DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO 1437 Bannock Street Denver, Colorado 80202 (303) 660-2300	DATE FILED August 30, 2024 2:49 PM FILING ID: 9191D0989E140 CASE NUMBER: 2022CV32193
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.	**▲ COURT USE ONLY ▲**

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MOTION FOR PARTIAL SUMMARY JUDGMENT	

Bounce Enterprises LLC as the successor by conversion to Bounce, Inc. ("Bounce"), Bounce, Inc., and Joseph Markham ("Markham") hereby file this Motion for Partial Summary Judgment under C.R.C.P. 56 and seek judgment in their favor as set forth herein on Bounce's Second Claim for Relief as stated in Bounce's Second Amended Complaint, for declaratory judgment regarding the rights of Kathy Decker Freuh ("Decker") in The KONG Company, LLC

("KONG") and on the Third, Sixth, and Seventh Claims for Relief set forth in the Second Amended Complaint filed jointly by KONG, Orixas, LLC ("Orixas"), and Decker (collectively, "the KONG Parties"), regarding Decker's rights in KONG and, on Bounce's Fourth Claim for Relief stated in Bounce's Second Amended Complaint, regarding KONG's breach of the promissory note between KONG and Bounce, and in support thereof, state as follows.

C.R.C.P. § 121, 1-15(8) Conferral: Counsel for Bounce has conferred with counsel for the KONG Parties regarding the relief requested herein. Decker and KONG oppose this Motion. Nelson and Orixas take no position.

Introduction

There are two issues in this case that are clear-cut, based on the terms of undisputed written agreements between the parties, and thus ripe for determination by the Court: (1) the rights Decker has (and does not have) in KONG and KREH; and (2) KONG's ongoing breach of the terms of the promissory note between KONG and Bounce.

Pursuant to C.R.C.P. 56, Defendants respectfully request that the Court grant partial summary judgment in Bounce's favor on two claims. First, the plain language of the contracts between the parties sets forth the limited rights Decker has in KONG and confirms that she has no rights in KREH. The disputes on this point should be resolved based only on the Court's review of the plain terms of the undisputed binding agreements. Adjudication of this issue will resolve multiple claims asserted in this action. Second, as a matter of law based on undisputed facts, KONG breached the terms of the short-term promissory note between KONG and Bounce. As a result, Defendants seek summary judgment on Bounce's Fourth claim for relief for breach of the promissory note.

First, Bounce's Second Claim for Relief in its Second Amended Complaint and KONG's Third, Sixth, and Seventh Claims for Relief in its Second Amended Complaint are all predicated on the scope and type of Decker's interests in KONG and KREH. Decker is an executive employee at KONG. Over time she has been extensively compensated including, starting in 2008, compensation based on percentages of KONG's profits. Decker and KONG entered into a series of employment agreements that ultimately granted her a 25% profits interest in KONG's distributable ordinary profits and a 10% interest in net proceeds from a future sale of KONG above a certain target as a non-voting member of KONG. Contravening unambiguous provisions of her written employment agreements with KONG, Decker now seeks to transform her limited profits interest in KONG into a 25% full equity and voting membership in KONG and has filed claims against Bounce (rather than the proper party, KONG) seeking declarations of her purported membership in KONG. Also, Decker admits that she is not a member of KREH, but attempts to bootstrap her limited profits interest in KONG into rights to KREH's profits. Decker's rights and interests in KONG and KREH are defined by the terms of undisputed written agreements and are ripe for the Court's adjudication as a matter of law. Accordingly, Bounce requests that the Court review the contracts and determine that Decker: (1) holds a 25% interest in KONG's distributable profits; (2) holds a 10% interest in net proceeds from a sale of KONG above the threshold amount; (3) does not hold any equity and/or voting interest in KONG; and (4) that Decker's interest in KONG does not extend to KREH.

Second, Bounce's Fourth Claim for Relief in its Second Amended Complaint relates to KONG's breach of the terms of a promissory note between Bounce as the lender and KONG as the borrower (the "Demand Note"). The Demand Note obligates KONG to pay Bounce the

principal amount KONG owes to Bounce within 30 days of written demand for payment. Bounce demanded payment over a year ago, yet KONG continues to refuse to make principal payments to Bounce (despite having informed Bounce that it has paid off other lenders and has significant cash flow). Further, KONG refuses to pay Bounce the profit distributions to which it is entitled, instead, deferring payment by adding Bounce's profit distributions to the principal balance of the Demand Note. The Demand Note is not KONG's "piggy bank" for KONG to use to defer payments due to Bounce. Bounce demanded that KONG stop adding Bounce's distributions to the principal balance of the Demand Note, but KONG continues to withhold Bounce's profit distributions and add them to the balance of the Demand Note. There is no dispute that KONG has violated the terms of the Demand Note and, as a result, Bounce is entitled to judgment in its favor as a matter of law.

