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 HERBALIFE INTERNATIONAL OF AMERICA, INC.

8 UNITED STATES DISTRICT COURT
 9 FOR THE CENTRAL DISTRICT OF CALIFORNIA

10 HERBALIFE INTERNATIONAL OF
 11 AMERICA, INC., a Nevada corporation,

12 Plaintiff,

13 vs.

14 EASTERN COMPUTER EXCHANGE,
 15 INC., a Connecticut corporation, and
 GERRY BERG, an individual, residing in
 16 the State of Pennsylvania,

17 Defendants.
 18

Case No. 2:22-cv-347

COMPLAINT FOR:

- 19 (1) **FRAUDULENT**
- 20 **CONCEALMENT;**
- 21 (2) **BREACH OF FIDUCIARY**
- 22 **DUTY;**
- 23 (3) **BREACH OF CONTRACT;**
- 24 (4) **CONVERSION; and**
- 25 (5) **DECLARATORY RELIEF.**

1 Plaintiff Herbalife International of America, Inc. (“Herbalife”), for its Complaint
2 herein, states and alleges as follows:

3 **THE PARTIES**

4 1. Plaintiff Herbalife is a Nevada corporation with its principal place of
5 business in Los Angeles, California.

6 2. Defendant Gerry Berg (“Berg”) is an individual who, on information and
7 belief, currently resides and is domiciled in Pennsylvania.

8 3. Defendant Eastern Computer Exchange (“Eastern”) is a Connecticut
9 corporation with its principal place of business in Westport, Connecticut.

10 **JURISDICTION AND VENUE**

11 4. This Court has jurisdiction over this action pursuant to the provisions of 28
12 U.S.C. Section 1332 because there is complete diversity between Herbalife, Eastern, and
13 Berg, and the amount in controversy exceeds the sum of \$75,000, exclusive of interest and
14 costs.

15 5. Venue is proper in this Court pursuant to 28 U.S.C. Sections 1391(b) and
16 1400 because a substantial part of the events giving rise to the claims occurred in this
17 judicial district, and Herbalife’s principal place of business is within this judicial district.
18 Eastern and Herbalife entered into a Master Services Agreement (“MSA”) providing that
19 “any and all disputes arising under this Agreement shall be adjudicated in the appropriate
20 state or federal court within California.” Eastern and Herbalife also entered into a Non-
21 disclosure Agreement (“NDA”) providing that “all disputes arising from or relating to this
22 Agreement [shall be subject] . . . to the exclusive venue and jurisdiction of, the state and
23 federal courts of Los Angeles County, California.”

24 6. Venue is also proper in this Court because Berg and Herbalife entered into a
25 confidentiality agreement (the “Confidentiality Agreement”) that “any action to enforce or
26 interpret it, or otherwise arising from it, shall be initiated and maintained in a court in the
27 County of Los Angeles”
28

1 **FACTUAL BACKGROUND**

2 **General Allegation**

3 7. In furtherance of a fraudulent scheme, defendant Berg conspired with
4 Eastern to provide Eastern an unfair advantage to the detriment of Herbalife.

5 **Herbalife’s Robust Procurement Policies and Procedures**

6 8. Herbalife is a global nutrition company that, through its network of
7 independent distributors, provides consumers with nutrition solutions in the areas of
8 weight management, sports nutrition, and health and wellness. Herbalife has been in
9 operation for over 41 years and is currently a New York Stock Exchange publicly traded
10 company operating in 95 markets globally.

11 9. Herbalife has robust and detailed written procurement policies and
12 procedures that all employees must follow. Pursuant to these policies and procedures,
13 Herbalife engages thousands of vendors to provide goods and services to Herbalife in a
14 fair and consistent manner.

15 10. Herbalife’s procurement policies and procedures contain extensive
16 requirements. Herbalife’s procurement procedures require, among other things, a number
17 of written approvals by specified employees before a vendor can be awarded a contract.
18 Berg was advised that before capital expenditures could be made through a third party
19 vendor, Herbalife’s policies and procedures required the following: 1) an approved Project
20 Authorization Request or “PAR”—that is, approval of the proposed total expenditure on
21 the overall project; 2) an approved purchase requisition or “PR”—that is, approval for the
22 specific purchase tied to the project for which there is an approved PAR; and 3) an
23 approved Purchase Order or “PO” for the vendor, tied to the project and purchase for
24 which there is already an approved PAR and PR, which represents Herbalife’s purchase
25 commitment to the vendor.

