

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO

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CASE NUMBER: 2022CV32193

Case No. 2022CV32193

Courtroom 259

(Consolidated with  
Case No. 2022CV32209)

**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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**DEFENDANT THE KONG COMPANY LLC'S ANSWER TO BOUNCE'S FIRST AMENDED COMPLAINT, COUNTERCLAIMS AND JURY DEMAND**

Defendant The KONG Company, LLC (“KONG” or “Defendant”) by and through its undersigned counsel, hereby submits its Answer to Bounce Enterprises, LLC’s (“Bounce” or “Plaintiff”) First Amended Complaint (the “Complaint”) as follows:

**Introduction**

Plaintiff’s introductory section contains a narrative description of Plaintiff’s version of events, so no response is required. To the extent a response is required, the KONG denies the same in its entirety

**Parties, Jurisdiction, and Venue**

1. KONG is without sufficient knowledge or information as to the allegations set forth in paragraph 1 of the Complaint and therefore denies them.

2. KONG is without sufficient knowledge or information as to the allegations set forth in paragraph 2 of the Complaint and therefore denies them.

3. Admitted.

4. Admitted.

5. Admitted.

6. Admitted.

7. KONG admits that Defendant Freuh is an individual who resides in Colorado, but is without sufficient knowledge or information as to whether she resides in Jefferson County, Colorado and therefore denies the same.

8. Admitted.

9. Admitted.

**General Allegations**

10. Admitted.

11. Admitted.

12. KONG admits that Markham hired Frueh to work for Bounce prior to the formation of KONG. KONG is without sufficient knowledge or information as to remaining allegations in paragraph 12 and therefore denies the same.

13. Admitted, except that KONG denies the allegation to the extent it is inferring that Markham and Nelson contributed certain assets in their individual capacities.

14. KONG states that the KONG Operating Agreement speaks for itself and denies each and every allegation in paragraph 14 inconsistent with the terms of the agreement.

15. KONG states that the KONG Operating Agreement speaks for itself and denies each and every allegation in paragraph 15 inconsistent with the terms of the agreement.

16. Denied.

17. Denied.

18. KONG states that the KONG Operating Agreement speaks for itself and denies each and every allegation in paragraph 18 inconsistent with the terms of the agreement.

19. KONG is without sufficient information as to the allegations regarding admissions of Nelson and therefore denies them. KONG further states that the KONG Operating Agreement speaks for itself and denies each and every allegation in paragraph 19 inconsistent with the terms of the same.

20. KONG admits that Members of KONG executed the First Amendment to the KONG Operating Agreement on March 13, 2002. KONG further states that the First Amendment speaks for itself and denies each and every allegation inconsistent with the terms of the First Amendment.

21. KONG admits that Members of KONG executed the Second Amendment to the KONG Operating Agreement on December 5, 2002. KONG further states that the Second Amendment speaks for itself and denies each and every allegation in paragraph 21 inconsistent with the terms of the Second Amendment.

22. Admitted.

23. KONG states that the 2005 KONG Written Consent speaks for itself and denies each and every allegation inconsistent with the terms of the 2005 KONG Written Consent.

24. KONG is without sufficient information as to the allegations regarding admissions of Nelson and therefore denies them. KONG further states that the 2005 KONG Written Consent speaks for itself and denies each and every allegation in paragraph 24 inconsistent with the terms of the same.

25. KONG states that Nelson's testimony at the preliminary injunction hearing speaks for itself and denies each and every allegation inconsistent with said testimony.

26. KONG is without sufficient knowledge or information as to the allegations set forth in paragraph 26 of the Complaint and therefore denies them.

27. KONG is without sufficient knowledge or information as to the allegations set forth in paragraph 27 of the Complaint and therefore denies them.

28. KONG is without sufficient knowledge or information as to the remaining allegations set forth in paragraph 28 of the Complaint and therefore denies them.

29. KONG states that the 2005 KONG Written Consent speaks for itself and denies each and every allegation in paragraph 29 inconsistent with the terms of the 2005 KONG Written Consent.

30. KONG states that the 2005 KONG Written Consent speaks for itself and denies each and every allegation in paragraph 30 inconsistent with the terms of the 2005 KONG Written Consent.

31. KONG states that the 2005 KONG Written Consent speaks for itself and denies each and every allegation in paragraph 31 inconsistent with the terms of the 2005 KONG Written Consent.