Undisputed Facts

KONG's Ownership:

1. On or about October 5, 2000, the then members of KONG, Bounce, Inc. and the Nelson-Gessner Family 1990 Irrevocable Trust (the "Nelson Trust"), executed an Operating Agreement for KONG. (Ex. 1 - December 23, 2022 Second Amended Complaint filed by the KONG Parties ("KONG SAC"), ¶13; Ex. 2 - July 22, 2024 Second Amended Complaint filed by Bounce ("Bounce SAC"), ¶13; Ex. 3, ¶4). John Nelson ("Nelson") and Joseph Markham ("Markham") are the co-managers of KONG.

2. On October 5, 2000, Nelson and Markham, as Managers of KONG, authorized issuance of 6,000 units of membership in KONG to Bounce, Inc. and 4,000 units of membership in KONG to the Nelson Trust. (Exs. 3, ¶5; 3-B).

3. On December 5, 2002, Nelson and Markham, as Managers of KONG, authorized issuance of an additional 2,000 units of membership in KONG to the Nelson Trust. (Exs. 3, 3-B). Thus, as of December 5, 2002, KONG's membership units were owned 50/50 by Bounce and the Nelson Trust (which later transferred its interests to Orixas). (Exs. 1, ¶¶16-17; 3, ¶6).

4. In 2008, Decker and KONG entered into an agreement (the "2008 Decker EEA") whereby Decker would be compensated for her employment with KONG by a salary and bonus of 10% of KONG's "Net Profit." (Ex. 1, ¶¶ 32-33; Ex. 2, ¶ 33; Exs. 3, ¶7, 3-C).

5. In 2012, Decker and KONG entered an agreement to amend the 2008 Decker EEA such that, under certain circumstances, Decker would receive a percentage of net proceeds realized from a sale of KONG. (Ex. 2, ¶ 33; Exs. 3, ¶8, 3-D).

6. In 2019, KONG and Decker engaged in discussions and negotiations regarding changes to Decker's compensation structure with KONG. (Ex. 3, ¶9).

7. Ultimately, in 2019, KONG agreed to compensate Decker with payment of 20% of KONG's distributable profits, equivalent to non-voting membership in KONG. (Ex. 3, ¶10).

8. On May 22, 2019, Nelson sent Markham an email confirming that Decker would have no voting rights in KONG. (Exs. 3, ¶11, 3-E).

9. Nelson, in his May 22, 2019 email, stated:

> Joe
>
> This seems correct. We (esp Scott) said that the profits interest is the same as ownership except for no voting rights. Of course her profits interest should be part of her estate.
>
> John

(Ex. 3-E).

10. In June 2019, Decker and KONG entered another written agreement, entitled the

"2019 AMENDMENT TO EXECUTIVE EMPLOYMENT AGREEMENT AND GRANT OF PROFITS INTEREST," (the "2019 Amendment") amending the 2008 Decker EEA to grant Decker a 20% interest in KONG's distributable profits and 10% interest in company sale proceeds above a certain target. (Ex. 1, ¶ 40; Ex. 2, ¶ 43; Exs. 3, ¶12, 3-F).

11. The 2019 Amendment provides:

2. The Company hereby grants to Executive an equity interest in the Company ("Profits Interest") which the parties agree is a "profits interest" for purposes of federal income tax laws and is intended to satisfy the safe harbor provisions of IRS Rev Proc. 93-27. Executive has no initial capital account with respect to the Profits Interest. The parties agree that Executive is admitted as an additional member of the Company. Executive agrees and acknowledges that she is a member of the Company and bound by (and has the rights and obligations of a member in) the Company's Operating Agreement, as amended and as further amended hereby **("Operating Agreement").**

Executive has no voting rights with respect to the Profits Interest, and therefore any requirement for member vote, approval or consent shall not include Executive in any such vote, approval or consent. Notwithstanding the foregoing, the Operating Agreement may not be amended without Executive's vote, approval or consent if any such amendment adversely affects Executive.

Notwithstanding anything in the Operating Agreement to the contrary, Executive may transfer her Profits Interest: (a) on her death to her estate, or to one or more of her issue or to a trust for their benefit, or (b) on her incapacity to a trust for her benefit or for the benefit of one or more of her issue. Nothing in Section 6.1.2 of the Operating Agreement shall apply in the event of any such Transfer by Executive.

The Profits Interest means that:

- From and after termination of Executive's employment with the Company, voluntarily or involuntarily, Executive shall be allocated 20% of the taxable income of the Company and receive 20% of the distributions from the Company.

- However, and regardless of any such termination, on a sale or other transfer of all or substantially all of the assets of the Company or a division of the Company, Executive shall be allocated 10% of the taxable income arising from such sale or transfer and entitled to received 10% of the distributions but only from the sale/transfer price in excess of the Target.

- The "Target" is $240,000,000 less all costs of such sale or transfer including legal, accounting and broker fees, plus the amount of all debts and obligations of the Company that are not assumed by the acquirer(s). In the event that there is more than one such sale or transfer the Target shall be in the aggregate and the debts and obligations shall not be duplicated. The parties agree that the value of the Company as of this date, with all of its debts in place, $240,000,000.