26 11. The PAR, PR, and PO must all be approved in writing by the specifically
27 designated employees at Herbalife with approval authority. Multiple approvals may be
28 required, including by senior management and the Board of Directors (“Board”),

1 depending on the size of the expenditure.

2 12. To ensure that all of these required procurement policies and procedures
3 were followed, Herbalife used database systems to record and maintain PARs, PRs, and
4 POs. For example, a PO cannot be issued using Herbalife's Oracle database unless all of
5 the required approvals have been obtained for both the associated PAR and PR.

6 13. The Oracle database sequentially assigns a unique number to a PO based on
7 the date of creation of the PO. Once all of the requisite approvals are obtained, and a PO is
8 able to be issued, an employee of Herbalife typically sends a copy of the PO to the vendor
9 from the Oracle system. All PARs, PRs, and POs, including all written authorizations for
10 such documents, are stored on Herbalife database systems.

11 14. These procurement procedures and procedures were designed by Herbalife
12 to promote transparency and to ensure that projects being bid were within the company's
13 budget, met the company's stated needs, and were subject to fair competitive bidding.

14 **Herbalife Hires Berg, Who Is Made Aware of Herbalife's Policies and Procedures**

15 15. In late 2019, Berg discussed a potential employment opportunity for Berg to
16 work at Herbalife. On or around January 6, 2020, Berg accepted an at-will position as
17 Vice President of Infrastructure & Operations at Herbalife, reporting directly to the Chief
18 Information Officer.

19 16. As part of Berg's onboarding process, Berg had access to, and was required
20 to be familiar with, Herbalife's procurement policies and procedures identified above.

21 17. Berg was well-aware of Herbalife's procurement policies and procedures.
22 In fact, in May 2020, an employee of Herbalife made a complaint against Berg alleging
23 that Berg had not followed Herbalife's procurement policies and procedures in connection
24 with work awarded to Eastern. Herbalife investigated the complaint and found that Berg,
25 among other things, had not competitively bid some of the services awarded to Eastern, in
26 violation of Herbalife's procurement policies and procedures. Berg, thus, was reminded of
27 Herbalife's procurement policies and procedures, and instructed that in the future Berg
28 must follow Herbalife's procurement policies and procedures.

1 18. Upon hire, Berg also signed the Confidentiality Agreement wherein Berg
2 agreed not to share Herbalife’s confidential information with “any third party, except,
3 when necessary, in the course and scope of his/her employment and in furtherance of
4 [Herbalife’s] business.” *See* Exhibit 1.

5 **Eastern Signs a MSA**

6 19. On information and belief, Eastern is a technology company based in
7 Westport, Connecticut. Eastern is what is known as a “value added reseller” or “VAR,”
8 which partners with original equipment manufacturers (“OEMs”) such as Dell
9 Technologies, to resell computer equipment to end users such as Herbalife.

10 20. Berg had a history of working with Eastern at companies where he was
11 previously employed. During that time, Berg developed a close personal relationship
12 with, among other individuals at Eastern, Eastern’s president, Brendan Lynch (“Lynch”).

13 21. In late 2019, Eastern was introduced to and became an Herbalife vendor for
14 the first time. Herbalife and Eastern signed the NDA, effective December 13, 2019,
15 strictly prohibiting the parties from using any confidential information of the other. *See*
16 Exhibit 2. Herbalife and Eastern also signed the MSA in January 2020. Berg signed the
17 MSA, although it was backdated to December 19, 2019, before his employment
18 commenced with Herbalife. *See* Exhibit 3.

19 **Herbalife Issues 21 Purchase Orders to Eastern**

20 22. Starting January 2020 through April 2021, Herbalife entered into 21
21 different POs with Eastern and paid Eastern over \$15 million in connection with those
22 POs. Eastern, thus, was well aware of the necessity of Herbalife issuing a PO before any
23 payments could and would be made by Herbalife.