32. KONG admits that the Members of KONG executed a Fourth Amendment to the KONG Operating Agreement on May 14, 2012. KONG states that the Fourth Amendment speaks for itself and denies each and every allegation inconsistent with the terms of the Fourth Amendment.

33. KONG admits that it entered into an Executive Employment Agreement with Frueh in September 2008. KONG further states that the Executive Employment Agreement speaks for itself and denies each and every allegation inconsistent with the terms of the Executive Employment Agreement.

34. KONG admits that Markham presented his plan to Members of KONG to devote his and Bounce's time to research and development in July 2018, and that minutes were memorialized at this meeting. KONG lacks sufficient knowledge and information to admit or deny the remaining allegations in paragraph 34 and therefore denies them.

35. Denied.

36. Admitted.

37. KONG admits that KREH was formed as a member-managed LLC to hold title to certain property owned by KONG. KONG denies the remaining allegations in paragraph 37.

38. KONG admits that title to three of its properties, including the Long Beach Property, were transferred to KREH in January 2019. KONG denies the remaining allegations in paragraph 38.

39. KONG is without sufficient knowledge or information as to the allegations set forth in paragraph 39 of the Complaint and therefore denies them.

40. Admitted.

41. KONG admits that by 2019, monthly capital distributions to Bounce and Orixas had been increased to \$85,000, and that Markham and Nelson were having discussion relating to distributions. KONG is without sufficient knowledge or information to admit or deny the remaining allegations in paragraph 41 and therefore denies them.

42. KONG admits that KONG, Bounce, Orixas, and Frueh executed the Frueh 2019 Amendment, effective January 1, 2019. KONG further states that the Frueh 2019 Amendment speaks for itself and denies each and every remaining allegation in paragraph 42 inconsistent with the terms of the agreement.

43. KONG admits that Members of KONG executed the July 1, 2019 Action by Written Consent. KONG further states that the July 1, 2019 Action by Written Consent speaks for itself and denies each and every allegation inconsistent with its terms.

44. KONG admits that the KONG/KVP Licensing Agreement, KONG/KVP Option Agreement, KONG/Bounce Manufacturing Agreement, and KONG/Bounce Distribution Agreement were executed on or after July 17, 2019. KONG further states that these agreements speak for themselves and denies each and every allegation inconsistent with the terms of each agreement.

45. KONG admits that in 2019 Markham requested the Company to increase distributions so as to provide Bounce with \$24MM in non-tax distributions over a 5-year period. KONG further admits that in August 2019, Mr. Nelson circulated a proposed plan aimed at accomplishing Markham's request, and that Mr. Markham provided a written response to the email. KONG denies the allegations in paragraph 45 to the extent inconsistent with the referenced emails. KONG further denies the allegations in paragraph 45 to the extent they infer the Company was obligated to provide Bounce with its requested \$24MM in distributions.

46. KONG admits that KONG's sunset provision was extended to 2035, but otherwise deny the allegations in paragraph 46.

47. KONG admits that by around the end of 2019, both Bounce and Orixas had received a \$6MM distribution. KONG denies the remaining allegations in paragraph 47.

48. Admitted.

49. KONG admits that Orixas and/or Nelson received distributions in the same manner as Bounce, and that Orixas and/or Nelson elected to lend that money back to KONG, which would have resulted in Nelson/Orixas having a larger loan balance than Bounce. KONG denies that Orixas and/or Nelson received equal distributions given that Orixas was entitled to 50% of the Company's profits and Bounce was entitled to 30% of the Company's profits.

50. KONG admits that Matt Sterk stated in an email to Mr. Markham that Bounce had received distributions "per the funding agreement the parties agreed to in 2019." KONG states that Matt Sterk's written correspondence speaks for itself and denies each and every allegation inconsistent with the written correspondence. Finally, KONG is without sufficient knowledge or

information as to the remaining allegations set forth in paragraph 50 of the Complaint and therefore denies them.

51. KONG is without sufficient knowledge or information as to the remaining allegations set forth in paragraph 51 of the Complaint and therefore denies them.

52. KONG admits that the parties executed the Frueh 2021 Amendment, effective July 1, 2021, and admits that the KONG members memorialized a July 1, 2021 KONG Action by Written Consent. KONG additionally states that the Frueh 2021 Amendment and July 1, 2021 KONG Action by Written Consent speak for themselves and denies each and every allegation inconsistent with the terms of either document. Finally, KONG is without sufficient knowledge or information to admit or deny the remaining allegations in paragraph 52.

