENFORCEMENT**

23 **4.1 General Enforcement Provisions.** CEH may, by motion or application for an
24 order to show cause before this Court, enforce the terms and conditions contained in this Consent
25 Judgment. Any action to enforce alleged violations of Section 3.1 by Settling Defendant shall be
26 brought exclusively pursuant to this Section 4, and be subject to the meet and confer requirement
27 of Section 4.2.5 if applicable.

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4.2 Enforcement of Reformulation Commitment.

4.2.1 **Covered Product Identification.** Within 30 days after the Effective Date, Settling Defendant shall notify CEH of a means sufficient to allow CEH to identify Covered Products supplied or offered by Settling Defendant as of the Effective Date, for example, a unique brand name or characteristic system of product numbering or labeling. Information provided to CEH pursuant to this Section 4.2.1, including but not limited to the identities of parties to contracts between Settling Defendant and third parties, may be designated by Settling Defendant as competitively sensitive confidential business information, and if so designated shall not be disclosed to any person without the written permission of Settling Defendant. Any motions or pleadings or any other court filings that may reveal information designated as competitively sensitive confidential business information pursuant to this Section shall be submitted in accordance with California Rules of Court 2.550, et seq.

4.2.2 Notice of Violation. In the event that CEH purchases a Covered Product in California that was sold or offered for sale by Settling Defendant with a best-by or sell-by (or equivalent) date more than 9 months after the Effective Date, and for which CEH has laboratory test results showing that the Covered Product exceeds the Reformulation Level, CEH may issue a Notice of Violation pursuant to this Section.

4.2.3 Service of Notice of Violation and Supporting Documentation.

4.2.3.1 The Notice of Violation shall be sent to the person(s) identified in Section 8.2 to receive notices for Settling Defendant, and must be served within sixty (60) days of the later of the date the Covered Product at issue was purchased or otherwise acquired by CEH or the date that CEH can reasonably determine that the Covered Product at issue was manufactured, shipped, sold, or offered for sale by Settling Defendant, provided, however, that CEH may have up to an additional sixty (60) days to send the Notice of Violation if, notwithstanding CEH's good faith efforts, the test data required by Section 4.2.3.2 below cannot be obtained by CEH from its laboratory before expiration of the initial sixty (60) day period.

1 4.2.3.2 The Notice of Violation shall, at a minimum, set forth: (a) the date
2 the Covered Product was purchased; (b) the location at which the Covered Product was
3 purchased; (c) a description of the Covered Product giving rise to the alleged violation, including
4 the name and address of the retail entity from which the sample was obtained and pictures of the
5 product packaging from all sides, which identifies the product lot; and (d) all test data obtained
6 by CEH regarding the Covered Product and supporting documentation sufficient for validation of
7 the test results, including any laboratory reports, quality assurance reports, and quality control
8 reports associated with testing of the Covered Product.

9 4.2.4 Notice of Election of Response. No more than sixty (60) days after
10 effectuation of service of a Notice of Violation, Settling Defendant shall provide written notice to
11 CEH whether it elects to contest the allegations contained in a Notice of Violation (“Notice of
12 Election”). Failure to provide a Notice of Election within sixty (60) days of effectuation of
13 service of a Notice of Violation shall be deemed an election to contest the Notice of Violation.
14 Upon notice to CEH, Settling Defendant may have up to an additional sixty (60) days to elect if,
15 notwithstanding Settling Defendant’s good faith efforts, Settling Defendant is unable to verify the
16 test data provided by CEH before expiration of the initial sixty (60) day period.

17 4.2.4.1 If a Notice of Violation is contested, the Notice of Election shall
18 include all documents upon which Settling Defendant is relying to contest the alleged violation,
19 including all available test data. If Settling Defendant or CEH later acquires additional test or
20 other data regarding the alleged violation during the meet and confer period described in Section
21 4.2.5, it shall notify the other Party and promptly provide all such data or information to the Party
22 unless either the Notice of Violation or Notice of Election has been withdrawn.

