

DISTRICT COURT, CITY AND COUNTY OF
DENVER, STATE OF COLORADO
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Plaintiff:

Bounce Enterprises LLC, a Delaware limited liability company;

v.

Defendants:

The KONG Company, LLC, a Colorado limited liability company; Kong Real Estate Holdings, LLC, a Colorado limited liability company; Orixas, LLC, a Colorado limited liability company; John J. Nelson, an individual; Kathy Decker Frueh, an individual.

AND

Plaintiffs:

The KONG Company, LLC, a Colorado limited liability company; Orixas, LLC, a Colorado limited liability company; and Kathy Decker Frueh, an individual;

v.

Defendants:

Bounce Enterprises, LLC, a Delaware limited liability company; Bounce, Inc., a Colorado corporation; Joseph Markham, an individual, and Central Garden & Pet Company, a Delaware corporation.

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Case No. 2022CV032193 and
consolidated 2022CV032209

Div. 259

BOUNCE ENTERPRISES LLC'S SECOND AMENDED COMPLAINT

COMES NOW, Plaintiff, Bounce Enterprises LLC, a Delaware limited liability company, as the successor by conversion to Bounce Incorporated, a Colorado corporation (“Bounce”), through its counsel, and for its First Amended Complaint against The KONG Company, LLC, a Colorado limited liability company (“KONG”); Kong Real Estate Holdings, LLC, a Colorado limited liability company (“KREH”); Orixas, LLC, a Colorado limited liability company (“Orixas”); John J. Nelson, an individual (“Nelson”); and Kathy Decker Frueh, an individual (“Decker” and collectively with KONG, KREH, Orixas, and Nelson, “Defendants”), state as follows:

Introduction

The Defendants continue to try to prevent the individual inventor and entrepreneur behind the popular “Kong” dog toy from managing the company he founded decades ago. This lawsuit seeks to remedy their wrongdoing and provide clarity to the parties to hopefully avoid future disputes and injury. .

Joseph Markham (“Markham”) is the founder of KONG and the inventor of its popular, rubber dog toy, the “Kong.” Markham and John Nelson (“Nelson”) have long equally shared

ultimate authority over KONG through entities they control. Nelson admits this. Markham's entity is called Bounce Enterprises LLC ("Bounce") and Nelson's entity is called Orixas, LLC ("Orixas"). Markham and Nelson, through Bounce and Orixas, also share equal control over KREH, an entity to which they agreed, through their entities, to transfer much of KONG's real estate.

Decker is not a voting member of KONG. Instead, Markham and Nelson, through their entities, continue to share 50/50 voting control over KONG. Decker has never had any interest in KREH, voting or otherwise.

Decker is a KONG employee to whom, over time, the Members of KONG have agreed to grant, as compensation per her employment agreement, a 25% interest in the annual profits of KONG. Decker admits this. Markham agreed to this grant with the understanding that KONG would carry out a plan reached in 2019 to increase its distributions to Bounce and Orixas, allowing Bounce to benefit KONG by developing a safe rubber ball for dogs, products for the underserved equine and zoo populations, and a better and more consistent rubber supply for KONG.

It has become clear that Nelson and Decker have been managing KONG without regard to Markham's right, through his company, of 50% voting control over KONG and intend to continue to do so. Nelson has inconsistently directed KONG to enter into transactions without obtaining Markham's approval, in violation of KONG's governance documents. Bounce was forced to file this action to address certain of these actions. However, as new and additional KONG business issues continue to arise, Nelson, Decker and KONG have made clear by their words and actions that they do not intend to honor Bounce's consent and veto rights as to such future KONG actions, even as to matters where the KONG operating agreement gives Bounce express rights of approval. Bounce expects that such issues will inevitably continue to arise in the future. To protect its rights as to such future actions and to give the parties guidance so that future disputes can be avoided, Bounce seeks a declaration of its contract rights as described below more fully.

KONG also continues to fail to provide Bounce with updated financial information and continues to fail to include Bounce and/or Markham in the KONG decision-making process even as to matters that require Bounce's and/or Markham's prior consent/approval. Bounce has therefore been deprived of its rights as a member of KONG and requires determinations from the Court to affirm those rights as set forth in KONG's governing documents.

Additionally, despite the clear terms of her employment agreement with KONG, Decker takes the position that instead of the generous profits interest granted to her by Bounce, she is actually a 25% voting member of KONG with voting and other rights inherent to membership in KONG. Despite the clear governing documents of KREH affirming that the members of KREH are Orixas and Bounce, 50/50, as agreed by and between Orixas and Bounce, Decker further claims an unspecified and unsubstantiated financial interest in KREH. These are disputed matters that require determinations and declarations from this Court.

Supporting further the active controversies, KONG, through its counsel (retained without Markham's or Bounce's consent), recently in this case filed a counterclaim for declaratory judgment and for an accounting asking this Court to "establish the amounts owed to each Member and [enter] a judgment declaring the current amounts each member is entitled to, whether in the form of related equity, loan balance or through cash distribution." (KONG's March 29, 2024 Counterclaim, ¶ 25). By its own admission, KONG is unable to function in its ongoing management and in keeping its books and records and has sought court intervention to perform this function on its behalf. At the same time, KONG continues to act in concert with Nelson, Orixas, and Decker, signing pleadings in tandem with these parties and entering into joint defense arrangements with Nelson, Orixas, and Decker while excluding Bounce and Markham from KONG's functions, decision-making, and actions.

Bounce faces immediate and irreparable harm because Nelson, Orixas, Decker, KONG, and KREH continue to take actions in violation of the operative governing documents which give Bounce, through Markham, a 50% vote in the management and conduct of KONG and KREH. Bounce seeks declaratory and other relief to address the active and ongoing controversies between the parties to rectify and remedy the ongoing breaches of the governing agreements and to enforce Bounce's rights to share equally in control of KONG's and KREH's business.

Parties, Jurisdiction, and Venue

1. Plaintiff Bounce is a Delaware limited liability company with its principal place of business located at 16191 Table Mountain Pkwy, Golden, CO 80403. Bounce is a continuation under Delaware and Colorado law of Bounce Incorporated as a result of a conversion transaction completed on July 19, 2022.
2. Markham, as Bounce's Manager, has authorized Bounce to file this action and assert the claims asserted herein on behalf of Bounce.
3. Defendant KONG is a Colorado limited liability company with its principal place of business located at 16191-D Table Mountain Pkwy, Golden, CO 80403.
4. Defendant KREH is a Colorado limited liability company with its principal place of business located at 16191-D Table Mountain Pkwy, Golden, CO 80403.
5. Defendant Orixas is a Colorado limited liability company with its principal place of business located at 2990 E. 17th Avenue, Apartment 2201, Denver, Colorado 80206.
6. Defendant Nelson is an individual who resides in the City and County of Denver, Colorado.
7. Defendant Decker is an individual who resides in Jefferson County, Colorado.

8. Jurisdiction is proper in the State of Colorado under C.R.S. § 13-1-124(1) in that Defendants have entered into contracts and contracted business within the State of Colorado.

9. Venue is proper in the City and County of Denver, Colorado because the operating agreement of KONG states that “Any suit involving any dispute or matter arising under this Agreement may only be brought in the United States District Court for the District of Colorado or any Colorado State Court having jurisdiction over the subject matter of the dispute or matter.” Further, the operating agreement of KREH states that “Each Member irrevocably submits to the jurisdiction of any Colorado court or Federal court sitting in Denver, Colorado in any action arising out of this Agreement[.]”

General Allegations

Markham founded the business that became KONG.

10. In 1970, Markham was working as a mechanic when his German Shepherd, Fritz — a destructive chewer — took a liking to a rubber axle bump stop from a Volkswagen bus. Markham realized that the shape and composition of the part made it an ideal dog toy, particularly for determined chewers like Fritz.

11. Markham spent the next several years experimenting with different compounds and designs to develop a safe chew toy modeled after the Volkswagen part. In 1976, Markham began selling his creation, the “Kong,” at trade shows and small retail stores. KONG has since become a revolutionary purveyor of dog toys and other pet products.

12. In 1997, as KONG continued to grow, Markham hired Decker as a customer service assistant.

Markham and Nelson share 50/50 voting rights concerning KONG, which is required to make certain monthly cash and annual tax distributions to Bounce and Orixas.

13. KONG, in its current form, was organized in 2000, when Markham and Nelson contributed certain assets to KONG in exchange for membership interests. On or about October 5, 2000, the members of KONG executed that certain Limited Liability Company Operating Agreement of The KONG Company, LLC (the “KONG Operating Agreement”).

14. The KONG Operating Agreement established that KONG would be a manager-managed Colorado limited liability company with two Members: Bounce and the Nelson-Gessner Family 1990 Irrevocable Trust, dated May 10, 1990 (the “Nelson Trust”). Initially, Bounce owned 60% of the equity and Nelson Trust owned 40% of the equity of KONG.