53. Denied.

54. KONG admits there is a document referred to as an Amended and Restated Secured Master Promissory Note that was signed by Nelson, which provided an effective date of August 15, 2020. KONG otherwise denies the allegations in paragraph 54.

55. KONG admits that there is a similar Amended and Restated Secured Promissory Note that was signed by Frueh, which provided an effective date of December 31, 2020. KONG otherwise denies the allegations in paragraph 55.

56. Denied.

57. KONG is without sufficient information or knowledge to admit or deny the allegations in paragraph 57 and therefore denies them.

58. Denied.

59. KONG admits that the Amended and Restated Secured Promissory Notes contained similar terms, including the language quoted in paragraph 59. KONG denies the allegations in paragraph 59 to the extent they infer that the referenced Promissory Notes were binding or valid agreements.

60. Denied.

61. KONG is without sufficient information or knowledge to admit or deny the allegations in paragraph 61 and therefore denies them.

62. KONG admits that the parties mutually agreed to terminate the Triangle Agreements.

63. Denied.

64. KONG states that the testimony of Frueh and Nelson speaks for itself and denies each and every allegation inconsistent with their testimony.

65. Denied.

66. Admitted.

67. KONG admits that Bounce continued its ongoing manufacture and distribution of products with the KONG logo after November 2021. KONG denies the remaining allegations in paragraph 67.

68. Admitted, except that KONG is without sufficient information or knowledge to admit or deny who initially proposed to sell KREH property so that the proceeds could be loaned to KONG for operations and, therefore, denies the allegation that it was Nelson who initially proposed the idea.

69. KONG admits that the Members of KREH signed an Action by Written Consent of the Members of KREH on or around November 15, 2021. KONG states that the KREH Consent speaks for itself and denies each and every allegation inconsistent with the terms of the KREH Consent.

70. KONG states that the KREH Operating Agreement speaks for itself and denies each and every allegation inconsistent with the terms of the same.

71. KONG states that the KREH Operating Agreement speaks for itself and denies each and every allegation inconsistent with the terms of the same.

72. KONG admits that the Long Beach Property sold on or around December 15, 2021. KONG is without sufficient knowledge or information to admit or deny allegations relating to Bounce's California and federal taxes and therefore denies them. KONG denies the remaining allegations.

73. Denied.

74. KONG admits that it has been paying interest to KREH relating to the referenced loan.

75. KONG admits that it provided KREH approximately \$6.5MM of the loaned funds so those funds could be used by Bounce and Orixas for the payment of California state taxes.

76. KONG admits the allegations in paragraph 76, except it lacks sufficient information and understanding to admit or deny whether Frueh had any tax liability resulting from the sale of the Long Beach Property and, therefore, denies the same.

77. Denied.

78. Admitted, but deny the allegations to the extent they infer such transfers were made improperly or without Mr. Markham's consent.

79. KONG admits that the Company made a \$10MM payment to Orixas/Nelson and \$4MM to Frueh from their respective short-term note accounts. KONG denies the remaining allegations in paragraph 79.

80. Denied.

81. Denied.

82. KONG admits it sent a letter a letter to counsel for Bounce on or around February 23, 2022. KONG states that the letter speaks for itself and denies each and every allegation in paragraph 82 inconsistent with the language of the same.

83. Denied.

84. KONG admits that its counsel (Mr. Dallmann) prepared formal documents, at Mr. Markham's request and direction, for execution by the parties. KONG denies the remaining allegations in paragraph 84.

85. KONG admits it did not sign the proposed agreements provided by Bounce/Markham. KONG denies the remaining allegations in paragraph 85.

86. Denied.

87. KONG admits that on or around March 4, 2022, it received a letter from Bounce requesting documents from KONG. The remaining allegations in paragraph 87 are denied.

88. KONG admits that on or around March 10, 2022, it caused a cease and desist letter to be sent to Bounce relating to Bounce's use of KONG's intellectual property. The remaining allegations in paragraph 88 are denied.

89. KONG states that the 2005 KONG Written Consent speaks for itself and denies each and every allegation in paragraph 89 inconsistent with the terms of the written consent.

90. KONG admits that on March 14, 2022, Nelson sent Markham an email regarding a non-binding LOI relating to a new warehouse lease for KONG's Ohio operations.