24 **Eastern Receives a Purchase Order to Conduct an Analysis of**
25 **Herbalife’s Business Continuity and Disaster Recovery Strategy**

26 23. Business continuity and disaster recovery (“BCDR”) generally refers to a
27 strategy to reduce the risk of technology outages that could disrupt a business. Herbalife
28 retained Eastern in or around April 2020, pursuant to a PO, to perform an “application

1 impact analysis” (“AIA”) of Herbalife’s BCDR systems in both its Salt Lake City and
2 Winston-Salem database locations. Herbalife paid Eastern for the AIA in accordance with
3 the PO issued for it.

4 24. Eastern provided Herbalife the AIA report, with its BCDR design
5 recommendations, on or around June 18, 2020. The June 18, 2020 Eastern AIA report
6 made two recommendations for potential BCDR solutions for Herbalife’s computer
7 systems located in Salt Lake City and Winston-Salem. In its AIA report, Eastern stated it
8 would make a proposal “in 4 weeks” (by July 18, 2020) to address the BCDR strategy for
9 both Salt Lake City and Winston-Salem. Notably, both design solutions recommended by
10 Eastern would have Herbalife commit significant resources to an on-premises, primarily
11 hardware-focused solution (i.e., use vendors such as Eastern to purchase hardware and
12 equipment from OEMs like Dell), rather than a cloud-based solution.

13 **Herbalife’s Board of Directors Reviews BCDR Strategy**

14 25. During the summer and into the fall of 2020, a team of Herbalife employees,
15 including Berg, prepared a presentation for Herbalife’s Board of Directors (the “Board”)
16 on BCDR. The presentation addressed various BCDR recommendations for both the Salt
17 Lake City and Winston-Salem locations. The purpose of the presentation to the Board
18 was to present management’s recommendations related to BCDR and to seek Board
19 approval for funding a BCDR project, consistent with Herbalife’s policies and approval
20 process.

21 26. The presentation requested the Board to approve \$40 to \$50 million to
22 address BCDR. The presentation noted that the “cost projections represent estimated
23 maximum spend, *as no negotiating has been initiated* (of which \$20 million is [capital
24 expenditures] and the remainder is maintenance and support).” (Emphasis added.) At this
25 Board meeting, which Berg did not attend, the Board approved a preliminary budget to
26 address BCDR.

27 **Berg Meets with Eastern on October 28, 2020**

28 27. Unbeknownst to his supervisor, Berg had arranged for Eastern (Lynch and

1 Marty O’Brien (“O’Brien”), Eastern’s Regional Sales Director), to meet at Herbalife’s
2 office in Torrance on October 28, 2020.

3 28. The October 28, 2020 meeting was attended by Gerry Berg, Peter Bray
4 (“Bray”), Herbalife’s Senior Director of Strategy and Governance, as well as Lynch and
5 O’Brien. Because Bray had been recently hired and had been primarily working remotely
6 at Herbalife, the meeting was Bray’s first time in Herbalife’s office, as well as Bray’s
7 first-time meeting Berg, Lynch, and O’Brien in person. Bray was unaware of the purpose
8 of the meeting.

9 29. As of October 28, 2020, there was no PAR, PR, or PO issued for the BCDR
10 project; therefore, neither Bray nor Berg had any authority to approve Eastern ordering
11 any equipment for the proposed BCDR project.

12 30. Nevertheless, Eastern (Lynch and O’Brien) raised the possibility of Eastern
13 pre-ordering BCDR equipment during the October 28, 2020 meeting. More specifically,
14 Eastern suggested that it purchase equipment from Dell on behalf of Herbalife before
15 Herbalife had approved a PAR, PR, or PO for the equipment. During this meeting, Bray
16 told Lynch and O’Brien that he wouldn’t take such an approach, but that if Eastern
17 nevertheless did so, and chose to pre-order BCDR equipment, that such a decision would
18 be “on them.”

19 31. Although the Board approved the initial spend, Herbalife’s policies
20 nevertheless require employees to follow its required approval process, which includes a
21 PAR, PR, and PO. Berg and Bray knew well that no one could bypass this process and
22 approve a “verbal order” for the purchase of the BCDR equipment. This was especially
23 so given the significant size of the expenditure. Eastern likewise knew that it must receive
24 a PO, in writing, from Herbalife, just as it had many times for prior orders.