15. Under the KONG Operating Agreement, Bounce and the Nelson Trust (later, Orixas) are entitled to appoint a Manager; each Manager is entitled to one vote; and the two Managers are referred to collectively as “General Manager.” At all relevant times, Markham and Nelson have been the Managers, appointed by Bounce and Orixas respectively. Any authority

granted to the General Manager and any action taken by the General Manager must be approved by both Markham and Nelson. Neither Markham nor Nelson is authorized to take unilateral action as the “General Manager.”

16. The Managers, who are appointed by the Members and who together act as the General Manager of KONG, are at all times the agents of the Members who appointed them.

17. As the agent of their appointing Member, the actions of a Manager is imputed to the appointing Member as the principal.

18. Although KONG is a manager-managed LLC, managed by the “General Manager” as defined in the KONG Operating Agreement, the KONG Operating Agreement delineates certain “Extraordinary Transactions” that require the unanimous consent and pre-approval of the Members of KONG, Bounce and Orixas.

19. Nelson admits that Orixas and/or Nelson lack the authority to make decisions for KONG that are deemed “Extraordinary Transactions” under the KONG Operating Agreement without Bounce’s consent.

20. On March 13, 2002, the two Members of KONG executed a certain First Amendment to the KONG Operating Agreement (the “First Amendment”) amending, among other things, Section 4.1.1 of the KONG Operating Agreement to provide that profits or losses, other than those derived from certain capital transactions, would “be distributed to Interest Holders in equal proportions.” Thus, the First Amendment obligated KONG to distribute profits from ordinary business activities equally to its two members.

21. On December 5, 2002, the Members of KONG executed a certain Second Amendment to the KONG Operating Agreement (the “Second Amendment”) amending and restating, among other things, Sections 4.1.1 and 4.2 of the KONG Operating Agreement. The Second Amendment made further changes, such that residual distributions from both ordinary business activities and also capital transactions were to be split equally.

22. On April 27, 2005, the managers of KONG, Markham and Nelson, executed Minutes of Actions of the Managers and Members By Written Consent in Lieu of a Special Meeting (“2005 KONG Written Consent”).

23. Under the 2005 KONG Written Consent, the Managers of KONG, Markham and Nelson, were required to unanimously approve “(i) any distribution of the Company’s Cash Flow, (ii) any compensation or bonus determinations, (iii) any Capital Transaction, (iv) making or committing the Company to any expenditures in excess of \$50,000, (v) entering into any transaction or entering into, modifying or amending any agreement with a Manager, Member or Affiliate of a Manager or Member,” or (vi) naming any person to a committee established to, among other things, make decisions regarding the development of new products.

24. Nelson admits that he lacks the authority to make decisions for KONG in the areas outlined in the 2005 KONG Written Consent that require unanimous member approval.

25. Nelson testified at the preliminary injunction hearing held in this case that there “are items that require the unanimous approval of each of the Company’s managers” and that even “if [Nelson] wanted to do any of th[o]se things and Mr. Markham didn’t consent, [Nelson] couldn’t do it.”

26. Nelson agreed that he “cannot make any distributions of [KONG]’s cash flow without Mr. Markham’s consent.”

27. Nelson agreed that he “cannot have KONG engage in any capital transaction . . . without Mr. Markham’s approval.”

28. In 2017 the parties entered into what Nelson agreed was a “reaffirmation of the 2005 Written Consent provisions.”

29. The 2005 KONG Written Consent created additional requirements for KONG to distribute to Bounce and the Nelson Trust cash, on the 15th day of each month, from their respective capital accounts (the “Monthly Capital Distributions”). The document also required annual distributions of cash to the KONG Members to cover the Member’s tax liabilities. The 2005 KONG Written Consent states the Managers shall not take any action that would jeopardize KONG’s ability to make these distributions. Further, the parties agreed in the 2005 KONG Written Consent that, in the unforeseen event that KONG could not make such distributions, the Company would borrow money to pay the amounts.

30. The 2005 KONG Written Consent also provided for Decker’s appointment as President of KONG and established a division of responsibilities between Markham and Nelson in their capacity as Managers. Under the 2005 KONG Written Consent, Nelson would serve as “Operating Manager” in charge of the day-to-day management decisions, and Markham would serve as the “Technical and Product Manager” with authority over public relations and KONG’s intellectual property rights including enforcement and legal decisions related thereto. This consent did not affect the exercise of management responsibilities outside of the specific areas described therein. For example, major decisions, which were not day-to-day matters and did not relate to public relations or intellectual property rights, continued to be within the purview of the General Manager — requiring approval from both Nelson and Markham.

31. However, under the 2005 KONG Written Consent, if there were to be “any failure” to make the Monthly Capital Distributions to Bounce and Orixas from their capital accounts, such failure would terminate the delineation of management responsibilities described in the 2005 KONG Written Consent.

32. On May 14, 2012, the Members of KONG executed a certain Fourth Amendment to the KONG Operating Agreement (the “Fourth Amendment”), which, among other things, amended the requirement under the 2005 KONG Written Consent that Markham and Nelson

unanimously approve the making or committing KONG to expenditures in excess of \$50,000 by increasing the threshold amount to \$250,000. The parties did not alter, however, the framework for the allocation of management authority over KONG set forth in the KONG Operating Agreement and the 2005 KONG Written Consent. For example, it left unaltered the requirement in the 2005 KONG Written Consent for unanimous approval of distributions of KONG's cash flow; any Capital Transaction, compensation, or bonus determinations; or entering into any transaction or entering into, modifying, or amending any agreement with a Manager, Member or Affiliate of a Manager or Member.

In 2008, the Members of KONG agreed to tie Decker's compensation to KONG's profits.

33. In September 2008, KONG and Decker entered into an Executive Employment Agreement ("Decker 2008 Employment Agreement"), which stated that Decker would receive compensation consisting of an annual salary and a bonus, paid at the end of each year, such that Decker's total compensation (via salary and bonus throughout a given year) would be equal to 10% of KONG's net profit. The Decker 2008 Employment Agreement was amended on May 14, 2012 (the "Decker 2012 Employment Addendum") to provide that Decker would be entitled, under certain circumstances, to a share of the profits from a sale of KONG.

By 2018, Markham had expressed concerns about KONG's reliance on third parties for its rubber supply and the development of a safer ball.

34. By 2018, Markham had expressed his desire for KONG to develop a rubber dog ball design that would address certain safety concerns. Nelson and Markham disagreed about whether KONG should do so. Markham had also expressed concerns about KONG's reliance on third-party rubber suppliers. In July 2018, the Members of KONG memorialized at a meeting Markham's plan to devote his and Bounce's time to research and development, including the development of a different ball, referred to at the time as the "Pro Ball," and other specialty products for horses, zoos, and aquariums.

35. Around this time, KONG, apparently without consent from Markham as Manager of KONG, but on information and belief with approval of Nelson, approved loans by Decker to KONG in excess of \$1.25 million in June and September 2018. Such action disregarded provisions in the KONG Operating Agreement and the 2005 KONG Written Consent granting Markham rights, as Manager of KONG appointed by Bounce, to approve transactions of this type.

36. As of September 21, 2018, the Members of KONG approved the transfer of the membership interest in KONG controlled by Nelson to Orixas because the Nelson Trust had ceased to exist.

At the end of 2018, KONG transferred certain of its real property to KREH, owned 50/50 by Bounce and Orixas; Decker never had and does not have any ownership in KREH.

37. On December 18, 2018, Markham and Nelson agreed to form Kong Real Estate Holdings, LLC (“KREH”) to own and hold certain real property that had been acquired by KONG. KREH is a member-managed limited liability company, and its two members, Bounce and Orixas, each own a 50% membership interest in KREH.

38. That month, Bounce and Orixas, as Members of KONG, approved the transfer of three KONG properties to KREH. One of the properties transferred to KREH was an industrial property located in Long Beach, California (“the Long Beach Property”); the other two properties were located in Colorado and Ohio.

39. Decker has no rights in KREH or to any of its property.

40. On February 1, 2019, Bounce and Orixas executed the KREH Amended and Restated Operating Agreement (the “KREH” Operating Agreement”).

41. The members of KREH are Bounce and Orixas, each owning 50% of the membership interests in KREH.

42. Decker is not a member of KREH.

In mid-2019, the Members of KONG made a series of agreements whereby Decker received a profits interest in KONG and Bounce would begin receiving significantly increased distributions.

43. By 2019, the Monthly Capital Distributions to Bounce and Orixas had been increased to \$85,000 by agreement of the Members. By this time, Markham and Bounce had begun operations developing proprietary rubber compounds and developing and marketing specialty products, including the Pro Ball and other equine and zoo products, through a new company formed by Markham, KSP USA, LLC (“KSP”). Markham and Nelson were in discussions concerning KONG’s distributions to Bounce and Orixas. Markham desired increased distributions, and Nelson continued to pressure Markham to increase Decker’s profits interest. Markham agreed to do so because he believed that increased distributions from KONG would assist Bounce and KSP to develop better rubber and products that could benefit KONG and the world’s population of zoo animals.