91. KONG admits the allegations in paragraph 91, except to the extent they infer that KONG had a binding obligation to move into the new building.

92. Denied.

93. Denied.



94. Denied.

95. Denied.

96. KONG admits that on or around March 14, 2022, Nelson informed Markham that KONG was considering bids to install a new HVAC system at KONG's facility in Golden, Colorado. KONG denies the remaining allegations in paragraph 96.

97. Denied.

98. Denied.

99. Denied.

100. Denied.

101. KONG admits that Bounce filed a lawsuit on March 18, 2022. KONG denies the remaining allegations in paragraph 101.

102. KONG admits that Nelson/Orixas returned the \$10MM payment, and that Bounce was not advised of the return until after the lawsuit. KONG denies the allegation to the extent it infers that the payment was made following, or in light of, the filing of the lawsuit. Rather, Bounce waited over a week to advise KONG that the lawsuit was filed, and Nelson/Orixas returned the \$10MM payment before learning that the lawsuit had been filed.

103. KONG admits that it returned approximately \$10MM to KREH, and that KREH then distributed those funds to Bounce and Orixas for the payment of taxes, and KONG further admits the Frueh did not receive a tax distribution from KREH. KONG denies the remaining allegations in paragraph 103.

104. KONG admits that the \$5,815,000 from KREH to Bounce occurred after March 18, 2022. KONG is without sufficient information to admit or deny the allegations in paragraph 104 and on that basis denies them.

105. Admitted.

106. KONG admits that Frueh subsequently received a payment of \$2.8MM. KONG denies the remaining allegations in paragraph 106.

107. KONG admits that Frueh subsequently received a payment of \$2.8MM. KONG denies the remaining allegations in paragraph 106.

108. Denied.

109. KONG admits that the relevant financial transactions occurred, but deny the characterization thereof.

- 110. Denied.
- 111. Admitted.
- 112. Denied.
- 113. Denied.
- 114. Denied.
- 115. Denied.
- 116. Denied.

**First Claim for Relief**  
**Breach of Contract (KONG Operating Agreement and Related Governance Documents)**  
**Against Nelson and Orixas**

117. KONG incorporates its answers to the allegations set forth in the preceding paragraphs as if fully set forth herein.

- 118. This claim is not made against KONG and so no response is required.
- 119. This claim is not made against KONG and so no response is required.
- 120. This claim is not made against KONG and so no response is required.
- 121. This claim is not made against KONG and so no response is required.
- 122. This claim is not made against KONG and so no response is required.
- 123. This claim is not made against KONG and so no response is required.
- 124. This claim is not made against KONG and so no response is required.
- 125. This claim is not made against KONG and so no response is required.
- 126. This claim is not made against KONG and so no response is required.
- 127. This claim is not made against KONG and so no response is required.
- 128. This claim is not made against KONG and so no response is required.
- 129. This claim is not made against KONG and so no response is required.

130. This claim is not made against KONG and so no response is required.

131. This claim is not made against KONG and so no response is required.

132. This claim is not made against KONG and so no response is required.

133. This claim is not made against KONG and so no response is required.

**Second Claim for Relief**  
**Breach of Contract (KREH Operating Agreement)**  
**Against Nelson and Orixas**

134. KONG incorporates its answers to the allegations set forth in the preceding paragraphs as if fully set forth herein.

135. This claim is not made against KONG and so no response is required.

136. This claim is not made against KONG and so no response is required.

137. This claim is not made against KONG and so no response is required.

138. This claim is not made against KONG and so no response is required.

139. This claim is not made against KONG and so no response is required.

140. This claim is not made against KONG and so no response is required.

141. This claim is not made against KONG and so no response is required.

142. This claim is not made against KONG and so no response is required.

143. This claim is not made against KONG and so no response is required.

144. This claim is not made against KONG and so no response is required.

145. This claim is not made against KONG and so no response is required.

**Third Claim for Relief**  
**Breach of Contract (KONG Operating Agreement and other governance documents)**  
**Against KONG**

146. KONG incorporates its answers to the allegations set forth in the preceding paragraphs as if fully set forth herein.

147. The allegations in paragraph 147 are legal conclusions to which no response is required. However, to the extent a response is deemed required, denied.

148. Admitted.

149. Denied.

150. The allegations in paragraph 150 are legal conclusions to which no response is required. However, to the extent a response is deemed required, denied.