25 32. While Defendants now claim that Bray placed a “verbal order” for tens of
26 millions of dollars of BCDR equipment at this October 28 meeting, without a PAR, PR, or
27 PO, this contention is belied by many facts. Bray steadfastly denies that he approved a
28 verbal order. Moreover, Berg, not Bray, was the project lead for BCDR, had the prior

1 relationship with Eastern, and convened the October 28, 2020 meeting. Moreover, unlike
2 Berg, Bray did not have a vice president title. Finally, Berg certainly was aware that
3 Bray, who was below Berg in the Herbalife hierarchy, and had just recently joined the
4 company, could not unilaterally ignore Herbalife's procurement policies and procedures
5 and place a verbal order worth tens of millions of dollars.

6 33. On October 30, 2020, Eastern, without Herbalife's knowledge or
7 authorization, placed an order in excess of \$20 million worth of computer hardware from
8 Dell, supposedly for Herbalife's BCDR project.

9 34. It is abundantly clear that Berg and Eastern understood that they did not
10 have the authority to proceed with the order and spend millions of dollars on the BCDR
11 project. There is no evidence confirming or even mentioning this supposed verbal
12 agreement anywhere at Herbalife. Herbalife has been unable to locate even a single email
13 evidencing an agreement between Eastern and Herbalife to purchase the BCDR
14 equipment, and there is no written agreement to this effect. It is inconceivable that a deal
15 worth tens of millions of dollars, potentially involving dozens of Herbalife employees,
16 would leave no paper trail at Herbalife. It appears that all communications, if any,
17 regarding Eastern's ordering of the equipment from Dell were conducted on non-
18 Herbalife devices in an apparent effort to conceal the transaction.

19 **Herbalife Issues a RFP for BCDR Strategy**

20 35. Herbalife, unaware that Eastern had placed an order for certain BCDR
21 equipment, began the formal process of searching for a vendor to fulfill its BCDR needs
22 after the Board approved an initial BCDR spend. As required by its policies and
23 procedures, Herbalife conducted a request for proposals ("RFP") process in November
24 2020 for the BCDR project. Herbalife invited vendors to bid on the BCDR project,
25 including Eastern.

26 36. In November 2020, Herbalife provided the vendors participating in the RFP
27 with highly confidential information about its computer systems, including information
28 related to data processing, data protection, and business continuity capabilities, to allow

1 the vendors to fully diagnose Herbalife’s needs and provide bids to address BCDR
2 strategy. The bid for the BCDR project was for the entire project, not phases.

3 37. At no time during the RFP process did Eastern or Berg ever mention that
4 Eastern had already allegedly been awarded all or part of the BCDR project, nor did
5 Eastern or Berg ever mention that it had already ordered equipment from Dell. To the
6 contrary, along with other vendors invited to participate in the RFP, Eastern prepared and
7 submitted a response to the RFP.

8 38. Indeed, Eastern’s full participation in the RFP process for BCDR—from
9 November 2020 through January 2021—undermines its position that Eastern had some
10 type of verbal commitment from Herbalife in October 2020 to order the BCDR
11 equipment. Even more perplexing, is that Eastern now claims that Herbalife informed
12 Eastern that it had won the RFP in mid-December 2020—which, again, runs contrary to
13 Eastern’s decision to order tens of millions of dollars of equipment from Dell in October
14 2020. Eastern’s contentions are further belied by email communications between Eastern
15 and Herbalife, which demonstrate that, as of January 2021, there were still discussions
16 between Herbalife and Eastern regarding Eastern’s potential bid for the entire BCDR
17 project. Thus, it was clear based on Eastern’s conduct that Eastern had not been
18 announced as the “winner” of the RFP prior to October 2020 or at any time whatsoever.

19 **Herbalife Circulates BCDR PAR in January 2021, Further Demonstrating That**
20 **There Was No Approval of the BCDR Project**

21 39. In accordance with Herbalife’s policies and procedures, on January 20,
22 2021, a PAR for the entire BCDR project was submitted for approval.

23 40. Given the size of the BCDR project, the PAR required written approval
24 from numerous employees, up to and including both the President, as well as the
25 Chairman/CEO. Berg was one of 15 Herbalife employees whose authorization was
26 required to approve the PAR.

27 41. On January 27, 2021, Berg recorded his approval of the PAR in the Oracle
28 system. At no time did Berg disclose that he was aware that Eastern had already ordered

1 the BCDR equipment from Dell.