(Ex. 3-F, p.2 (emphasis added)).

12. The 2019 Amendment does not mention KONG Real Estate Holdings, LLC. (*Id.*).

13. The 2019 Amendment did not bestow Decker with any right or claim to KONG's capital or assets except a right to 10% of taxable income arising from the "sale or other transfer of all or substantially all of the assets of the Company or a division of the Company" if the sale/transfer price exceeds $240,000.00 and an allocation of 20% of the KONG's ordinary taxable income and profit distributions. (*Id.*).

14. On or about June 26, 2019, the members of KONG (Orixas and Bounce) executed a document entitled "ACTION BY WRITTEN CONSENT OF THE MEMBERS OF [KONG]" whereby, among other actions, Bounce and Orixas as the voting members of KONG acknowledged the 2019 Amendment. (Exs. 3, ¶13, 3-G).

15. The June 26, 2019 KONG Action by Written Consent provided the following:

ACTION BY WRITTEN CONSENT OF THE MEMBERS OF THE KONG COMPANY, LLC (a Colorado limited liability company)

The undersigned, being all of the voting members (the "Members") of The KONG Company, LLC, a Colorado limited liability company (the "Company"), pursuant to the Colorado Limited Liability Company Act and the Company's Operating Agreement dated October 5, 2000, hereby consent to, vote in favor of and adopt the following resolutions by written consent (the "Consent") to be effective as of July 1, 2019 (the "Effective Date"):

WHEREAS, on May 12, 2012, the Members of the Company entered into a fourth amendment to the Company's operating agreement ("Fourth Amendment") for the express purpose of amending, *inter alia*, the Members' compensation;

WHEREAS, the Fourth Amendment provided that the Company would make certain tax distributions, pay certain salaries and distribute certain bonuses (the "Compensations");

WHEREAS, the Members of the Company entered into an amendment to Kathy Decker Frueh's employment agreement (the "Frueh Amendment") for the express purpose of amending, *inter alia*, Ms. Frueh's compensation, having an effective date of January 1, 2019;

WHEREAS, the Frueh Amendment provided that Ms. Frueh would receive a profits interest of twenty percent (20.0%) in the Company;

WHEREAS, the Company wishes to further amend the Members' Compensations as set forth below;

WHEREAS, the Company wishes to amend the annual salary of Member John Nelson, President of Orixas, LLC ("Nelson"), from $240,000 to $1,000,000;

WHEREAS, the Company wishes to amend its tax distribution to the Members from the current applicable tax rate to a total tax distribution rate of fifty percent (50%);

WHEREAS, the Company wishes to amend the Members' interest in the profit and loss of the Company, and distribution of profits thereof, consistent with the Frueh Amendment as follows: fifty percent (50%) to Nelson, thirty percent (30%) to Member Joseph Markham, President of Bounce Inc., ("Markham"), and twenty percent (20%) to Frueh; and

WHEREAS, the Company wishes to permit Members to donate to charities or otherwise some or all of their profit in the Company with such donation attributable to that Member's share of profit.

NOW, THEREFORE, BE IT RESOLVED that the contemplated Compensations be and it hereby is adopted and approved;

RESOLVED FURTHER, that the Company is hereby authorized and directed to enter into the Compensations and any and all documents contemplated by such Compensations;

This Action by Written Consent may be executed in one or more counterparts, each of which shall be deemed an original, and all of which together shall constitute one and the same instrument.

IN WITNESS WHEREOF, the undersigned Members have executed this Action by Written Consent to be effective as of the date set forth above.

MEMBERS:

BOUNCE INCORPORATED

Dated: June 24, 2019

By: _____
Name: Joseph P. Markham, President

ORIXAS, LLC

Dated: June 26, 2019

By: _____
Name: John Nelson, President

ACKNOWLEDGMENT

The undersigned hereby acknowledges and consents to the above Compensations described in the foregoing Consent.

Dated: June 26, 2019

By: _____
Name: Kathy Decker Frueh

(Ex. 3-G (emphasis added)).

16. Decker did not sign the June 26, 2019 KONG Action by Written Consent as a voting member of KONG. (*Id.*)

17. Following the 2019 Amendment and the June 26, 2019 KONG Action by Written Consent, Decker was not issued any units of membership in KONG.

18. Following the 2019 Amendment and the June 26, 2019 KONG Action by Written Consent, Decker was not issued a KONG Membership Certificate. (Ex. 3, ¶14).

19. Following the 2019 Amendment and the June 26, 2019 KONG Action by Written Consent, Bounce continued to hold 6,000 units of membership interest in KONG, as evidenced by the October 5, 2000 Membership Certificate. (Ex. 3-A).

20. Following the 2019 Amendment and the June 26, 2019 KONG Action by Written Consent, Orixas continued to hold 6,000 units of membership interest in KONG, as evidenced by the October 5, 2000 and December 5, 2002 Membership Certificates. (Ex. 3-A).