151. Denied.

152. Denied.

153. Denied.

154. KONG states that 2005 Written Consent speaks for itself and denies each and every allegation that is inconsistent with its terms.

155. KONG states that the KONG Operating Agreement speaks for itself and denies each and every allegation that is inconsistent with its terms.

156. KONG states that the KONG Operating Agreement speaks for itself and denies each and every allegation that is inconsistent with its terms.

157. KONG states that the KONG Operating Agreement speaks for itself and denies each and every allegation that is inconsistent with its terms.

158. Denied.

159. Denied.

**Fourth Claim for Relief**  
**Breach of Contract (KREH Operating Agreement)**  
**Against KREH**

160. KONG incorporates its answers to the allegations set forth in the preceding paragraphs as if fully set forth herein.

161. This claim is not made against KONG and so no response is required.

162. This claim is not made against KONG and so no response is required.

163. This claim is not made against KONG and so no response is required.

164. This claim is not made against KONG and so no response is required.

165. This claim is not made against KONG and so no response is required.
166. This claim is not made against KONG and so no response is required.
167. This claim is not made against KONG and so no response is required.
168. This claim is not made against KONG and so no response is required.
169. This claim is not made against KONG and so no response is required.
170. This claim is not made against KONG and so no response is required.

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

171. KONG incorporates its answers to the allegations set forth in the preceding paragraphs as if fully set forth herein.

172. Denied.
173. Denied.
174. Denied.
175. Denied.
176. Denied.
177. Denied.
178. Denied.
179. Denied.
180. Denied.
181. Denied.
182. Denied.
183. Denied.

184. Based on the foregoing, KONG respectfully requests that this Court deny the relief requested.

**Sixth Claim for Relief**  
**Breach of Implied Duty of Good Faith and Fair Dealing**  
**Against Nelson and Orixas**

185. KONG incorporates its answers to the allegations set forth in the preceding paragraphs as if fully set forth herein.

186. This claim is not made against KONG and so no response is required.

187. This claim is not made against KONG and so no response is required.

188. This claim is not made against KONG and so no response is required.

189. This claim is not made against KONG and so no response is required.

190. This claim is not made against KONG and so no response is required.

191. This claim is not made against KONG and so no response is required.

192. This claim is not made against KONG and so no response is required.

193. This claim is not made against KONG and so no response is required.

**Seventh Claim for Relief**  
**Declaratory Judgment (Frueh's Rights to KONG & KREH)**  
**Against KREH, KONG, and Frueh**

194. KONG incorporates its answers to the allegations set forth in the preceding paragraphs as if fully set forth herein.

195. Denied.

196. KONG states that Frueh's Executive Employment Agreement, as amended, speaks for itself and denies each and every allegation inconsistent with the terms of the agreement.

197. KONG admits that in 2008, Frueh was granted a 10% interest in the profits of KONG. KONG denies the allegations in paragraph 197 to the extent inconsistent with the terms Ms. Frueh's employment agreement.

198. KONG states that Frueh's 2008 Employment Agreement speaks for itself and denies each and every allegation inconsistent with the terms of the agreement.

199. KONG admits that in 2009, Mr. Frueh's share of the Company's profits was increased to 20%. KONG denies the allegations in paragraph 199 to the extent they are inconsistent with the terms of 2019 Amendment to her employment agreement and any other corporate documents relating to her compensation and status as a member of KONG.

200. KONG admits that it entered into an amendment to the 2008 Employment Agreement with Frueh, effective January 1, 2019. KONG states that the Frueh 2019 Amendment speaks for itself and denies each and every allegation inconsistent with the terms of the agreement.

201. Admitted.

202. KONG states that the 2019 KONG Action by Written Consent speaks for itself and denies each and every allegation inconsistent with the terms of the written consent.

203. KONG states that the Frueh 2021 Amendment speaks for itself and denies each and every allegation inconsistent with the terms of the amendment.

204. KONG states that the Frueh 2021 Amendment speaks for itself and denies each and every allegation inconsistent with the terms of the amendment.

205. KONG states that the July 1, 2021 KONG Action by Written Consent speaks for itself and denies each and every allegation inconsistent with the terms of the written consent.

206. Denied.

207. Denied.

208. KONG denies the allegations in paragraph 208 on the basis that the Frueh 2019 Amendment states that the KONG “Operating Agreement may not be amended without [Frueh’s] vote, approval or consent if any such amendment adversely affects” her.