23 4.2.5 Meet and Confer. If a Notice of Violation is contested, CEH and Settling
24 Defendant shall meet and confer to attempt to resolve their dispute. Within sixty (60) days of
25 serving a Notice of Election contesting a Notice of Violation, Settling Defendant may withdraw
26 the original Notice of Election contesting the violation and serve a new Notice of Election to not
27 contest the violation, provided, however, that, in this circumstance, Settling Defendant shall pay
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1 \$2,500 in addition to any other payment required under this Consent Judgment. At any time,
2 CEH may withdraw a Notice of Violation, in which case for purposes of this Section 4.2 the
3 result shall be as if CEH never issued any such Notice of Violation. If no informal resolution of a
4 Notice of Violation results within sixty (60) days of a Notice of Election to contest, CEH may file
5 an enforcement motion or application pursuant to Section 4.1. In any such proceeding, CEH may
6 seek whatever fines, costs, penalties, attorneys' fees, or other remedies are provided by law for an
7 alleged failure to comply with the Consent Judgment, and Settling Defendant shall reserve all of
8 its rights to contest, dispute and defend the Notice of Violation, including all allegations therein,
9 in the enforcement motion or application proceeding.

10 4.2.6 Non-Contested Notices. If Settling Defendant elects to not contest the
11 allegations in a Notice of Violation, it shall undertake corrective action(s) and make payments, if
12 any, as set forth below.

13 4.2.6.1 Settling Defendant shall include in its Notice of Election a detailed
14 description with supporting documentation of the corrective action(s) that it has undertaken or
15 proposes to undertake to address the alleged violation. Any such correction shall, at a minimum,
16 provide reasonable assurance that all Covered Products having the same lot number as that of the
17 Covered Product identified in CEH's Notice of Violation (the "Noticed Covered Products") will
18 not be thereafter sold in California or offered for sale to California customers by Settling
19 Defendant, and that Settling Defendant has sent instructions to any retailers or customers that
20 offer the Noticed Covered Products for sale to cease offering the Noticed Covered Products for
21 sale to California consumers and to return all such Noticed Covered Products to Settling
22 Defendant. Settling Defendant shall keep for a period of one year after the Notice of Violation
23 and make available to CEH upon reasonable notice during the one year period for inspection and
24 copying records of any correspondence regarding the foregoing. If there is a dispute over the
25 corrective action, Settling Defendant and CEH shall meet and confer before seeking any remedy
26 in court. In no case shall CEH issue more than one Notice of Violation per manufacturing lot of a
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1 type of Covered Product, nor shall CEH issue more than two Notices of Violation in the first
2 twelve (12) months following the Effective Date.

3 4.2.6.2 If the Notice of Violation is the first, second, third, or fourth Notice
4 of Violation received by Settling Defendant under Section 4.2.2 that was not successfully
5 contested or withdrawn, then Settling Defendant shall pay \$15,000 for each Notice of Violation.
6 If Settling Defendant has received more than four (4) Notices of Violation under Section 4.2.1
7 that were not successfully contested or withdrawn, then Settling Defendant shall pay \$25,000 for
8 each Notice of Violation. If Settling Defendant produces with its Notice of Election test data for
9 the Covered Product that: (i) was conducted prior to the date CEH gave Notice of Violation;
10 (ii) was conducted on the same type of Covered Product; and (iii) demonstrates acrylamide levels
11 below the Unit Level, then any payment under this Section shall be reduced by 100 percent
12 (100%) for the first Notice of Violation, by seventy-five percent (75%) for the second Notice of
13 Violation, and by fifty percent (50%) for any subsequent Notice of Violation. In no case shall
14 Settling Defendant be obligated to pay more than \$100,000 for all Notices of Violation not
15 successfully contested or withdrawn in any calendar year irrespective of the total number of
16 Notices of Violation issued.

17 4.2.7 Payments. Any payments under Section 4.2 shall be made by check
18 payable to the “Lexington Law Group” and shall be paid within thirty (30) days of service of a
19 Notice of Election triggering a payment and shall be used as reimbursement for costs for
20 investigating, preparing, sending, and prosecuting Notices of Violation, and to reimburse
21 attorneys’ fees and costs incurred in connection with these activities.