2 42. The PAR did not receive approval from all 15 individuals required and,
3 therefore, there was no authorization from Herbalife for Eastern or any vendor to proceed
4 with the BCDR project.

5 **Herbalife Terminates the RFP Process**

6 43. Herbalife decided to terminate the RFP without awarding the contract to any
7 vendor in January 2021 to further assess the proposed BCDR project design. Later that
8 month, Herbalife decided to engage a neutral third-party to review and assess the
9 proposed BCDR project design. Berg expressed his extreme displeasure regarding
10 Herbalife's decision to retain a third party to independently assess the BCDR project.

11 44. That same month, Eastern and the other bidders were advised that the RFP
12 process was put on hold. No vendor was selected, and the bidding process was terminated
13 to avoid a tainted process and allow Herbalife to further scrutinize its BCDR solution
14 options.

15 **Berg Delivers a Fraudulent PO to Eastern**

16 45. On information and belief, Dell asked Eastern for proof that Herbalife had
17 committed to the multi-million dollar purchase of computer hardware through Eastern
18 from Dell for Herbalife's BCDR strategy.

19 46. On information and belief, desperate to get a PO from Herbalife, Lynch
20 conspired with Berg to create a fraudulent PO wrongly suggesting that Herbalife had
21 authorized Eastern to purchase the BCDR computer hardware from Dell. On February 23,
22 2021, Berg hand delivered to Lynch a fraudulent PO backdated to October 30, 2020.
23 According to a sworn declaration provided by Lynch, "[o]n or about February 23, 2021,
24 Gerry and [Lynch] met with a mutual friend for a dinner meeting, as [they] have done for
25 many years. Just prior to the dinner meeting, [Lynch] asked Gerry if he could bring
26 [Lynch] any written acknowledgement of the BCDR Equipment Order so [Lynch] could
27 show it to Dell, as requested. Gerry brought [Lynch] a document that memorialized the
28 October 28, 2020 BCDR Equipment Order."

1 47. On information and belief, Eastern then provided the fraudulent PO to Dell
2 for the purpose of falsely confirming Herbalife's BCDR equipment order.

3 48. Not surprisingly, the fraudulent PO provided by Berg to Eastern does not
4 exist anywhere in any of Herbalife's files or Oracle database. The fraudulent PO is not in
5 Herbalife's Oracle database and was not transmitted through Herbalife's email systems to
6 anyone at Herbalife or to any third party. Moreover, there is no record of any actual PO
7 being issued to Eastern on or around October 30, 2020, nor is there any record of any PO
8 being issued to Eastern for any project close to \$20 million, including BCDR. This is not
9 surprising, as there was never an approved PAR or PR issued for the BCDR order; thus,
10 there could not have been an approved PO issued for any equipment order related to
11 BCDR.

12 49. The fraudulent PO that was delivered by Berg to Eastern on February 23,
13 2021 was identified with the PO number 1102051762. This PO number was originally
14 issued by Herbalife to Eastern for a completely different project. The original PO was
15 redacted, and new language for the fraudulent PO inserted, to disguise the fact that the
16 fraudulent PO was in fact fabricated. Though not immediately apparent at first blush,
17 upon closer review, the fraudulent PO was also riddled with errors, further underscoring
18 its fraudulent nature. The Payment Terms on page 1 ("60 on Delivery in Full") do not
19 match the Payment Terms on pages 2 and 3 ("30"). Under the word "Release" on the front
20 page, the text "Page 1 of 3" is missing, but would be included on Herbalife POs. The PO
21 contains vague language rather than identifying specific equipment that would be ordered.
22 Nevertheless, this fraudulent PO was delivered by Eastern to Dell as evidence that Eastern
23 had an "agreement" with Herbalife to order the Dell equipment.

24 **Herbalife Hires Deloitte to Reevaluate Herbalife's BCDR Needs**

25 50. In February 2021, Herbalife hired Deloitte to analyze its BCDR needs.
26 Deloitte was retained to make independent recommendations without any financial
27 incentives. Throughout the month of March 2021, confidential meetings occurred
28 between representatives of Deloitte and Herbalife to evaluate the proposed BCDR project.

1 It was made clear to participants, including Berg, that these meetings and the information
2 shared during these meetings with Deloitte were highly confidential. Eastern was not
3 invited to, and did not attend, these meetings.