44. On June 26, 2019, KONG, Bounce, Orixas, and Decker executed a contract (the “Decker 2019 Amendment”), which was made effective January 1, 2019. The Decker 2019 Amendment, among other things, increased Decker’s compensation. The Decker 2019 Amendment created a profits interest equal to 20% of the KONG “Taxable Net Profit” subject to certain limitations. Decker’s profits interest, however, did not entitle her to a voting membership interest in KONG. Rather, the Decker 2019 Amendment states that Decker “has no voting rights with respect to [her] Profits Interest, and therefore any requirement for member vote, approval or consent shall not include [Decker] in any such vote, approval or consent” (except that Decker had the right to approve amendments to the KONG Operating Agreement if such amendment were to adversely affect her interest).

45. Under an Action by Written Consent of the Members of KONG signed June 26, 2019 and made effective July 1, 2019 (the “July 1, 2019 KONG Action by Written Consent”), various interests in the profits of KONG were amended to be as follows: 50% to Nelson/Orixas, 30% Markham/Bounce, and 20% to Decker.

46. Shortly thereafter, on July 17, 2019, a series of agreements were executed between KONG, KVP International, Inc. (an entity owned by Orixas/Nelson, Decker, and Markham engaged in the distribution of veterinary and other animal products), and Bounce. Those agreements (collectively, the “Triangle Agreements”) included a KONG/KVP Licensing Agreement, a KONG/KVP Option Agreement, a KONG/Bounce Manufacturing Agreement, and a KONG/Bounce Distribution Agreement. Pursuant to these agreements and in reliance thereon, Bounce, through KSP, began manufacturing and distributing certain products utilizing the KONG logo.

47. In August 2019, Markham and Nelson reached consensus on the proposed distribution plan, which involved distributions to Bounce and Orixas of \$6 million, after tax, each from August 2019 through September 2020, and \$18 million over the next four years in increments of \$4.5 million per year, after tax, through September 2024 (the “2019 Distribution Plan”). Although the proposed 2019 Distribution Plan, as originally proposed by Markham, was not binding on KONG, on August 26, 2019, Nelson wrote a detailed letter outlining “how [he] propose[d] meeting Joe’s Start Up Funds proposal” so that KONG could execute the 2019 Distribution Plan, stating he was “quite confident” that the commitments could be met if KONG maintained its annual \$17 million in net profit. Nelson’s write up of the 2019 Distribution Plan confirmed that the \$85,000 in Monthly Capital Distributions to Bounce and Orixas under the 2005 KONG Written Consent would be replaced by the distributions under the 2019 Distribution Plan. In response, Markham said to Nelson, “from the day[] you told me you would make it work, I have never questioned you would.”

48. In return for and in reliance on the carrying out of the 2019 Distribution Plan, Markham agreed to extend KONG’s sunset date by 10 years, from 2025 to 2035.

49. KONG began carrying out the 2019 Distribution Plan, making a total \$6 million distribution to each of Bounce and Orixas (at slightly different times) around the end of 2019.

50. From the fall of 2020 to the fall of 2021, KONG distributed \$9 million in equity to Bounce that was immediately converted into debt (and thus not paid in cash). During that period, KONG also paid an additional \$4.5 million to Bounce in repayment of the KONG’s debt to Bounce.

51. Orixas and/or Nelson received distributions equal to those made to Bounce under the 2019 Distribution Plan and elected to lend that money back to KONG, thereby increasing the debt that KONG owed to Nelson/Orixas.

52. KONG’s Vice President of Finance, Matt Sterk, reconfirmed in writing the terms of the 2019 Distribution Plan, stating that Bounce had received distributions “per the funding

agreement the parties agreed to in 2019.” Sterk further confirmed that distributions for September 2020 through August 2021 were prepaid by KONG starting in May 2020 with the balance from that time period being paid off in April 2021. On information and belief, Sterk was referencing the \$4.5 million paid to Bounce in repayment of KONG’s debt to Bounce. Bounce did not know at that time that KONG would not make any additional payments pursuant to the 2019 Distribution Plan.

53. Markham and Bounce relied on Nelson’s representations concerning carrying out of the 2019 Distribution Plan by purchasing real estate for Bounce and/or KSP, hiring and maintaining employees, and beginning manufacturing operations.

54. Markham also relied on the carrying out of the 2019 Distribution Plan in approving, at Nelson’s urging, a further increase to Decker’s profits interest in KONG, at Bounce’s expense. On August 24, 2021, KONG, Bounce, Orixas, and Decker executed another amendment to Decker’s employment agreement (the “Decker 2021 Amendment”), which was made effective July 1, 2021, and increased Decker’s compensation and bonus to equal 25% of the KONG “Taxable Net Profit.” The Decker 2021 Amendment did not change Decker’s status as a non-voting member of KONG. The voting Members of KONG, Bounce, and Orixas memorialized their consent to Decker’s profits interest via a written Action by Written Consent of the Members of KONG signed August 24, 2021, made effective July 1, 2021 (the “July 1, 2021 KONG Action by Written Consent”). After giving effect to the July 1, 2021 KONG Action by Written Consent, various interests in the profits of KONG were to be as follows: 50% to Nelson/Orixas, 25% to Markham/Bounce, and 25% to Decker.

In 2020 and 2021, Nelson, Orixas, and Decker converted millions of dollars debt owed to them by KONG from profit distributions into long-term debt pursuant to written “Amended Promissory Notes” such that KONG does not owe repayments of loan principal until 2030 and 2031.

55. In 2020 and 2021, Nelson and KONG restructured the debt KONG owed to its Members without Markham’s consent. In 2020 and 2021, KONG distributed profits to Members’ capital accounts and then immediately converted those profits into debt owed by KONG to the Members, reflected in what KONG has referred to as the “short-term” debt accounts of Nelson (and Orixas), Bounce, and Decker.

56. On August 15, 2020, Nelson and KONG executed an Amended and Restated Secured Master Promissory Note whereby the short-term debt owed to Nelson was converted into long-term debt with only interest payments required over a 10-year term until the Maturity Date. The conversion to long-term debt meant that KONG was not required to repay the principal balance until August 2030.

57. On December 31, 2020, Decker executed a similar promissory note between herself and KONG that also had the effect of converting short-term debt to long-term debt.

58. On January 31, 2021, Orixas executed a similar promissory note effecting the same change to the debt KONG owed to it.

59. Nelson admits that nothing in the 2005 KONG Written Consent would authorize Nelson to change the maturity dates of KONG's debts to members. To the contrary, the 2005 KONG Written Consent expressly states that "modifying or amending any agreement with a Manager, Member or Affiliate of a Manager or Member" requires "the unanimous approval of each of the Company's Managers."

60. The restructuring and/or refinancing of debt owed by KONG is also a "Capital Transaction" as that term is defined in the KONG Operating Agreement.

61. Markham was not consulted regarding and did not consent to KONG's agreement to change the terms of its promissory notes with Orixas, Nelson, and Decker.

62. The Amended and Restated Secured Master Promissory Notes (the "Amended Notes") executed by Nelson, Orixas, and Decker contain similar terms including that the notes require interest only payments during the Term, that the Term is a period of "ten (10) years from the Issue Date," and that "no payments on principal shall be required until the expiration of the Term."

63. Markham was not consulted regarding and did not approve a prepayment of long-term debt owed by KONG to Nelson, Orixas, or Decker.

In November 2021, the Managers of KONG made a new agreement, again giving Bounce the right to use KONG's intellectual property.

64. On November 3, 2021, Markham, Nelson, Decker, and KVP's President Ken Bowman met to discuss the July 17, 2019 licensing arrangement between KONG, Bounce, and KVP.

65. KONG, Bounce, and KVP agreed that KVP's participation in the Triangle Agreements would terminate.

66. KONG and Bounce agreed to continue with Bounce's ongoing manufacture and distribution (through KSP) of products bearing the KONG® logo under a new agreement the same as or close to the standard trademark licensing agreement that was in place between KONG and KVP.

67. Decker and Nelson each testified at the preliminary injunction hearing held by this Court that they understood that the parties would "replace the V [in KVP] with an S" to change KVP to Bounce's affiliate KSP. Decker and Nelson each testified that they understood that KONG and Bounce would continue to operate under the terms of the Triangle Agreements but with Bounce/KSP stepping into the shoes of KVP.

68. Markham and Nelson, the managers of KONG, affirmed their agreement to the continued licensing arrangement between KONG and Bounce in writing via emails sent on November 3, 2021 to KONG's corporate counsel, Andrew Dallman (the "November 2021 Bounce License Agreement").

69. On November 3, 2021, KONG, Bounce, and KVP executed a Mutual Termination of Agreements (the "Mutual Termination of Agreements") whereby the parties terminated the Triangle Agreements.

70. But for the agreement that KONG and Bounce would continue its ongoing licensing arrangement, but without KVP, via the November 2021 Bounce Licensing Agreement, Bounce would not have agreed to terminate the Triangle Agreements on November 3, 2021.

71. Under the November 2021 Bounce License Agreement with KONG, Bounce through KSP, continued its ongoing manufacture and distribution of products with the KONG® logo.