22 4.3 **Repeat Violations**. If Settling Defendant has received four (4) or more Notices of
23 Violation concerning the same type of Covered Product that were not successfully contested or
24 withdrawn in any one (1) year period then, at CEH’s option, CEH may seek whatever fines, costs,
25 penalties, attorneys’ fees, or other remedies that are provided by law for failure to comply with
26 the Consent Judgment. Prior to seeking such relief, CEH shall meet and confer with Settling
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1 Defendant for at least sixty (60) days to determine if Settling Defendant and CEH can agree on
2 measures that Settling Defendant can undertake to prevent future alleged violations.

3 **5. PAYMENTS**

4 5.1 **Payments by Settling Defendant.** Settling Defendant shall pay the total sum of
5 \$30,000 as a settlement payment as further set forth in this Section according to the following
6 schedule: (a) on or before December 1, 2018: \$10,000; (b) on or before March 1, 2019: \$10,000;
7 and (c) on or before June 1, 2019: \$10,000.

8 5.2 **Allocation of Payments.** The total settlement amount shall be paid in the
9 amounts specified below and delivered as set forth below. Any failure by Settling Defendant to
10 comply with the payment terms herein shall be subject to a stipulated late fee to be paid by
11 Settling Defendant to CEH in the amount of \$100 for each day the full payment is not received
12 after the payment due date set forth in Section 5.1. The late fees required under this Section shall
13 be recoverable, together with reasonable attorneys' fees, in an enforcement proceeding brought
14 pursuant to Section 4 of this Consent Judgment. The funds paid by Settling Defendant shall be
15 allocated as set forth below between the following categories and made payable as follows:

16 5.2.1 \$3,830 as a civil penalty pursuant to Health & Safety Code § 25249.7(b).
17 The civil penalty payment shall be apportioned in accordance with Health & Safety Code §
18 25249.12 (25% to CEH and 75% to the State of California's Office of Environmental Health
19 Hazard Assessment ("OEHHA")). Accordingly, the OEHHA portion of the civil penalty
20 payment for \$2,872.50 shall be made payable to OEHHA and associated with taxpayer
21 identification number 68-0284486. This total amount shall be made in three payments of \$957.50
22 each payable on or before December 1, 2018, on or before March 1, 2019, and on or before June
23 1, 2019, and delivered as follows:

24 For United States Postal Service Delivery:

25 Attn: Mike Gyurics
26 Fiscal Operations Branch Chief
27 Office of Environmental Health Hazard Assessment
28 P.O. Box 4010, MS #19B
Sacramento, CA 95812-4010

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For Non-United States Postal Service Delivery:

Attn: Mike Gyurics
Fiscal Operations Branch Chief
Office of Environmental Health Hazard Assessment
1001 I Street, MS #19B
Sacramento, CA 95814

The CEH portion of the civil penalty payment for \$957.50 shall be made payable to the Center for Environmental Health and associated with taxpayer identification number 94-3251981. This total amount shall be made in two payments of \$320 each payable on or before December 1, 2018 and on or before March 1, 2019, and one final payment of \$317.50 on or before June 1, 2019, each of which payments shall be delivered to Lexington Law Group, 503 Divisadero Street, San Francisco, CA 94117.

5.2.2 \$2,870 as an Additional Settlement Payment (“ASP”) to CEH pursuant to Health & Safety Code § 25249.7(b), and California Code of Regulations, Title 11, § 3204. CEH intends to restrict use of the ASPs received from this Consent Judgment to the following purposes: the funds will be placed in CEH’s Toxics in Food Fund and used to support CEH programs and activities that seek to educate the public about acrylamide and other toxic chemicals in food, to work with the food industry and agriculture interests to reduce exposure to acrylamide and other toxic chemicals in food, and to thereby reduce the public health impacts and risks of exposure to acrylamide and other toxic chemicals in food sold in California. CEH shall obtain and maintain adequate records to document that ASPs are spent on these activities and CEH agrees to provide such documentation to the Attorney General within thirty (30) days of any request from the Attorney General. The payment pursuant to this Section shall be made payable to the Center for Environmental Health and associated with taxpayer identification number 94-3251981. The total amount under this section shall be made in two payments of \$960 each payable on or before December 1, 2018 and on or before March 1, 2019, and one final payment of \$950 on or before June 1, 2019, each of which payments shall be delivered to Lexington Law Group, 503 Divisadero Street, San Francisco, CA 94117.