4 51. At these meetings between Herbalife and Deloitte, various alternative
5 BCDR solutions were discussed. Berg, who attended the meetings with Deloitte, never
6 advised anyone at Herbalife or Deloitte that, allegedly, Eastern had already been awarded
7 the BCDR contract, or that Eastern had already ordered the BCDR equipment. Berg had a
8 fiduciary obligation to disclose to Herbalife that he understood that Eastern had already
9 ordered tens of millions of dollars of BCDR equipment. Despite attending a series of
10 meetings between Herbalife and Deloitte, Berg kept the alleged Eastern order a secret.

11 52. At these meetings between Deloitte and Herbalife, which Berg attended,
12 different solutions regarding BCDR were discussed, including a cloud-based solution that
13 would render the Eastern equipment purchase unnecessary.

14 53. On March 31, 2021, Deloitte sent an “executive readout” PowerPoint deck
15 to the Chief Information Officer, who then forwarded the deck to her direct reports,
16 including Berg, the next day. The executive readout makes clear that Deloitte was
17 recommending that Herbalife consider options other than a hardware-heavy BCDR
18 solution that would rely on vendors like Eastern and Dell.

19 54. Realizing that, with Deloitte’s involvement, a different BCDR solution
20 might be selected that would render Eastern’s equipment purchase unnecessary, Berg
21 panicked and began displaying aggressive and hostile behavior at the meetings with
22 Deloitte. At one meeting with Deloitte in March 2021, Berg became so enraged that he
23 slammed his hand on a table in outrage. Such aggressive and unprofessional behavior
24 compelled Herbalife executives to later apologize to representatives from Deloitte.

25 **Berg Is Terminated**

26 55. Berg’s unprofessional and aggressive behavior was observed by and also
27 reported to senior management. Ultimately, Herbalife decided to terminate Berg’s at-will
28 employment on or about April 9, 2021. As part of his separation, Berg signed a

1 “Proprietary Information” agreement (“Proprietary Information Agreement”) which stated
2 that “any proprietary information which you may have obtained regarding Herbalife
3 International of America, Inc. or its affiliates, as a result of your employment is to be held
4 in strictest confidence.” *See* Exhibit 4.

5 56. On April 27, 2021, 18 days after he was terminated, Berg forwarded a copy
6 of the confidential Deloitte deck to Eastern from his personal Gmail account. There is no
7 record of Berg ever emailing a copy of the presentation from his Herbalife email account
8 to his personal Gmail email account; it appears that Berg must have used another method
9 to transfer Herbalife materials to his personal device to avoid detection.

10 **Herbalife Discovers the Fraudulent PO**

11 57. Herbalife was unaware of the fraudulent PO or any order for BCDR
12 equipment placed by Eastern. In July 2021, a Dell executive reached out to Herbalife
13 requesting to speak about a “situation” that had arisen with Eastern.

14 58. The Dell representative explained that Dell had been informed by Eastern
15 that Herbalife had placed a “firm order” via a PO numbered 1102051762 for BCDR
16 equipment. The Dell representative further explained that Dell had built over \$20 million
17 worth of computer equipment based on Eastern’s representations. The Dell
18 representative also informed Herbalife that Eastern had refused to accept delivery or pay
19 for the BCDR equipment, causing a dispute between Dell and Eastern. At Herbalife’s
20 request, Dell sent the PO numbered 1102051762—the *fraudulent PO*—to Herbalife,
21 which led to Herbalife’s discovery of the fraud.

22 **Eastern Settles Its Dispute with Dell**

23 59. On information and belief, Dell and Eastern entered into a settlement and
24 release agreement in which the parties released each other from any and all claims in
25 connection with Eastern’s BCDR order with Dell on Herbalife’s behalf. On information
26 and belief, Dell did not charge Eastern for the equipment nor did it charge Eastern for any
27 restocking fees.

28 ///

Eastern Seeks Compensation

1
2 60. Despite its fraudulent acts, and despite being released from all claims by
3 Dell, Eastern seeks to benefit from its fraudulent conduct by charging Herbalife fees in
4 connection with its fraudulent BCDR order from Dell. Eastern now seeks millions of
5 dollars from Herbalife in payment for the BCDR project, including equipment and labor.
6 Eastern also has demanded that Herbalife pay \$2,267,476.86 to account for purported
7 “restocking fees,” as well as other alleged fees, such as “financing fees,” allegedly
8 charged by Dell to return the equipment Eastern ordered without authorization in October
9 2020. On information and belief, no such fees were charged.