21. On August 1, 2019, after the execution and adoption of the 2019 Amendment, Raymond Seto, counsel for Nelson, sent an email to Nelson with the subject "Kong Ownership" stating the following and acknowledging the capital ownership of KONG being 50/50 between Bounce and Orixas:

> Hi John:
> The attached copies of Share Certificates, each signed by you and Joe, should be sufficient proof of 50:50 ownership. As we discussed, initially Joe was issued 6,000 shares and you were issued 4,000 shares. But shortly thereafter you converted your loan to Kong ($1 million?) into equity and were issued another 2,000 shares to make you 50:50. I'll check to see if I have copies of any LLC Minutes to memorialize the transaction. You'll see from the handwritten note in the attached that Leanna Shulda may have the originals.
> Ray

(Exs. 3, ¶15, 3-H). Thus, as of August 1, 2019, after KONG and Decker agreed on her profits interest grant, Nelson's lawyer knew that the capital/equity ownership of KONG was still shared

50/50 between Bounce and Orixas.

22. In 2021, Decker and KONG agreed to further increase Decker's profits interest in KONG from 20% to 25%. (Exs. 3, ¶16, 3-I). The 2021 Amendment increased Decker's profits interest to 25% but did change that Decker "has no voting rights." (Exs. 3-I, 3-F).

23. Following the 2021 Amendment, Decker was not issued any units of membership in KONG and did not receive a KONG Membership Certificate. (Ex. 3, ¶17).

24. In 2022, at the Preliminary Injunction Hearing, Decker testified as follows:

> Q. Have you ever signed a document where you're listed as a member, voting member of the company?
> A. No.
> Q. All Right. Is there any other amendment to the operating agreement that you can point me to which grants you voting rights in excess of what's listed here?
> A. No.

(Ex. 4 - Trans. PI Hearing, 11/1/22, pp. 153-154).

25. Kong Real Estate Holdings, LLC ("KREH") is a member-managed limited liability company that is owned 50/50 by members Bounce and Orixas. (Exs. 3, ¶19; 3-K; Ex. 5 - Decker's March 29, 2024 Answer to Bounce's First Amended Complaint, ¶ 210 (admitting that "KREH, a separate entity from KONG, has two members, Bounce and Orixas, each of whom own 50% of the membership interests of KREH.")).

26. Decker is not a member of KREH. (Ex. 3-K, pp. 44-45 (members are Bounce and Orixas); Ex. 5, ¶ 211 (admitting that "Frueh [defined as Kathy Decker Frueh] is not a member of KREH")).

The Demand Note:

27. On December 13, 2022, KONG as "Borrower" and Bounce as "Lender," executed a Secured Master Promissory Note (the "Demand Note"). (Exs. 3, ¶20, 3-L).

28. The Demand Note "evidences all short-term loans (each a "Loan"), made by Lender to Borrower from time to time." (*Id.*).

29. The Demand Note provides that, "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." (*Id.*).

30. The Demand Note provides further that, "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." (*Id.*).

31. The Demand Note specifies that it shall be an Event of Default for Borrower to fail to make any payment when due. (*Id.*).

32. 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 Demand 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 Demand Note. (Exs. 3, ¶21, 3-M).

33. 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 Demand Note. On June 27, 2023, Bounce demanded cash payment of $232,169.00. (Exs. 3, ¶22, 3-N).

34. On June 30, 2023, KONG refused Bounce's requests and stated that it would, over Bounce's objection, continue allocating Bounce's share of distributed profits to the balance of the Demand Note. (Exs. 3, ¶23, 3-O).

35. On August 17, 2023, Bounce sent KONG a formal demand for payment under the Demand Note. Bounce demanded payment of $338,282.00 representing the total of amounts allocated by KONG to the balance of the Demand Note for the months of May and June 2023. (Exs. 3, ¶24, 3-P). 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 Demand Note. (*Id.*).

36. 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. (Ex. 3, ¶25).

37. KONG continues to allocate profits distributable to Bounce to the balance of the Demand Note. (Exs. 3, ¶26, 3-Q).

Legal Standard

"Summary judgment is appropriate when the pleadings and supporting documents demonstrate that no genuine issue as to any material fact exists and that the moving party is entitled to summary judgment as a matter of law." *Matter of Kennedy*, 2024 CO 21, ¶ 48 (citing C.R.C.P. 56(c)).

"The interpretation of a contract is a question of law." *FDIC v. Fisher*, 2013 CO 5, ¶ 9. "The meaning of a contract is found by examination of the entire instrument and not by viewing clauses or phrases in isolation." *U.S. Fidelity & Guar. Co. v. Budget Rent-A-Car Systems, Inc.*,

842 P.2d 208, 213 (Colo. 1992). "An unambiguous agreement must be enforced according to its express terms." *Highlands Broadway OPCO, LLC v. Barre Boss LLC*, 2023 COA 5, ¶ 15. "Merely because the parties have different opinions regarding the interpretation of the contract does not itself create an ambiguity in the contract." *USI Properties East, Inc. v. Simpson*, 938 P.2d 168, 172 (Colo. 1997).