1 5.2.3 \$23,300 as a reimbursement of a portion of CEH’s reasonable attorneys’
2 fees and costs. The attorneys’ fees and cost reimbursement shall be allocated as follows: (a)
3 \$19,865 payable to the Lexington Law Group and associated with taxpayer identification number
4 94-3317175; and (b) \$3,435 payable to the Center for Environmental Health and associated with
5 taxpayer identification number 94-3251981. The total amounts due under this section shall be
6 made in six payments delivered to Lexington Law Group, 503 Divisadero Street, San Francisco,
7 CA 94117 as follows: (a) \$6,617.50 payable to the Lexington Law Group on or before December
8 1, 2018; (b) \$1,145 payable to the Center For Environmental Health on or before December 1,
9 2018; (c) \$6,617.50 payable to the Lexington Law Group on or before March 1, 2019; (d) \$1,145
10 payable to the Center For Environmental Health on or before March 1, 2019; (e) \$6,630 payable
11 to the Lexington Law Group on or before June 1, 2019; (f) \$1,145 payable to the Center For
12 Environmental Health on or before June 1, 2019.

13 **6. MODIFICATION AND DISPUTE RESOLUTION**

14 6.1 **Modification.** This Consent Judgment may be modified from time to time by
15 express written agreement of the Parties, with the approval of the Court, or by an order of this
16 Court upon motion and in accordance with law.

17 6.2 **Notice; Meet and Confer.** Any Party seeking to modify this Consent Judgment
18 shall attempt in good faith to meet and confer with the other Party prior to filing a motion to
19 modify the Consent Judgment.

20 **7. CLAIMS COVERED AND RELEASE**

21 7.1 Provided that Settling Defendant complies in full with its obligations under
22 Section 5 hereof, this Consent Judgment is a full, final and binding resolution between CEH on
23 behalf of itself and the public interest and Settling Defendant and its parents, subsidiaries,
24 affiliated entities that are under common ownership, directors, officers, employees, agents,
25 shareholders, successors, assigns, and attorneys (“Defendant Releasees”), and all entities to
26 which Settling Defendant directly or indirectly distribute or sell Covered Products, including but
27 not limited to distributors, wholesalers, customers, retailers, franchisees, licensors, and licensees,

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Renee D. Wasserman
Alecia E. Cotton
Rogers Joseph O'Donnell
311 California Street
San Francisco, CA 94104
rwasserman@rjo.com
acotton@rjo.com

Any Party may modify the person and/or address to whom the notice is to be sent by sending the other Party notice by first class and electronic mail.

9. COURT APPROVAL

9.1 This Consent Judgment shall become effective upon the date signed by CEH and Settling Defendant, whichever is later, and approval by the Court, provided however, that CEH shall prepare and file a Motion for Approval of this Consent Judgment and Settling Defendant shall support entry of this Consent Judgment by the Court.

9.2 If this Consent Judgment is not entered by the Court, it shall be of no force or effect and shall not be introduced into evidence or otherwise used in any proceeding for any purpose other than to allow the Court to determine if there was a material breach of Section

9.3 If this Consent Judgment is approved by the Court, CEH shall dismiss Walgreen Co. from this action without prejudice and shall dismiss Oriental Trading Company, Inc. and its wholly owned subsidiary OTC Direct, Inc. without prejudice from the Related CEH Proposition 65 Acrylamide Case, *CEH v Biscomerica Corp. et al.*, Case No, RG 17-881931, within fifteen (15) days of the Effective Date, and Walgreen Co. shall waive all costs in this action and Oriental Trading Company, Inc. and its wholly owned subsidiary OTC Direct, Inc. shall waive all costs in the Related CEH Proposition 65 Acrylamide Case, *CEH v Biscomerica Corp. et al.*, Case No, RG 17-881931.