209. Denied.

210. KONG is without sufficient knowledge or information to admit or deny the allegations in paragraph 210 and therefore denies them.

211. KONG is without sufficient knowledge or information to admit or deny the allegations in paragraph 211 and therefore denies them.

212. KONG is without sufficient knowledge or information to admit or deny the allegations in paragraph 212 and therefore denies them.

213. KONG respectfully requests that this Court deny all relief requested by Bounce.

**Eighth Claim for Relief**  
**Injunctive Relief**  
**Against Orixas, Nelson, and KONG**

214. KONG incorporates its answers to the allegations set forth in the preceding paragraphs as if fully set forth herein.

215. The allegations in paragraph 215 are legal conclusions to which no response is required.

216. Denied.

217. Denied.

218. Denied.

219. Denied.

220. Denied.

221. KONG respectfully requests that this Court deny all relief requested by Bounce.

**Ninth Claim for Relief**  
**Failure to Comply with C.R.S. § 7-8-408**  
**Against Orixas, Nelson, and KONG**

222. KONG incorporates its answers to the allegations set forth in the preceding paragraphs as if fully set forth herein.

223. The allegations in paragraph 223 are legal conclusions to which no response is required.

224. Admitted.

225. Admitted.

226. Denied.

227. Denied.

228. Denied.

229. KONG states that Nelson's testimony speaks for itself and denies each and every allegation inconsistent with that testimony.

230. Admitted.

231. Denied.

232. Denied.

233. KONG respectfully requests that this Court deny all relief requested by Bounce.



### **Prayer for Relief**

KONG denies that Plaintiff is entitled to any of the relief requested in its “WHEREFORE” paragraph, including the lettered subparagraphs that follow.

### **General Denial**

KONG denies each allegation not expressly and specifically admitted above.

### **Jury Demand**

KONG requests a jury on all claims triable to a jury.

### **KONG’S AFFIRMATIVE DEFENSES**

1. Plaintiff has failed to state a claim upon which relief may be granted.
2. Plaintiff lacks standing to assert its claims against KONG.
3. KONG has fully discharged all contractual obligations to Plaintiff under the terms and conditions of all applicable statutes, regulations, rules, and contracts.
4. Plaintiff’s claims may be barred, in whole or in part, by the doctrines of waiver, laches, estoppel, acquiescence, course of performance, course of dealing, modification, assumption of risk, novation, accord and satisfaction, or by subsequent agreement.
5. Plaintiff’s claims are barred, in whole or in part, by a lack of reasonable and/or justifiable reliance.
6. Plaintiff’s claims and/or damages re barred in whole or in part because of Plaintiff’s own actions, inactions, and/or omissions or by those of third parties.
7. Plaintiff’s claims are barred, limited, or set off, in whole or in part, by the doctrine of unjust enrichment.
8. KONG is not the cause of Plaintiff’s alleged damage, if any, and/or Plaintiff’s alleged damages are the result of an intervening or superseding cause.
9. Plaintiff’s claims are barred, in whole or in part, by Plaintiff’s failure to mitigate damages.
10. Plaintiff’s claims are barred, in whole or in part, by the doctrines of unclean hands and/or *in pari delicto*.
11. Plaintiff’s claims are barred, in whole or in part, by Plaintiffs’ lack of good faith.

12. Plaintiff's claims may be barred, in whole or in part, by KONG's lack of actual knowledge of a material fact, and/or by mistake of fact.

13. Plaintiff's claims are barred, in whole or in part, due to its own conduct and breaches of KONG's Operating Agreement.

14. Plaintiff's claims are barred, in whole or in part, by misrepresentation and/or fraudulent inducement.

15. Plaintiff's claims may be barred, in whole or in part, by the economic loss doctrine.

16. Plaintiff's claims may be barred, in whole or in part, by Plaintiff's own material breach, failure of a condition precedent, or failure of consideration.

17. Plaintiff's damages, if any, are subject to set off.

18. Plaintiff's claims are barred, in whole or in part, by modification of agreement through express mutual consent and/or inferred by conduct and course of performance.

19. Plaintiff's claims may be substantially groundless, frivolous, and vexatious, entitling KONG to an award of its reasonable attorneys' fees and costs.

20. KONG reserves the right to supplement or withdraw these defenses as additional information becomes available through mandatory disclosures and discovery.