In November 2021, the Members of KREH (Bounce and Orixas) decided to sell valuable property in Long Beach, California.

72. By the fall of 2021, Nelson had been reporting to Markham that KONG was in need of liquidity, and Nelson proposed to sell KREH property so that the proceeds could be loaned to KONG for operations. Markham agreed, and in November 2021, KREH elected to sell the Long Beach Property for a profit of approximately \$43,000,000.

73. The Members of KREH signed an Action by Written Consent of the Members of KREH dated November 15, 2021 (the "KREH Consent") authorizing the sale of the property on behalf of KREH. The KREH Consent also authorized Nelson to effectuate a loan from KREH to KONG from the proceeds from the sale of the Long Beach Property. In particular, the consent contemplated that KREH would "loan some or all of the Net Proceeds [from the sale] to [KONG] to be used for general operations of [KONG], including without limitation, to pay security deposits, rental payments or other costs and expenses in connection with [KONG's] lease of the [Long Beach] Property from" the third-party purchaser thereof. The KREH Consent was executed by the members of KREH in their capacity as members of KREH and did not extend to or authorize any actions by KONG itself, such as any determination by KONG as to the terms on which it would borrow funds from KREH.

74. At the time Markham and Nelson signed the KREH Consent, the KREH Operating Agreement provided that the first priority for making distributions to its Members was to distribute, within 30 days after the end of each quarter, an amount equal to their respective tax liabilities attributable to profits allocated to them pursuant to the KREH Operating Agreement.

75. At the time Markham and Nelson signed the KREH Consent, the KREH Operating Agreement further provided, with regard to a sale of property by KREH, "Net Cash from Sales or Refinancings, if any, shall be distributed not later than the ninetieth (90th) day

following the close of the Fiscal Year in which the sale or refinancing took place to the Members and their Transferees in proportion of their Percentage Interests.

Orixas and Nelson violated the KONG Operating Agreement by approving, without Markham's consent, KONG's borrowing of the proceeds from the Long Beach Property sale and payment of \$14 million in proceeds from the Long Beach Property sale to Orixas/Nelson and Decker.

76. On or about December 15, 2021, the Long Beach Property sold for a profit of \$42,713,310.73. As a result of the sale, Bounce, in its capacity as Member of KREH, owed California state taxes and an estimated \$6.1 million in federal tax. At the time or shortly after the sale of the Long Beach Property, KREH did not make any distributions to its members to cover the tax liability that its Members incurred as a result of the sale.

77. Instead, Nelson unilaterally directed that \$42,250,000 in proceeds from the sale be loaned to KONG, which used much, but not all, of the loan proceeds for operations.

78. KONG paid interest to KREH on the \$42,250,000 that it loaned from KREH.

79. Despite KONG paying interest on the loaned funds, KONG paid KREH back approximately \$6.5 million of loaned funds to pay for California state taxes.

80. In January 2022, KONG repaid approximately \$6.5 million to KREH so that KREH could make tax distributions to Bounce and Orixas sufficient to cover California state tax liabilities arising from the sale of the Long Beach Property. No distribution was made to Decker for payment of any taxes because Decker had no tax liability resulting from the sale of the Long Beach Property.

81. Contrary to the managerial authority granted to Markham under the KONG Operating Agreement, Nelson did not seek or obtain Markham's consent or approval, as a manager of KONG, for any borrowing by KONG from KREH, including the amount of the borrowing or the terms thereof.

82. Following the transfer of the Long Beach Property sale proceeds from KREH to KONG, Nelson directed in January 2022 that KONG make payments to Orixas/Nelson and Decker in the amounts of \$10 million to Orixas/Nelson and \$4 million to Decker, as repayment of debt.

83. Nelson directed that KONG use borrowed funds, on which KONG owed interest to KREH, to make \$14 million in debt repayments to himself, Orixas, and Decker even though KONG's debt obligations to Nelson, Orixas, and Decker had been previously refinanced into 10-year interest-only notes and the principal balances thereof were not owed by KONG until 2030 and 2031.

84. Contrary to the managerial authority granted to Markham under the KONG Operating Agreement, Nelson did not seek or obtain Markham's consent or approval for these distributions or for the prepayment of KONG debt to Orixas or Decker. This use of proceeds was also contrary to the language of the KREH Consent, which contemplated the use of the funds for "general operations" of KONG, not the enrichment of Nelson and Decker.

85. Despite Bounce having incurred an estimated \$9 million or greater tax liability as a result of the Long Beach Property sale, and despite KONG having ceased making payments from the 2019 Distribution Plan, neither KREH nor KONG, at Nelson's direction, distributed any proceeds from the Long Beach Property sale to Bounce.

86. Instead, also at Nelson's direction and without Markham's approval, on February 23, 2022, KONG sent a letter (the "February 23, 2022 KONG Letter") to counsel for Bounce and Markham stating that "KONG does not anticipate having enough cash on hand to make distributions for federal capital gains tax liability arising from the sale/leaseback of the Long Beach building" and that "KONG will not be making tax distributions to meet tax liabilities related to the sale of the long Beach property."

87. Markham was not consulted regarding and did not consent to KONG hiring the counsel that sent the February 23, 2022 KONG Letter.

In 2022, Nelson directed KONG, without Markham's consent or approval, to breach the November 2021 Bounce License Agreement and not to provide Markham with financial and other documents related to KONG.

88. Although Bounce and KONG had not formalized the written November 2021 Bounce License Agreement, in February 2022, KONG's counsel proposed such formal documents for execution by KONG and Bounce. According to the November 2021 Bounce License Agreement, those documents included a new Exclusive Distribution Agreement (the "2022 KONG/Bounce Distribution Agreement") and a new Trademark Licensing Agreement (the "2022 KONG/Bounce Trademark Licensing Agreement"). As per the November 2021 Bounce License Agreement, these documents contained the same or similar terms as the previously terminated agreements between KONG, KVP, and Bounce.

89. Despite prior agreement by Nelson and Markham, the managers of KONG, KONG, at Nelson's direction, refused to execute the 2022 KONG/Bounce Distribution Agreement and the 2022 KONG/Bounce Trademark Licensing Agreement.

90. Nelson and/or KONG refused to engage in a negotiation of new agreements and instead — despite clear agreement in November 2021 that KONG and Bounce would continue the relationship, just without KVP's involvement — refused to engage any further in formalizing the agreement with Bounce.

91. Irrespective of the execution of the 2022 KONG/Bounce Distribution Agreement and the 2022 KONG/Bounce Trademark Licensing Agreement, the November 2021 Bounce

License Agreement is a binding contract, the terms of which are the same terms as the Triangle Agreements but with Bounce/KSP as a replacement for KVP.

92. On March 4, 2022, concerned over its tax liability in connection with the Long Beach Property sale and the improper use of the proceeds from that sale, Bounce, through counsel, requested documents from KONG to which Bounce is entitled under the Colorado LLC statute as a member of KONG. KONG refused to provide all of the requested documents. Indeed, KONG did not even provide Markham and Bounce with a complete set of 2021 consolidated financial statements prepared by KONG's management which were being audited.

93. Instead, shortly thereafter, on March 10, 2022, counsel for KONG, on information and belief at the direction of Nelson, and despite the existence of the November 2021 Bounce License Agreement sent a letter to Bounce demanding that Bounce cease and desist in the use of KONG® intellectual property.

94. KONG sent its cease and desist letter to Bounce without obtaining consent or approval of Markham, despite the requirements of the 2005 KONG Written Consent that Markham, as the Technical and Product Manager of KONG, has "the general authority to make decisions regarding . . . intellectual property management, including but not limited to managing and enforcing the Company's intellectual property protection practices, managing the Company's intellectual property exploitation program and legal decisions related thereto."

Only after Bounce and Markham filed suit did Orixas/Nelson/Decker, without Markham's consent, return some, but not all money improperly taken from KONG.

95. On March 18, 2022, facing millions of dollars in tax liabilities and a refusal by Nelson, KONG, KREH, and Decker to engage in amicable negotiations and discussions, Bounce was forced to file a lawsuit.

96. Following Bounce's filing of the lawsuit, KONG informed Bounce (for the first time) that Nelson (and Orixas) had returned \$10 million to KONG (which in turn gave back \$10 million to KREH) of the proceeds from the Long Beach Property sale.

97. KREH used this repayment of \$10 million of funds it had loaned to KONG, on which KONG owed and paid KREH interest since December 2021, to make distributions to its Members Orixas and Bounce for partial payments of federal tax liabilities resulting from the sale of the Long Beach Property. No distribution was made to Decker.

98. Only after Bounce filed suit did KREH distribute to Bounce \$5,815,000, for Bounce's estimated federal tax liabilities arising from KREH's sale of the Long Beach Property.

99. KONG, through its counsel, also informed Bounce that Decker would be returning \$4 million to KONG. But at Nelson's and Orixas unilateral direction, Decker retained and still retains at least \$2.8 million of funds improperly distributed following the sale of the Long Beach Property.