Argument

A. Decker is a non-voting member of KONG entitled to receive 25% of KONG's distributions under her written agreement with KONG.

The plain terms of the governing contracts establish conclusively that Decker does not have a voting interest in KONG. Equity membership in a limited liability company is multi-faceted. It consists of economic interests, voting control over the entity, and the right to inspect company records. *See Condo v. Conners*, 266 P.3d 1110, 1117 (Colo. 2011); Ex. 3-A, §1.21. Economic interests are themselves multi-faceted and involve interests in distributable profits and interests in proceeds derived from a sale. Entities and members may divide these interests in any manner they deem appropriate. *See id.* at 1119 (citing C.R.S. § 7-80-108 and concluding a legislative preference for the freedom of contract regarding membership rights).

In 2019, KONG's members granted Decker an economic interest in 20% of KONG's distributable profits and 10% of proceeds of a sale above a target threshold. (Ex. 3-F). In 2021, Decker's *economic* interest in KONG's distributable profits was increased to 25% and her 10% interest in proceeds of a sale was unchanged. (Exs. 3-I, 3-J). As outlined in the 2019 Amendment, however, while Decker was admitted as a member of KONG, she "has no voting rights with respect to the Profits Interest, and therefore any requirement for member vote, approval or consent shall not include [Decker] in any such vote, approval or consent." (Ex. 3-F).

Instead, Decker was provided only a limited consent right for any amendment to the KONG Operating Agreement that would adversely affect Decker. (*Id.*).

Decker's interest in KONG does not entitle her to any voting right, and Bounce and Orixas remain the 50/50 voting members of KONG. Consistent with the terms of the 2019 Amendment, KONG and its members did not treat Decker as a voting member following the 2019 grant of Decker's 20% profits interest. The 2021 Amendment provides that "Orixas and Bounce are the sole members of [KONG]." (Ex. 3-I). The clear intent of this provision is that Bounce and Orixas, as they have since the early 2000s, share equally the vote in KONG's affairs 50/50. Accordingly, Decker was never issued and has never received a membership certificate evidencing ownership of any units of membership interest in KONG. (Ex. 3, ¶¶14, 17). Decker's 25% economic profits interest and her 10% interest in proceeds of a potential sale of KONG above a target threshold as set forth in the 2019 and 2021 Amendments is the full extent of Decker's ownership interest in KONG.

The clear division of Decker's economic interest in KONG itself, as documented in the 2019 Amendment, shows that Decker was not granted full equity membership in KONG. If Decker had been granted what she now claims (full equity membership), there would be no division of what her "Profits Interest" means regarding ordinary, operational, distributable net profits (Decker has a 25% interest in KONG's ordinary distributable net profits) as opposed to entitlement to distribution of proceeds following a sale of KONG (Decker is entitled to receive 10% of proceeds above a target threshold as stated in the 2019 Amendment). If Decker were intended to be a full 25% equity member, she would be entitled to 25% of ordinary and company liquidation profits (equity).

To the contrary, however, Decker apparently sought to avoid potential tax implications that would accompany a capital and voting membership in KONG. For example, the 2019 Amendment stated the value of KONG was $240,000,000.00, but there is no evidence Decker paid any taxes (which could be upward of $15 million) on a grant of either a 20% or 25% equity interest in a company of that value. The 2019 Amendment explicitly did not grant Decker voting rights. Nelson knew this, (Ex. 3-E), and Nelson's attorney knew this, (Ex. 3-H). It was only after other disputes arose between Markham and Nelson that Nelson and Decker and KONG seek to use Decker's status as leverage against Defendants.

It is ripe for the Court to determine and declare Decker's rights in KONG, which, in accordance with the 2019 Amendment and the 2021 Amendment, are:

- Decker is a non-voting member of KONG;
- Decker is entitled to receive 25% of KONG's distributable net profit;
- Decker must provide consent for any amendment to the KONG Operating Agreement that adversely affects Decker;
- Upon the occurrence of a sale or transfer of all or substantially all of the assets of KONG or a division of KONG, Decker shall be allocated 10% of the taxable income arising from such a sale or transfer and she is entitled to receive 10% of the distributions but only from the sale/transfer price in excess of the "Target" which is $240,000,000.00 less all costs of such sale or transfer including legal, accounting, and broker fees, plus the amount of all debts and obligations of the Company that are not assumed by the acquirer(s).

(Exs. 3-f, 3-I).

There is no genuine dispute as to any material fact that relates to Decker's interests in KONG, and the Court should resolve this issue as a matter of law. Bounce respectfully requests that the Court rule in Bounce's favor by adopting the declarations regarding Decker's ownership in KONG that are requested in Bounce's Second Claim For Relief.