### **COUNTERCLAIMS**

For its counterclaims against Plaintiff Bounce Enterprises, LLC, Defendant and Counterclaimant The KONG Company, LLC alleges as follows:

### **PARTIES**

1. The KONG Company, LLC ("KONG" or "Company") is a Colorado limited liability company with its principal place of business located at 16191-D Table Mountain Parkway, Golden, Colorado 80403.

2. Bounce Enterprises LLC is a Delaware limited liability company with its principal place of business located at 16191 Table Mountain Parkway, Golden Colorado 80403.

### **JURISDICTON AND VENUE**

3. Pursuant to Colo. Rev. Stat. § 13-1-124, jurisdiction is appropriate in this Court because Bounce and Mr. Markham transact business in Colorado and the alleged tortious acts were committed within the state of Colorado.

4. Pursuant to Colo. R. Civ. P. 98(c)(1), venue is appropriate in this judicial district.

### **FACTUAL ALLEGATIONS**

5. In connection with its business operations, KONG acquired several buildings and warehouses. By January 2019, KONG owned three properties in the U.S., which were: (1) 16191 Table Mountain Parkway, Golden, Colorado 80403 (the “Colorado Property”), (2) 129 Marc Drive, Cuyahoga Falls, Ohio (the “Ohio Property”) and (3) 3815 Schaufele Avenue, Long Beach, California (the “California Property”) (collectively, “the Properties”).

6. For many years prior to 2019, Mr. Markham had been promoting the idea that KONG should transfer title of its real estate holdings into a separate entity to benefit and protect the Company. Specifically, Mr. Markham, along with his third-party advisors, had advised and represented to KONG that transferring the Properties to a separate entity would provide KONG additional liability protection and potential tax benefits, as well as a source of cash in case of emergencies.

7. Based on Mr. Markham’s advice and recommendations the titles to the Properties were transferred to KONG Real Estate Holdings (“KREH”). KREH did not pay any consideration for the Properties.

8. Instead, at the time of the transfers, it was KONG’s understanding and expectation that the purpose of the transfers was to benefit KONG, and that KONG would not be negatively impacted by the transfers.

9. After the transfers, KONG entered into lease agreements with KREH to continue using the Properties in connection with its operations and made rent payments pursuant to those lease agreements. However, from a practical standpoint, nothing changed after the transfer of the Properties. KONG continued to manage and maintain the Properties, as well as manage all aspects of KREH's ownership of the Properties.

10. At the time of the transfers, KONG owned both the Colorado Property and the Ohio Property outright, but had an approximately \$12MM mortgage on the California Property.

11. Later in 2019, Mr. Markham requested that KONG provide him an additional \$24MM in distributions over the next 5 years in connection with his KSP Plan. KONG agreed to provide Bounce increased distributions as an "aspirational goal" but made clear that it was not promising or guaranteeing it could provide Bounce the full amount of its requested increased distributions. (KONG had no idea that early in 2020 there would be a global pandemic, which would have an unprecedented impact.)

12. In connection with trying to provide Bounce its requested increased distributions, KONG worked with Wells Fargo to refinance the Properties. As a result, KREH took out a \$23MM loan with Wells Fargo secured, in part, by mortgages on all three of the Properties. Of those loan proceeds, approximately \$11MM was used to pay off the existing mortgage on the California Property (which was still held by KONG even though title had been transferred to KREH) and the remaining \$12MM was used to provide Bounce and Orixas each a \$6MM distribution from KONG.

13. Along with refinancing the Properties to provide Orixas and Bounce each a \$6MM distribution, KONG's members also agreed to modify the Company's prior monthly distribution policy. Specifically, beginning in May 2020, the Company agreed that the members (Markham,

Nelson and Decker) could take monthly distributions of \$375,000 from their short term loans. This distribution would not affect the distribution for monthly taxes agreed in August 2019.

14. The primary purpose of adopting this distribution policy was to ensure that over the course of the year each Member continued to receive equal distributions (based on their pro rata share of the Company's net profits) and allow each member the opportunity to withdraw \$375,00 per month from their short-term note account. Bounce took the \$375,000 cash each month while Orixas and Ms. Decker allowed their loan balances to increase. Ms. Decker and Orixas realized that in order for Bounce to continue to receive payments, they could not also drain the company's cash.