100. The payment of \$2.8 million in April 2022 to Decker has not been repaid by Decker.

101. The payment of \$2.8 million in April 2022 to Decker was not a tax distribution.

Orixas and Nelson have made and continue to make numerous unauthorized business decisions on behalf of KONG and KREH without Markham's or Bounce's consent.

The Ohio Property:

102. On March 14, 2022, Nelson emailed Markham to inform Markham that Nelson had executed a letter of intent on behalf of KONG ("LOI") for a ten (10) year lease related to KONG's Ohio operations.

103. Nelson informed Markham that KONG has decided to move its Ohio operations from its current building to a new location approximately 17 miles from KONG's current building.

104. Nelson also informed Markham that the new landlord will buy the building in Ohio where KONG currently operates (the "Ohio Property"). KREH owns the Ohio Property.

105. Neither Markham, as manager of KONG, nor Bounce, a member of KONG, were consulted before KONG, apparently at the direction of Nelson, executed the LOI with a new landlord in Ohio.

106. Neither Markham, as manager of KONG, nor Bounce, a member of KONG, were consulted before KONG decided to move its Ohio operations 17 miles from the Ohio Property.

107. Bounce, a member of KREH, was not consulted regarding the sale of the Ohio Property and did not approve any discussions or action regarding the sale of the Ohio Property.

Operations in Golden:

108. On March 14, 2022, Nelson also informed Markham that KONG intended to spend over \$1 million and possibly upwards of \$1.5 million to upgrade the air management system at KONG's facility in Golden, Colorado (the "Colorado Property"). KREH owns the Colorado Property.

109. Neither Markham, as manager of KONG, nor Bounce, a member of KONG, were consulted before KONG, apparently at the direction of Nelson, decided to spend upwards of \$1.5 million to upgrade the air management system at the Colorado Property.

110. Bounce, a member of KREH, was not consulted regarding any decision to upgrade the air management system at the Colorado Property — real property that KREH owns.

111. Additionally, at Nelson's direction and without consulting Markham or obtaining Markham's consent, KONG decided to add additional machines to its rubber production operation requiring KONG to incur costs to lease a new facility in Boulder, Colorado, and greatly decreased the working environment for KONG's employees.

112. Additionally, at Nelson's direction and without consulting Markham, disclosing the resulting costs, or obtaining Markham's consent, KONG decided to add solar car ports to its parking lot.

KONG's Decision to Pay \$6 million in Debt Owed By KREH:

113. In January 2024, KONG's counsel sent correspondence to Bounce's counsel indicating that KONG desired to absolve itself from guarantor obligations under loans between Wells Fargo as lender and KREH as borrower secured by real property still owed by KREH and that were personally guaranteed by KONG in total amounts of approximately \$6,000,000.00.

114. On January 18, 2024, KONG proposed that it "pre-pay a portion of its outstanding loan with KREH equal to the pay-off amounts for KREH mortgages, and then KREH agrees to use those funds to pay-off the mortgages and release KONG from further obligations under the Wells Guaranty Agreement."

115. Bounce, through counsel, responded to KONG on February 8, 2024 stating that Bounce generally agreed to the proposal and setting forth certain clarification questions regarding source of funds from KONG, impact on pending litigation, tax implications, and resulting note/loan balances.

116. In response to Bounce's February 8, 2024 letter, KONG, on March 1, 2024, sent further correspondence to Bounce indicating that Decker raised concerns about having KONG pay down its debt owed to KREH and instead suggested that the members of KREH (Orixas and Bounce) should pay down debt owed by KREH that KONG guaranteed using monies distributed to Orixas and Bounce by KONG. This arrangement was substantially different from KONG's initial proposal.

117. On March 22, 2024 Bounce responded to KONG raising various issues with the new proposed arrangement whereby Bounce and Orixas would receive money from KONG and use that money to pay off KREH's mortgages held by Wells Fargo. Bounce reiterated its agreement to KONG's original proposal whereby KONG would repay a portion of the debt it owes to KREH and KREH would then use that money to pay off the Wells Fargo mortgages, releasing KONG from its obligations as guarantor of those loans.

118. On April 30, 2024, KONG's counsel sent an email to Bounce's counsel stating that, despite KONG's initial proposal of the idea, KONG was not agreeable to KONG paying down part of its debt to KREH so that KREH would have money sufficient to pay off the Wells Fargo mortgages and release KONG from its guarantor obligations.

119. On April 30, 2024, KONG proposed that it provide money to KREH by loaning KREH money despite the fact that KONG already owed millions to KREH because KREH, at the direction of Nelson, had, following the sale of the Long Beach Property, loaned more than \$42 million to KONG.

120. Bounce objected to the idea that KONG would create additional debt liabilities between itself and KREH when the simplest approach for KONG to provide cash to KREH would be for KONG to pay down existing debt owed by KONG to KREH. Counsel for Bounce sent correspondence to KONG's counsel again confirming Bounce's agreement to KONG's original proposal but objecting to the convoluted lending proposal under which KONG (presumably at the unilateral direction of Decker and/or Nelson) would cross-lend money back to KREH without paying down any of the debt that KONG already owed and continues to owe to KREH.

121. There is no rational reason why, if KONG genuinely sought to absolve itself of its guarantor obligations under the Wells Fargo mortgages, and desired to provide cash to KREH so that KREH could pay off its mortgages, KONG would not do so, as KONG originally proposed, by paying down a certain amount of pre-existing debt owed by KONG to KREH.

122. The only cognizable reason why KONG would balk at its original proposal is because Decker objected for reasons having to do with her claims of a financial interest in KREH.

123. KONG admitted to seeking Decker's approval for its original plan and confirmed in its February 8, 2024 correspondence that its change in proposal was due to objection from Decker.

124. Decker is not a voting member of KONG. Decker had no right to object to KONG's original proposal, which did not contemplate any amendment to the KONG Operating Agreement, in the first place.

125. On May 24, 2024 KONG's counsel sent another letter to Bounce's counsel, this time stating that KONG would "move forward with paying off the entire KREH loan balances by no later than June 30, 2024." KONG's counsel stated that would do so and would then "seek reimbursement of that payment from KREH at the appropriate time." This new proposal changed further how KONG intended to account for the payment to KREH.

126. On June 21, 2024, Bounce again responded to KONG and confirmed Bounce's agreement to the original proposal but not the changed manner in which KONG proposed doing so. Bounce highlighted that the creation of a new loan or liability between KONG and KREH would be illogical and confirmed Bounce's disagreement with KONG's assertion that Bounce's approval is not needed or has already been provided. Bounce demanded that no action be taken without its consent and reiterated that the proper manner to reach KONG's intended goals would be for KONG to pay down its existing debt owed to KREH.

127. In its June 21, 2024 letter, Bounce stated, “To better understand the New Loan, Bounce requests that KONG provide the journal entries for how KONG and KREH will book this transaction on their respective balance sheets.”

128. On June 24, 2024, before the June 30, 2024 date indicated by KONG, KONG’s counsel responded to Bounce’s counsel indicating that “KONG has already paid off the outstanding balances for the KREH loans.”

129. KONG paid millions of dollars to pay off the debt owed by KREH without Bounce’s or Markham’s consent and in the fact of Bounce’s and Markham’s specific objections and concerns regarding the manner in which KONG made and accounted for the payment.

130. KONG paid off the debt owed by KREH to Wells Fargo without reducing the principal amount of the debt owed by KONG to KREH.

131. KONG continues to accrue and pay interest to KREH.

132. KONG has not provided Bounce with the journal entries for how KONG and KREH will book the transaction on their respective balance sheets.

KONG Refuses to Make Payments to Bounce of Amounts Owed to Bounce by KONG under Bounce’s Short-Term Note Despite Bounce’s Payment Demands.

133. On December 13, 2022, KONG, by Nelson, as “Borrower” and Bounce as “Lender” executed a certain Secured Master Promissory Note (“The Bounce-KONG Short-Term Note”).

134. The Bounce-KONG Short-Term Note “evidences all short-term loans (each a “Loan”), made by Lender to Borrower from time to time.

135. The Bounce-KONG Short-Term Note specifies the following, without limitation:

- a. “NOTWITHSTANDING ANYTHING TO THE CONTRARY HEREIN, BORROWER ACKNOWLEDGES THAT THIS PROMISSORY NOTE IS A DEMAND NOTE IN THAT THE ENTIRE OUTSTANDING AMOUNT OF THIS NOTE WILL BE DUE AND PAYABLE THIRTY (30) DAYS AFTER DEMAND IN WRITING FROM LENDER TO BORROWER.”
- b. “Nothing in this Promissory Note shall be deemed to require Lender to make any Loan.”
- c. “Borrower shall make interest payments on a monthly basis on the monthly anniversary of the Issue Date;”

- d. “All outstanding amounts owing under this Note, including unpaid interest and principal, shall be due and payable thirty (30) days after demand from Lender to Borrower.”

136. The Bounce-KONG Short-Term Note specifies that it shall be an Event of Default for Borrower to fail to make any payment when due.