10. GOVERNING LAW AND CONSTRUCTION

10.1 The terms of this Consent Judgment shall be governed by the laws of the State of California.

11. ATTORNEYS' FEES

11.1 A Party who unsuccessfully brings or contests an action, motion, or application

1 arising out of this Consent Judgment shall be required to pay the prevailing Party's reasonable
2 attorneys' fees and costs.

3 11.2 Nothing in this Section 11 shall preclude a party from seeking an award of
4 sanctions pursuant to law.

5 **12. ENTIRE AGREEMENT**

6 12.1 This Consent Judgment contains the sole and entire agreement and understanding
7 of the Parties with respect to the entire subject matter hereof, and any and all prior discussions,
8 negotiations, commitments, or understandings related thereto, if any, are hereby merged herein
9 and therein. There are no warranties, representations, or other agreements between the Parties
10 except as expressly set forth herein. No representations, oral or otherwise, express or implied,
11 other than those specifically referred to in this Consent Judgment have been made by any Party
12 hereto. No other agreements not specifically contained or referenced herein, oral or otherwise,
13 shall be deemed to exist or to bind any of the Parties hereto. Any agreements specifically
14 contained or referenced herein, oral or otherwise, shall be deemed to exist or to bind any of the
15 Parties hereto only to the extent that they are expressly incorporated herein. No supplementation,
16 modification, waiver, or termination of this Consent Judgment shall be binding unless executed in
17 writing by the Party to be bound thereby. No waiver of any of the provisions of this Consent
18 Judgment shall be deemed or shall constitute a waiver of any of the other provisions hereof
19 whether or not similar, nor shall such waiver constitute a continuing waiver.

20 **13. RETENTION OF JURISDICTION**

21 13.1 This Court shall retain jurisdiction of this matter to implement or modify the
22 Consent Judgment.

23 **14. AUTHORITY TO STIPULATE TO CONSENT JUDGMENT**

24 14.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized
25 by the Party he or she represents to stipulate to this Consent Judgment and to enter into and
26 execute the Consent Judgment on behalf of the Party represented and legally to bind that Party.

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1 **15. NO EFFECT ON OTHER SETTLEMENTS**

2 15.1 Nothing in this Consent Judgment shall preclude CEH from resolving any claim
3 against an entity other than Settling Defendant on terms that are different than those contained in
4 this Consent Judgment. Settling Defendant may move to modify this Consent Judgment
5 pursuant to Section 6 to substitute a higher Reformulation Level that CEH agrees to in a future
6 consent judgment applicable to products identical to the Covered Products, and CEH agrees not
7 to oppose any such motion except for good cause shown

8 **16. EXECUTION IN COUNTERPARTS**

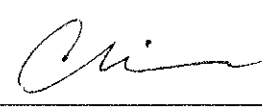
9 16.1 The stipulations to this Consent Judgment may be executed in counterparts and by
10 means of facsimile or portable document format (pdf), which taken together shall be deemed to
11 constitute one document.

12 **IT IS SO ORDERED, ADJUDGED,**
13 **AND DECREED**

14 Dated: 8/29/18

IOANA PETROU
Judge of the Superior Court

17 **IT IS SO STIPULATED:**

| | |
|---------------------------------------|--|
| <p>19 Dated: <u>25 JUNE, 2018</u></p> | <p>CENTER FOR ENVIRONMENTAL HEALTH</p> <p><u></u></p> <p>Signature</p> <p><u>CHARLIE PETROU</u></p> <p>Printed Name</p> <p><u>ASSOCIATE DIRECTOR</u></p> <p>Title</p> |
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Dated: *June 18*, 2018

PURE'S FOOD SPECIALTIES, LLC


Signature

JONATHAN PURE
Printed Name

MANAGING PARTNER
Title