15. Shortly after the Company switched to this distribution plan the Company was faced with navigating the challenges of the worldwide COVID-19 pandemic. As a result, the Company faced significant cash-flow issues as a result of extraordinary large sales volumes, inventory disruptions, and personnel health issues. The chaos was further exacerbated with other massive financial challenges such as Brexit and the worldwide supply chain disruptions. In fact, to help ensure the financial stability of the Company, Orixas and Decker stopped taking any cash distributions, including their tax distributions.

16. In spite of the financial chaos, KONG was able to continue the cash payments to Bounce through September 2021, a total of \$4,500,000. All the while, KONG was in short-term trouble with cash primarily due to inventory issues caused by the Covid, Brexit and the unpredictable supply chain issues. KONG tried to refinance some of the Properties but the cash was not enough. Mr. Nelson had called Mr. Markham stating that he and Mr. Markham should come up with \$5MM each, and with the refinance KONG could weather the cash storm. Mr. Markham acknowledged the problem, but stated he could not help. Markham and Nelson agreed

that the sale of the California Property was the only option to consider. In order to maintain the financial stability of the Company through this turbulent period, the Company advised Mr. Markham it needed to suspend providing Bounce its \$375,000 monthly payment. Mr. Nelson and Mr. Markham also agreed to sell the California Property so that the cash proceeds from the sale could be used to cover the financial needs of KONG.

17. In November 2021, KREH sold the California Property, which resulted in approximately \$42MM in net proceeds before tax. That \$42MM was then “loaned” to KONG so that KONG could use the funds to pay the real estate tax, repay a \$10 MM loan from a vendor, pay off the line of credit, and pay the AP balance.

18. However, just a few months after Bounce agreed to sell the California Property and allow KONG to use the proceeds, Bounce filed a lawsuit against KONG – including a request to have the Company placed in receivership – based on allegations that the Company had no right to the \$42MM and that KONG was using those funds without Mr. Markham’s approval and consent. Specifically, Bounce alleged that KONG used a portion of those funds (\$14MM) to pay distributions to Orixas and Ms. Decker, but not Bounce.

19. Bounce filed its lawsuit even though – prior to the Complaint being filed – KONG had explained to Bounce that the purpose of the payments to Orixas and Ms. Decker was to bring the members’ respective loan balances closer to parity. Moreover, after Bounce raised concerns with those payments, both Orixas and Ms. Decker voluntarily agreed to return those funds before Bounce’s Complaint was filed.

20. Bounce eventually agreed to dismiss its Complaint without prejudice, and KONG provided Bounce with further information and documentation demonstrating that (1) Mr. Markham had consented to KONG’s use of the proceeds from the sale of the California Property

and (2) the purpose of the distributions to Orixas and Ms. Decker was to help bring the members' loan balances closer to parity. In other words, the Company was not providing Orixas and Ms. Decker distributions, but not Bounce; rather Bounce did not receive a distribution at that time because it had already received equivalent distributions.

21. Nonetheless, Bounce eventually refiled its Complaint in August 2022. Moreover, since refiled its Complaint, Bounce has continued to allege the Company is failing to provide distributions consistent with KONG's Operating Agreement. And Bounce has continued to take the position that KREH has no obligation to continue to use and manage the Properties for the benefit of KONG.

**FIRST COUNTERCLAIM FOR RELIEF**  
(Declaratory Judgment and Accounting)

22. The foregoing allegations are incorporated herein by reference.

23. Pursuant to the terms of KONG's Operating Agreement, KONG has certain duties and obligations relating to maintaining capital accounts as well as managing and providing distributions to the Company's Members.

24. Numerous disputes have arisen amongst the Members of KONG relating to the Company's management and handling of distributions, and the amounts owed to each Member, including how the transfer of the Properties to KREH impacts KONG's finances and the calculation of distributions.

25. Accordingly, KONG seeks a claim for an accounting to establish the amounts owed to each Member, and a judgment declaring the current amounts each Member is entitled to, whether in the form of retained equity, loan balance or through cash distribution.

**WHEREFORE**, The KONG Company respectfully requests entry of judgment in their favor and against Defendant as follows:

- A. For an accounting as described above;
- B. For the declarations described above;
- C. For all allowable attorney fees and costs; and
- D. For such other relief as the Court deems just and proper.

DATED: March 29, 2024

Respectfully submitted,

*/s/ Joseph C. Daniels*

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 29, 2024, a true and correct copy of the foregoing was filed via the Colorado Courts E-Filing system on the following:

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