137. The Bounce-KONG Short-Term Note further specifies that, upon the occurrence of an Event of Default, Lender may, by notice to Borrower, declare the unpaid principal amount of this Promissory Note, interest accrued thereon and all other amounts owing by Borrower hereunder to be immediately due and payable.

138. Although KONG has not provided Bounce with consistent current accounting of the balance of the Bounce-KONG Short-Term Note, as of April 26, 2024, the balance of principal owed by KONG under the Bounce-KONG Short-Term Note was \$7,764,691.22.

139. On June 22, 2023, Bounce requested that KONG make its monthly distribution to Bounce in cash in full rather than allocating portions thereof to the balance of the Bounce-KONG Short-Term Note. On June 22, 2023, Bounce requested cash payment of \$269,824.00 which was Bounce’s distributable portion of profits as of April 30, 2023. Bounce also asked that KONG make future distributions to Bounce in cash in full rather than allocating non-tax portions to the balance of the Bounce-KONG Short-Term Note.

140. On June 27, 2023, Bounce requested that KONG make its monthly distribution for the month ending May 31, 2023 to Bounce in cash in full rather than allocating portions thereof to the balance of the Bounce-KONG Short-Term Note. On June 27, 2023, Bounce demanded cash payment of \$232,169.00.

141. On June 30, 2023, KONG sent correspondence to Bounce explicitly refusing Bounce’s requests for cash payments and stating that it would, despite Bounce’s requests and the terms of the Bounce-KONG Short-Term Note, continue allocating non-tax portions of profit distributions to the balance of the Bounce-KONG Short-Term Note.

142. On August 17, 2023, Bounce sent KONG a formal demand for payment under the Bounce-KONG Short-Term Note. Bounce demanded payment of \$338,282.00 representing the total of amounts allocated by KONG to the balance of the Bounce-KONG Short-Term Note for the months of May and June 2023.

143. In its August 17, 2023 demand, Bounce noted that it was not seeking payment under the Bounce-KONG Short-Term Note of the then-current outstanding balance of \$6,142,258.22.

144. In its August 17, 2023 demand, Bounce further demanded that, on a going forward basis, all profits distributions allocated to Bounce be made from KONG to Bounce in

cash in full, rather than allocating portions to the balance of the Bounce-KONG Short-Term Note.

145. KONG failed to comply with Bounce's August 17, 2023 demand and failed to make the demanded payment to Bounce on or before September 16, 2023, which was 30 days after the August 17, 2023 demand.

146. In contradiction to Bounce's demand, KONG continued its practice of allocating portions of profits distributions to the Bounce-KONG Short-Term Note balance throughout 2023 and into 2024.

KONG, Despite its Engagement in this Lawsuit since 2022 and Assertion of Affirmative Claims Unilaterally and Against Bounce and Markham, By its Own Admission(s) in Court Filings in 2024, is Unable to Operate and Manage its Own Books, Records, and Actions as a Result of Disputes Among its Members and Managers.

147. KONG has filed four affirmative pleadings in this lawsuit.

148. On August 2, 2022, after Bounce first-filed its initial complaint in this lawsuit, KONG, in concert and with Orixas, LLC and Decker, filed the initial joint complaint in the now consolidated case, 2022CV32209.

149. Therein, KONG alleged 43 paragraphs of allegations, incorporated by reference claims and allegations asserted by Orixas and Decker, and asserted a breach of fiduciary duty claim against Bounce and Markham.

150. KONG participated in seeking relief in the initial complaint not just on its own behalf but also for claims asserted by Orixas and Nelson with which KONG should properly have no role and take no action.

151. On November 2, 2022, KONG, again in concert with Orixas and Decker, filed its First Amended Complaint.

152. Therein, KONG alleged 88 paragraphs of allegations, again incorporated by reference claims and allegations asserted by Orixas and Decker, and again asserted a breach of fiduciary duty claim against Bounce and Markham.

153. KONG participated in seeking relief in the First Amended Complaint not just on its own behalf but also for claims asserted by Orixas and Nelson with which KONG should properly have no role and take no action.

154. On December 23, 2022, KONG, again in concert with Orixas and Decker, filed its Second Amended Complaint.

155. Therein, KONG alleged 135 paragraphs of allegations, again incorporated by reference claims and allegations asserted by Orixas and Decker, again asserted a breach of fiduciary duty claim against Bounce and Markham, and asserted a claim against Defendant Central Garden & Pet Company.

156. KONG participated in seeking relief in the Second Amended Complaint not just on its own behalf but also for claims asserted by Orixas and Nelson with which KONG should properly have no role and take no action.

157. Then, on March 29, 2024, for the first time since the disputes in this case arose, KONG filed a counterclaim in response to Bounce's First Amended Complaint requesting declaratory judgment and an accounting from this Court concerning:

- a. KONG's duties and obligations under the KONG Operating Agreement regarding KONG's maintenance of capital accounts and managing and providing distribution's to KONG's members;
- b. KONG's management and handling of monetary distributions including the amount of money owed to each of KONG's members and issues surrounding dealings between KONG and KREH; and
- c. What amounts KONG owes to its members and the form thereof.

First Claim for Relief

Declaratory Judgement Regarding Bounce's Management Rights in KONG

158. Bounce incorporates the foregoing allegations as if set forth fully herein.

159. The KONG Operating Agreement, as amended, is a valid and binding contract between the Members of KONG.

160. The KONG Operating Agreement, as amended, provides certain rights to Bounce regarding the management of KONG.

161. Under the 2005 KONG Written Consent, Bounce's appointed manager of KONG, Markham, must approve (before any action is taken by KONG), (i) any distribution of the Company's Cash Flow, (ii) any compensation or bonus determinations, (iii) any Capital Transaction, (iv) making or committing the Company to any expenditure in excess of \$50,000 (which threshold was later increased to \$250,000), (v) entering into any transaction or entering into, modifying or amending any agreement with a Manager, Member or Affiliate of a Manager or Member, or (vi) naming any person to the Committee.

162. An actual dispute exists regarding Bounce's rights with regard to the ongoing management of KONG.

163. As set forth more fully herein, above, Nelson, Orixas, Decker, and KONG, have taken repeated actions in contradiction of Bounce's management rights in KONG.

164. For example and not by way of limitation:

- a. As set forth more fully herein, above, as recently as June 2024, KONG, presumably at the direction of Nelson and/or Orixas and/or Decker, has engaged in actions that require Bounce's and/or Markham's, Bounce's appointed manager of KONG, prior consent without obtaining Bounce's or Markham's prior consent and in the face of Bounce's or Markham's specific non-consent.
- b. As set forth more fully herein, above, KONG has failed to provide Bounce or Markham with current, complete financial information regarding KONG, especially the information required to be provided to Bounce and/or Markham under Section 8.2 of the KONG Operating Agreement and so that Bounce and Markham may make informed decisions regarding the management of KONG.
- c. KONG has not involved Bounce or Markham to approve distributions of KONG's cash flow.
- d. Instead of obtaining Bounce's or Markham's prior approval, KONG makes unilateral decisions regarding the distribution of its cash flow and informs Bounce, usually after the fact, of KONG's decision.
- e. KONG has inconsistently and seemingly at Nelson's sole direction and discretion involved Bounce or Markham to approve KONG's actions involving Capital Transactions, as that term is defined in the KONG Operating Agreement. The KONG Operating Agreement defines Capital Transactions as "any transaction not in the ordinary course of business which results in the Company's receipt of cash or other consideration other than Capital Contributions, including, without limitation, proceeds of sales or exchanges or other dispositions of property not in the ordinary course of business, financings, refinancings, condemnations, recoveries of damage awards, insurance proceeds and liquidation of Company pursuant to Section 4.4 [of the KONG Operating Agreement]."
- f. KONG has not involved Bounce or Markham to approve KONG's making or committing KONG to any expenditures in excess of \$250,000.00.
- g. KONG has not involved Bounce or Markham to approve KONG's activities regarding related party transactions including entering into any transaction or entering into, modifying or amending any agreement with a Manager, Member or Affiliate of a Manager or Member.

- h. As set forth more fully herein, above, KONG engaged in actions to refinance certain debts owed by it to Nelson, Orixas, and Decker without obtaining Bounce's or Markham's prior approval.
- i. As set forth more fully herein, above, KONG additionally engaged in financial transactions, over Bounce's objection, whereby it unilaterally decided to pay off \$6 million in debt owed by KREH to KONG without simultaneously paying down debt obligations owed by KONG to KREH and resulting in KONG continuing to owe unnecessary and wasteful interest obligations to KREH.
- j. As set forth more fully herein, above, and in the 2005 KONG Written Consent, if the Monthly Capital Distributions set forth in the 2005 KONG Written Consent are/were not made by KONG, then the management split set forth between Markham and Nelson in the 2005 KONG Written Consent terminates.

165. KONG has also failed to make all of the Monthly Capital Distributions set forth in the 2005 KONG Written Consent.

166. Specifically, and without limitation, upon KONG's unilateral decision to cease payments agreed upon under the Plan, KONG failed to continue to make required Monthly Capital Distributions under the 2005 KONG Written Consent in the amount of \$45,000.00 per month.