B. Decker's claims concerning KREH fail as a matter of law.

Decker admits that she is not a member of KREH. (Ex. 5, ¶211). Thus, the Court should make the narrow declaration Bounce seeks in its Second Claim for Relief.

In contravention of this clear admission, Decker claims in the KONG Second Amended Complaint entitlement to profits derived by KREH via some unspecified interest Decker holds in KREH. Each of Decker's claims regarding KREH should be denied as a matter of law in accordance with the clear written documents governing KREH's ownership.

a. Decker's claim for breach of the implied duty of good faith and fair dealing fails.

Decker claims in her Third Claim for Relief that Bounce breached the implied duty of good faith and fair dealing inherent in the KONG Operating Agreement and Decker's Executive Employment Agreement, as amended ("EEA"), by "maintaining that Ms. Decker lacks an interest in the profits of KREH after promising that the transfer of real property to KREH would not affect Ms. Decker's interest in KONG." (Ex. 1, ¶156). This position contradicts the clear terms of the written contracts upon which the position is allegedly based. Decker asserts an implied good faith covenant claim based on two contracts: the KONG Operating Agreement and Decker's EEA. (*Id.*, ¶154). But neither the KONG Operating Agreement nor Decker's EEA make any reference at all to *KREH*. (Exs. 3-A, 3-F, 3-I). Therefore, there can be no implied duty arising out of the KONG Operating Agreement or Decker's EEA *with KONG* that would give

rise to any implied duty of good faith regarding any dealings *with KREH*, a wholly separate entity from KONG and of which Decker admits she is not a member. (Ex. 5, ¶211).

Also, Decker's breach of implied covenant claim, brought against Bounce, but arising from alleged dealings involving KREH fails for lack of potential for Bounce to exercise discretion. It is well-settled that the covenant of good faith and fair dealing "may be relied upon only when the manner of performance under a specific contract term allows for discretion on the part of either party." *Univ. of Denver v. Doe*, 2024 CO 27, ¶ 51. "However, the covenant may not contradict any terms or conditions for which a party has bargained." *Id.* In asserting her claim, Decker maintains that Bounce breached an implied covenant of good faith arising under the KONG Operating Agreement and Decker's EEA *with KONG* by maintaining that Decker lacks an interest in KREH. KONG and KREH are two different companies. It's impossible to imagine what discretion *Bounce* has as a result of Decker's agreements with *KONG* that relates to Bounce taking positions with respect to *KREH*. Decker's attempts to weaponize the implied duty, without establishing any discretionary authority Bounce possesses, to contradict terms of expressed written contracts (the KONG Operating Agreement and Decker's EEA with KONG) that make no mention of KONG real property or KREH, let alone bestow Decker with rights in KREH or its assets. So, Decker's third claim, to the extent it is based on anything related to KREH, fails.

b. Decker has no interest in KREH or its profits as a matter of law.

Next, in the KONG Parties' Sixth Claim for Relief, Decker asks the Court to declare that "pursuant to the EEA, Ms. Decker has an interest in the net profits of KREH equal to the interest in KONG, for past, present, and future transactions." (Ex. 1, ¶185). Fundamental legal flaws are once again fatal to Decker's claim.

First, Decker has failed to assert any claim against KREH, the entity in which she claims an interest, and opted instead to sue only Bounce, which is only a 50% member of KREH. Decker has not even asserted claims against Orixas, the other 50% member of KREH. (Ex. 12). Decker's failure to assert claims against KREH and Orixas is fatal under C.R.C.P. 57(j) and C.R.S. § 13-51-115 which provide that when declaratory relief is sought, "all persons shall be made parties who have or claim any interest which would be affected by the declaration."

Second, even if Decker was correct in her allegations, the declaration Decker seeks would not result in the relief Decker requests because Bounce is not KREH, and Bounce cannot unilaterally grant Decker an interest in KREH or amend KREH's Operating Agreement. (Ex. 3-K, §§1.1, 9.1).

Third, Decker seeks relief from Bounce pursuant to her EEA with KONG. But, Decker's EEA is between Decker and KONG. (Exs. 3-F, 3-I). KREH is not referenced in the EEA — Decker's EEA with KONG provides no basis for a claim of interest in KREH. (*Id.*). For example, Decker alleges that "Ms. Decker has an agreement with the owners of KREH and KONG that Ms. Decker would receive, first 20% and then 25% of the net profit of KREH[.]" (Ex. 1, ¶181), then Decker asks the Court to declare Decker's rights in KREH "pursuant to the EEA." (Ex. 1, ¶¶181, 185). No contract entitles Decker to any interest in KREH.

This lack of any written contract is likewise fatal to Decker's claims, as any purported oral contract providing Decker an interest in KREH or its profits would be barred by the statute of frauds, *see* C.R.S. § 38–10–112(1)(a) ("Every agreement that by the terms is not to be performed within one year after the making thereof ... shall be void, unless such agreement or some note or memorandum thereof is in writing and subscribed by the party charged

therewith."). Further, to the extent that Decker's claim is to an interest in the real property transferred to KREH from KONG, such a claim also fails because no written contract provided Decker an interest in any real property, and the statute of frauds requires all contracts for the sale of any interest in lands to be in writing. C.R.S. § 38–10–108.