167. Without limitation, KONG failed to make any such required Monthly Capital Distributions during 2022 and 2023.

168. Instead of recognizing Bounce's and Markham's continued management rights in KONG, KONG, Nelson, and Decker have maintained that Bounce's and Markham's rights to participate in the management of KONG have been and are waived.

169. On the contrary, Bounce and Markham have consistently participated in KONG's management, including without limitation the following:

- a. Approvals of Decker's compensation and profits sharing arrangement with KONG;
- b. Approval of Orixas' predecessor's transfer of its entire interest in KONG to Orixas;
- c. Consideration of proposals regarding KONG's governing structure and tax elections;

- d. Consultation regarding KONG's proposed purchase of property in the United Kingdom;
- e. Consultation regarding KONG's decisions to do business with certain distributors/retailers including Amazon;
- f. Consistent management of KONG's intellectual property protection; and
- g. Consistent oversight and handling of KONG's resolution of product incident reports, issues, and disputes.

170. Nelson's own testimony in this case exemplifies the current dispute and controversy regarding Bounce's and Markham's management rights in KONG.

171. At the preliminary injunction hearing held in this matter, on October 14, 2022, Nelson testified in response to being questioned whether there are any management rights whatsoever that Mr. Markham has with respect to KONG that he has not waived that "This is a very confusing question. You asked me this before. And prior to the Central deal, I would say he has all the rights he has, he can do whatever he wants to do, he's welcome to come to the building. But after Central, I really don't know. I don't know the answer to that question. That's some legal question that somebody has to decide[.]" And when Bounce's counsel asked Nelson, "moving forward with KONG, do you agree or disagree that Mr. Markham and Bounce are required to approve all six of the items listed [in the 2005 Written Consent]?" Nelson responded "Oh, if he wants to get involved, sure," claiming that he needed only "tell me he wants to be involved" but that "it should be in writing." 10/14/22 Tr. 203:3-14. KONG's briefing in this case has stated "the Company has never told [Bounce] or Mr. Markham that it has no right to participate in management."

172. Yet in deposition testimony prior to the preliminary injunction hearing held in this case, Nelson testified in response to being questioned whether there are any management rights whatsoever that Mr. Markham has with respect to KONG that he has not waived that, "There's none that I know of."

173. In deposition testimony prior to the preliminary injunction hearing held in this case, Nelson said that he believed that Markham has no management rights in KONG.

174. At the preliminary injunction hearing held in this matter, on October 14, 2022, Nelson testified further in response to being questioned whether or not Markham has any management rights whatsoever in KONG that, "I don't know."

175. As a result of Nelson's own admissions, there exists an active controversy ripe for this Court's declaration(s) regarding Bounce's and/or Markham's management rights in KONG under KONG's governing documents.

176. As a result of the active and ongoing controversy regarding Bounce's management rights in KONG, Bounce seeks the following declarations from this Court:

- a. The following matters require the prior approval of Bounce and/or its appointed Manager of KONG:
 - i. Any distribution of KONG's Cash Flow;
 - ii. Any compensation or bonus determinations, especially with respect to KONG's executives: Decker, Nelson, and Markham;
 - iii. Any Capital Transactions (as that term is defined in the KONG Operating Agreement);
 - iv. Making or committing KONG to any expenditures in excess of \$250,000.00; and
 - v. KONG's engagement in related-party transactions, specifically entering into any transaction or entering into, modifying or amending any agreement with a Manager, Member or Affiliate of a Manager or Member.
- b. That, as a result of KONG's failure to make the Monthly Capital Distributions required by the 2005 KONG Written Consent, the delineation of management responsibilities set forth in the 2005 KONG Written Consent is terminated.
- c. That, under the KONG Operating Agreement, the following "Extraordinary Transactions" require the unanimous prior approval of KONG's voting members, including Bounce:
 - i. Any Capital Transaction.
 - ii. KONG's lending of more than \$10,000.00 of its money on any one occasion.
 - iii. The admission of additional Members to the Company.
 - iv. The Company's electing to exercise any Purchase Option under Section 6.4 of the KONG Operating Agreement.
- d. That KONG must provide Bounce and/or Markham with access to KONG's financial records as required under Section 8.2 of the KONG Operating Agreement and so that Bounce and/or Markham may make informed decisions regarding their management roles and responsibilities regarding KONG.

- e. That, upon the Court's determination of breaches of the KONG Operating Agreement by Orixas and/or Nelson, Bounce may elect to provide notice to KONG of such breaches and the resulting Involuntary Withdrawal of Orixas, and that Bounce and/or Markham may thereafter elect, under Section 7.1.3 of the KONG Operating Agreement, to continue to business of KONG or to dissolve KONG.

Second Claim for Relief

Declaratory Judgment Regarding Decker's Rights and Interests in KONG and KREH

177. Bounce incorporates the allegations in the forgoing paragraphs as if stated in full herein.

178. KONG has two voting members, Bounce and Orixas, each of which own 50% of the membership interests of KONG.

179. Decker, an officer of KONG, is employed by KONG and is contractually entitled to a certain percentage of the profits of KONG as part of Decker's employment compensation from KONG and pursuant to Decker's employment contract with KONG, as amended.

180. In 2008, Decker was granted 10% interest in the profits of KONG.

181. Under the Decker 2008 Employment Agreement, Decker was compensated via an annual salary plus an annual bonus, which included a bonus of 10% of any excess profit before depreciation, donations, and amortization of KONG generated in 2008 over 2007 performance.

182. In 2019, Decker's profits interest in KONG was increased to 20%.

183. On June 26, 2019, KONG, Bounce, Orixas, and Decker executed the Decker 2019 Amendment, which was made effective January 1, 2019, and which amended the terms of the Decker 2008 Employment Agreement by, without limitation, increasing Decker's compensation and bonus to equal 20% of the KONG "Taxable Net Profit" (as that term is defined in the Decker 2019 Amendment).

184. Under the Decker 2019 Amendment, Decker was admitted as a non-voting member of KONG.

185. Under the Decker 2019 Amendment, any requirement for member vote, approval or consent (of KONG's members) shall not include Decker in any such vote, approval or consent.

186. Under the Decker 2019 Amendment, and as set forth more fully therein, Decker was granted a 10% interest in the proceeds derived from a sale of KONG (after payment of all costs of such sale or transfer including legal, accounting and broker fees and the payment of all

debts and obligations of KONG that are not assumed by the acquirer(s)) above a threshold sale price of \$240,000,000.00.

187. Proceeds of a sale below and up to the threshold \$240,000,000.00 are to be distributed equally between Orixas and Bounce.

188. Above the \$240,000,000.00 sale price threshold, proceeds would be distributed 10% to Decker, 45% to Orixas, and 45% to Bounce.

189. Decker's 20% profit interest in KONG, created by the Decker 2019 Amendment, was consented to by the members of KONG via the July 1, 2019 KONG Action by Written Consent.

190. Under the July 1, 2019 KONG Action by Written Consent, various interests in the profits of KONG (except for sale proceeds as set forth herein and in the Decker 2019 Amendment) were to be as follows: 50% to Nelson/Orixas, 30% Markham/Bounce, and 20% to Decker.

191. On August 24, 2021, KONG, Bounce, Orixas, and Decker executed the Decker 2021 Amendment, which was made effective July 1, 2021, and which amended the terms of the Decker 2008 Employment Agreement (as previously amended by the Decker 2019 Amendment) by, without limitation, increasing Decker's compensation and bonus to equal 25% of the KONG "Taxable Net Profit" (as that term is defined in the Decker 2019 Amendment).

192. The Decker 2021 Amendment did not alter Decker's interest in 10% of proceeds derived from a sale of KONG (after payment of all costs of such sale or transfer including legal, accounting and broker fees and the payment of all debts and obligations of KONG that are not assumed by the acquirer(s)) above a threshold sale price of \$240,000,000.00 as set forth in the Decker 2019 Amendment.

193. Decker's 25% profit interest in KONG, created by the Decker 2021 Amendment, was consented to by the members of KONG via the July 1, 2021 KONG Action by Written Consent.

194. Under the July 1, 2021 KONG Action by Written Consent, various interests in the profits of KONG were to be as follows: 50% to Nelson/Orixas, 25% Markham/Bounce, and 25% to Decker.

195. Decker does not have any interest in day-to-day or other transactions that generate revenue for KONG except to the extent that said transactions affect KONG's annual and year-end profits.

196. Despite her contractual entitlement to an interest in the profits of KONG, Decker is not, and has never been, a voting member of KONG.

197. In December 2018, by written consent of its members, KONG approved the transfer of certain real property owned by KONG, including the Long Beach Property, to KREH.

198. KREH, a separate entity from KONG, has two members, Bounce and Orixas, each of whom own 50% of the membership interests of KREH.

199. Decker is not a member of KREH.

200. Decker owns no interest in any profits of KREH.

201. An actual controversy exists regarding Decker's interests with regard to KONG and KREH. Despite the clear terms of Decker's employment agreements, the generous grants of substantial sums of money to Decker (and the sole expense of Markham) in the form of profits interests in KONG, Decker maintains (and KONG and Nelson have unjustifiably supported her claim) that she is a 25% voting and full equity member of KONG. Further and additionally, Decker claims an unspecified and unsubstantiated interest in the profits of KREH. Thus, declarations from this Court are required to resolve the actual and active disputes regarding Decker's interest(s) in KONG and KREH.

202. As a result of and based on the foregoing, Bounce respectfully requests that this Court declare the following:

- a. Decker is a limited, non-voting member of KONG;
- b. Decker's non-voting membership in KONG does not entitle her to make decisions on KONG's behalf without prior consent of the voting Members and/or the Managers of KONG as set forth in KONG's governing documents;
- c. As of July 1, 2021, Decker owns a profits interest which entitles her to receive 25% of KONG's profits in accordance with KONG's governing documents and Decker's employment agreements with KONG;
- d. Decker is not a member of KREH;
- e. Decker does not have an interest in the profits of KREH.

Third Claim for Relief
Breach of Contract (KONG Licensing Agreement) Against KONG

203. Bounce incorporates the allegations in the forgoing paragraphs as if stated in full herein.

204. Under the Triangle Agreements, Bounce, through and with KSP, manufactured and distributed certain products utilizing the KONG® logo.

205. On November 3, 2021, Markham, Nelson, Decker, and KVP's President Ken Bowman met to discuss the then-current licensing arrangement between KONG, Bounce, and KVP.

206. KONG, Bounce, and KVP agreed that KVP had officially optioned out of the Triangle Agreements.

207. KONG and Bounce agreed to continue with Bounce's ongoing manufacture and distribution (through KSP) of products bearing the KONG® logo under a new agreement the same as or close to the standard trademark licensing agreement that was in place between KONG and KVP.

208. Decker and Nelson each testified at the preliminary injunction hearing held by this Court that they understood that the parties would "replace the V [in KVP] with an S" to change KVP to Bounce's affiliate KSP. Decker and Nelson each testified that they understood that KONG and Bounce would continue to operate under the terms of the Triangle Agreements but with Bounce/KSP stepping into the shoes of KVP.

209. Markham and Nelson, the managers of KONG, affirmed their agreement to the November 2021 Bounce License Agreement between KONG and Bounce in writing via emails sent on November 3, 2021 to KONG's corporate counsel, Andrew Dallmann.

210. Contrary to this agreement, on March 10, 2022, counsel for KONG, at Nelson's direction and without Markham's approval, sent a letter on behalf of KONG to Bounce demanding that Bounce cease and desist in the use of KONG® intellectual property.

211. KONG's cease and desist letter to Bounce was sent without the required approval or Bounce or Markham, despite the requirements of the 2005 KONG Written Consent that Markham, as the Technical and Product Manager of KONG, has "the general authority to make decisions regarding . . . intellectual property management, including but not limited to managing and enforcing the Company's intellectual property protection practices, managing the Company's intellectual property exploitation program and legal decisions related thereto."

212. Proceeding further, in contradiction of the agreed-upon terms of the November 2021 Bounce License Agreement, KONG proceeded to file a lawsuit in federal court asserting claims against Bounce and Markham including trademark infringement.

213. Bounce has reasonably acted in reliance on KONG's agreement to continue to license its intellectual property to Bounce, including by agreeing to the mutual termination of the Triangle Agreements between KONG, KVP, and Bounce, and continuing to manufacture products that bear the KONG® logo.

214. Bounce and its affiliate(s) have employees for whom it must make payroll obligations and mortgage/financing obligations relating its operations in manufacturing and distributing products in reliance on its intellectual property licensing agreement with KONG.

215. As a result of KONG's refusal to honor the agreed-upon new licensing agreement between Bounce/KSP and KONG, Bounce/KSP have been unable to market and/or sell its existing products in the marketplace and has been unable to manufacture additional products.

216. The refusal to honor this agreement has harmed Bounce in a manner separate and apart from any injury inflicted on KONG or Orixas.

217. Bounce seeks a declaratory judgment that the November 2021 Bounce License Agreement, is binding and enforceable on KONG, with terms the same as the Triangle Agreements but with Bounce/KSP replacing KVP in the Triangle Agreements.

Fourth Claim for Relief
Breach of Promissory Note Against KONG

218. Bounce incorporates the allegations in the forgoing paragraphs as if stated in full herein.

219. The Bounce-KONG Short-Term Note is a binding and enforceable contract between Bounce and KONG.

220. Bounce substantially complied with all of its obligations under the Bounce-KONG Short-Term Note.

221. The Bounce-KONG Short-Term Note provides that amounts owed thereunder shall be due and payable by KONG to Bounce within 30 days of Bounce demanding payment thereof from KONG.

222. Bounce demanded payment under the Bounce-KONG Short-Term Note of \$

223. On August 17, 2023, Bounce sent KONG a formal demand for payment under the Bounce-KONG Short-Term Note. Bounce demanded payment of \$338,282.00 representing the total of amounts allocated by KONG to the balance of the Bounce-KONG Short-Term Note for the months of May and June 2023.

224. KONG failed to make Bounce's demanded payment of \$338,282.00 on or before September 16, 2023, which was 30 days after Bounce's formal demand for payment under the Note.

225. Additionally, despite Bounce's demand that it cease adding to the principal balance of the Bounce-KONG Short-Term Note, first communicated in June 2023 and then again in August 2023, KONG continued to allocate profits distributions to the principal balance of the Bounce-KONG Short-Term Note throughout 2023 and into 2024.

226. As a result of its failure to make timely payment(s) of loaned amounts demanded by Bounce under the Bounce-KONG Short-Term Note and as an additional result of its refusal to

honor Bounce's request that profits be distributed to Bounce in cash rather than allocated to the principal balance of the Bounce-KONG Short-Term Note, KONG breached the terms of the Bounce-KONG Short-Term Note.

227. As a result of KONG's breaches of the terms of the Bounce-KONG Short-Term Note, Bounce has been damaged in an amount to be determined at trial, which amount consists of the principal amounts demanded by Bounce and not paid, interest, late penalties as set forth in the Bounce-KONG Short-Term Note, and Bounce's attorney fees and costs.

228. Bounce additionally seeks a declaration that, under the terms of the Bounce-KONG Short-Term Note, and as a result of KONG's default thereof for failure to make timely payment of amounts demanded, Bounce is entitled to declare all unpaid principal owed under the Bounce-KONG Short-Term Note plus all accrued attorney fees plus costs and attorney fees immediately due and payable.

Fifth Claim for Relief
Failure to Comply with C.R.S. § 7-80-408 Against KONG

229. Plaintiff incorporates the allegations in the forgoing paragraphs as if stated in full herein.

230. Pursuant to C.R.S. § 7-80-408, "Each member of a limited liability company has the right, . . . to inspect and copy at the expense of the requesting member the [certain] records of the limited liability company from time to time upon reasonable demand for any purpose reasonably related to the member's interest as a member of the limited liability company."

231. Bounce is a member of KONG.

232. On March 4, 2022, Bounce issued a written demand for such records from KONG.

233. KONG did not appropriately respond, nor did it provide all information reasonably requested.

234. For example, KONG failed to provide consolidated financial statements for 2021 prepared by management of KONG that is, on information and belief, currently being audited or reviewed by KONG's independent auditor.

235. Upon information and belief, this failure to respond was directed by Nelson/Orixas.

236. Additionally, Nelson testified at the preliminary injunction hearing in this case that he has restricted Markham's access to KONG's electronic database for business and financial records, "Foxpro." Nelson has determined, without Markham's consent, that Markham should not be provided the same access to KONG's records as Nelson.

237. Nelson and Markham are each Managers of KONG, appointed by KONG's Members.

238. Markham, to exercise his duties as a Manager of KONG appointed by Bounce, requires the same access to KONG records and information as Nelson.

239. Without Markham having the same access to information as Nelson, Bounce is unable to exercise its equal rights to manage KONG.

240. Based on the foregoing, Bounce respectfully requests that this Court enter preliminary and permanent Orders requiring KONG to provide Bounce with the information requested as required by C.R.S. § 7-80-408 and award Bounce its costs and attorneys' fees incurred in connection with KONG's failure to provide Bounce with the information reasonably requested by Bounce.

Prayer for Relief

WHEREFORE, based on the foregoing, Bounce respectfully requests that this Court rule in Bounce's favor on each of the above claims and enter judgment and appropriate orders in favor of Bounce as follows:

- a. For the declarations as set forth herein.
- b. For actual damages as set forth herein.
- c. An award of pre- and post-judgment interest as permitted by law.
- d. An award to Bounce of attorneys' fees, costs, and similar expenses as permitted by law and the parties' agreements.
- e. Any further relief the Court deems fair and just.

Plaintiff Demands Trial to a Jury on All Issues So Triable.

DATED: July 22, 2024.

Respectfully submitted,

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Certificate of Service

I hereby certify that on July 22, 2024, a true and accurate copy of the foregoing was served via Colorado Courts E-Filing on all counsel for all parties of record.

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