Finally, Decker's claimed interest in KREH or its profits contradicts the KREH Operating Agreement establishing the members of KREH, which Decker admits she is not. (Exs. 3-K; 5, ¶211). And yet, the grant of an interest in the profits of KREH would require Decker to be a member of KREH (just as she was not entitled to KONG profits until she was made a limited non-voting profits interest holding member of KONG in 2019). Further, granting Decker a profits interest in KREH would require dilution of the profits interests in KREH held by Bounce and/or Orixas. None of that occurred, and there are no documents purporting to show otherwise.

Accordingly, Decker's claims as to KREH fail as a matter of law as Decker's EEA provides Decker no interest in KREH, its property, or profits, and the KREH Operating Agreement identifies only Orixas and Bounce as members of KREH and exclusive owners of KREH's profits. (Exs. 3-F, 3-I, 3-K). For these reasons, this Court should deny the declaratory relief sought in the KONG Parties' Sixth Claim for Relief.

C. Decker's Promissory Estoppel Claim Fails.

In the KONG Parties' Seventh Claim for Relief, Decker asserts a promissory estoppel claim against Bounce regarding Decker's rights in KREH. First, this claim fails because as set forth above, Decker has no rights in KREH. Secondly, it seeks relief regarding an interest that Decker claims should be granted to her by KREH but fails to assert any relief against KREH or even name KREH as a party. Indeed, in her Seventh Claim, Decker explicitly demands "damages

for 25% of the profits from KREH for the sale of the Long Beach property." (Ex. 1, ¶ 191). As discussed above, Bounce, as a 50% member of KREH, cannot unilaterally distribute KREH profits or income. Even if Decker's relief were proper, Bounce (by itself) cannot provide the relief that Decker seeks, and the Seventh Claim therefore fails as a claim asserted against Bounce.

Next, Decker's promissory estoppel claim fails because it is premised on her false assertion of an "interest in the profits generated by the real property" that KONG subsequently transferred to KREH. (Ex. 1, ¶187). Decker had no "interest in the profits *generated by the real property*" that KONG subsequently transferred to KREH. Decker's rights are determined exclusively by her EEA, which provided her only with a profits interest in KONG itself, not innumerable piecemeal profits interests in particular pieces of KONG's property and assets.

Specifically, the EEA provided Decker a right to "20% of the taxable income of the Company and receive 20% of the distributions from the Company," which was later increased to 25%. (Exs. 3-F, 3-I). The 2019 KONG written consent phrases it as "a profits interest of twenty percent (20.0%) *in the company*" and "interest in the profit and loss *of the Company*, and distribution *of profits* thereof." (Ex. 3-G) (emphasis added). The language of the EEA is clear: Decker has an economic profits interest in KONG. If KONG turns a profit in a particular year, Decker gets a cut. But nothing in the EEA provides a profit interest in specific pieces of KONG's property or assets — and certainly nothing in the EEA gives Decker an interest in the property or assets of KREH.

The EEA's language is plain and unambiguous in this regard and must be enforced as written. Colorado Courts "enforce [an] agreement as written unless there is an ambiguity in the

language; courts should neither rewrite the agreement nor limit its effect by a strained construction." *Allen v. Pacheco*, 71 P.3d 375, 378 (Colo. 2003). Decker's claim of a profit interest in *individual assets of KONG* is, to say the least, a "strained construction" and should therefore be rejected. For example, if KONG were to sell a $500,000 piece of machinery, would Decker have a right to 25% of the profits derived from that sale? No. Decker's profits interest as established in the EEA is in 25% of KONG's distributions (and 10% of proceeds from a sale of KONG above the "Target"). (Exs. 3-F, 3-I).

Fourth, Decker's promissory estoppel claim fails because the promissory estoppel claim is based on and arises out of Decker's EEA which is indisputably subject to a written and enforceable contract. An equitable claim cannot stand in the face of a contract. *Wheat Ridge Urban Renewal Auth. v. Cornerstone Group XXII, LLC*, 176 P.3d 737, 741 (Colo. 2007) ("Recovery on a theory of promissory estoppel is incompatible with the existence of an enforceable contract."); *Pickell v. Arizona Components Co.*, 902 P.2d 392, 394-95 (Colo. App. 1994) ("Promissory estoppel is available as a remedy only in the absence of an otherwise enforceable contract."). Within Decker's promissory claim, Decker seeks a declaration from this Court "that the EEA entitles her to have an interest in the net profits of KREH[.]" (Ex. 1, ¶192). Because the promissory estoppel claim is based on Decker's (erroneous) interpretation of her EEA, an unambiguous and enforceable contract, the promissory estoppel claim fails and should be dismissed. *See Cornerstone Group XXII, LLC*, 176 P.3d at 741.

Finally, Decker's promissory estoppel claim for a profits interest in KREH fails because she has failed to assert or present any evidence of a mandatory element of the claim: detrimental reliance. "Certainly, before plaintiff may recover upon the theory of promissory estoppel, it must

establish that it relied to its detriment on the promise of another." *Snow Basin, Ltd. v. Boettcher & Co., Inc*., 805 P.2d 1151, 1155 (Colo. App. 1990). Decker pled no detrimental reliance and has offered no evidence or assertion of any detrimental reliance she allegedly undertook because of a promise Markham allegedly made. Nor can Decker, because she did not change "position" in any way based on this alleged promise. Bounce is thus entitled to judgment in its favor with respect to Decker's Seventh Claim.

D. KONG Breached the Demand Note.

The terms of the Demand Note mandate that payment of principal KONG owes to Bounce must be made within 30 days of written demand issued from Bounce to KONG. (Ex. 3-L). On August 17, 2023, Bounce sent KONG a formal demand for payment under the Demand Note. Bounce demanded payment of $338,282.00 representing the total of amounts KONG allocated to the balance of the Demand Note for the months of May and June 2023. (Ex. 3-P). Bounce $232,169 in distributable profits from May 2021 and then $106,113 in distributable profits from June 2023 (after Bounce had demanded that KONG cease adding future profit distributions to the Demand Note balance). (Exs. 3-M, 3-N, 3-P). KONG failed to pay the demanded amount on or before September 16, 2023, which was 30 days after Bounce's formal demand for payment under the Demand Note. Additionally, despite Bounce's demands that KONG cease adding to the balance of the Demand Note, KONG has done the opposite and continued to allocate distributable profits for Bounce to the principal balance of the Demand Note. (Ex. 3-L, ¶1 ("Nothing in this Promissory Note shall be deemed to require [Bounce] to make any Loan")). Bounce did not agree to or authorize this additional debt (and all additions to the principal balance of the Demand Note after June 22, 2023 when Bounce asked KONG to stop

adding to the loan balance). (Ex. 3-M). Bounce has repeatedly requested that its share of distributable profits from KONG not be allocated to the balance of the Demand Note — requests that KONG has repeatedly ignored.

KONG has blatantly breached the terms of the Demand Note which (1) require payment of principal balance within 30 days of demand thereof and (2) do not require any loans to be made under the Demand Note. (Ex. 3-L). Bounce therefore requests that the Court determine as a matter of law that KONG is in breach of the terms of the Demand Note. Bounce further requests that the Court declare that, under the terms of the Demand Note, and as a result of KONG's default for failure to make timely payment of amounts demanded, Bounce is entitled to declare all unpaid principal owed under the Demand Note plus all accrued attorney fees plus costs and attorney fees immediately due and payable. (Ex. 3-L, ¶9).

Conclusion

For the foregoing reasons, Bounce Enterprises LLC, Bounce Inc., and Joseph Markham respectfully request that this Court enter partial summary judgment in their favor and against the KONG Parties as follows:

On Bounce's Second Claim for Relief, declaring:

- That Decker is a limited non-voting member of KONG.
- That Decker's non-voting membership in KONG does not allow her to direct KONG without prior consent of the voting Members and/or the Managers of KONG as set forth in KONG's governing documents.
- That Decker owns a profits interest which entitles her to receive 25% of KONG's distributable net profits in accordance with KONG's governing documents and

Decker's employment agreements with KONG.

- That, in the event of a sale of KONG or substantially all of its assets, Decker is entitled to receive 10% of distributable proceeds above the Target in accordance with KONG's governing documents and Decker's employment agreements with KONG.

Denying the KONG Parties' Third Claim for Relief in the KONG Parties' Second Amended Complaint asserting breach of the implied duty of good faith and fair dealing regarding Decker's alleged interests in KREH.

Denying the KONG Parties' request for declarations set forth in the Sixth Claim for Relief in the KONG Parties' Second Amended Complaint regarding Decker's alleged interests in KONG and KREH.

Denying the KONG Parties' Seventh Claim for Relief in the KONG Parties' Second Amended Complaint for promissory estoppel.

Entering judgment in Bounce Enterprises LLC's favor on its Fourth Claim for Relief stated in Bounce's Second Amended Complaint as follows:

- Judgment on liability against KONG that KONG is in breach of the Demand Note.
- Declarations that under the terms of the Demand Note, and as a result of KONG's default thereof for failure to make timely payment of amounts demanded and refusal to honor Bounce's requests to cease additional loans, Bounce is entitled to relief set forth in the Demand Note including the right to declare all unpaid principal owed under the Demand Note plus all accrued attorney fees plus costs

and attorney fees immediately due and payable.

Dated: August 30, 2024.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via the Colorado Courts E-Filing system on August 30, 2024 on all parties and counsel of record.

s/ Caryl L. Septon
Caryl L. Septon