10 61. Eastern is also seeking payment for \$1,074,915.62 in tokens and licenses
11 Eastern purchased from a company called VMware allegedly on Herbalife’s behalf. The
12 agreement entered into between Eastern and Herbalife specifically provides that Herbalife
13 is only responsible to pay for such tokens and licenses when they are ordered pursuant to a
14 purchase order. However, Herbalife has never issued a PO (i.e., Herbalife has never given
15 corporate approval) to purchase any of the VMware tokens or licenses for which Eastern
16 is now seeking payment; therefore, no money is due or owing to Eastern for the purchase
17 of such tokens.

18 **Eastern Has Breached the NDA and MSA with Herbalife**
19 **by Engaging in Fraudulent and Unethical Conduct**

20 62. Paragraphs 2(B) and 5(v) of the MSA between Herbalife and Eastern state
21 in pertinent part:

22 Contractor [i.e., Eastern] hereby agrees to perform the
23 Services in a conscientious and professional manner and to the
best of Contractor’s ability . . .

24 [Eastern] will perform the Services in a workmanlike manner.

25 63. The conduct alleged herein and above breaches Eastern’s contractual
26 obligation under the MSA to perform its services in a conscientious, workmanlike, and
27 professional manner to the best of Eastern’s ability.

28 64. Furthermore, the Deloitte meetings, including the PowerPoint deck, qualify

1 as “Confidential Information” under the NDA signed by Herbalife and Eastern. Paragraph
2 2, “Confidential Information,” of the NDA broadly defines Confidential Information as:

3 . . . any nonpublic, confidential or proprietary information that
4 the Disclosing Party or any of its representatives, employees,
5 agents, affiliates, or financial, legal, or accounting advisors
6 (together, the “Representatives”) make available to the
7 Receiving Party in connection with the Services. Such
8 Confidential Information shall include, but is not limited to the
9 following: business and strategic plans, market analysis,
10 business summaries, business processes, financial forecasts
11 and reports, product formulas, ingredients, clinical studies,
12 prospective product designs, pricing policies and methods,
13 vendor and business partner identities, purchasing methods
14 and Information, operational material and manuals, financial
15 data, proposed trademarks or service marks, patent
16 applications, trade secrets, technical and engineering data,
17 drawings, models, software products, and design and technical
18 specifications.

11 65. Paragraph 5 of the NDA between Herbalife and Eastern states, in pertinent
12 part, that Eastern (i.e., the “Receiving Party”) will:

13 (a) not use Confidential Information for any purpose
14 whatsoever other than evaluation and/or facilitating
15 discussions between the Parties; (b) not copy the Confidential
16 Information, reproduce it in any form or store it in a retrieval
17 system or database without the prior written consent of the
18 Disclosing Party, subject to the exceptions contained herein;
19 (c) keep in confidence all Confidential Information received,
20 and not distribute, disclose, or disseminate such Confidential
21 Information [sic] in any way to anyone except to the minimum
22 number of Representatives of the Receiving Party with a need
23 to know and who are involved in a consideration or evaluation
24 of the Confidential Information; *provided however*, that such
25 Representatives have been advised of the obligations to
26 protect the Confidential Information [sic], and *provided*
27 *further*, that notwithstanding the foregoing, the Receiving
28 Party shall be liable for any misuse of such Confidential
Information [sic] by such Representatives; (d) use reasonable
care to protect the Confidential Information, and in no event
use less than the same degree of care as the Receiving Party
safeguards its own Confidential Information of like kind

25 66. Herbalife is informed and believes that Eastern used confidential
26 information gained before, during, and after the bidding process which was a breach of the
27 NDA. Herbalife is informed and believes that Eastern conspired with Berg to orchestrate a
28 situation in which Eastern would ultimately be able to win the BCDR bid and be able to

1 pay Dell for its unauthorized order.

2 **FIRST CAUSE OF ACTION**

3 **Fraudulent Concealment**

4 **(Against Defendants)**

5 67. Herbalife incorporates herein by reference each of the allegations set forth
6 above as though fully set forth herein.

7 68. Eastern and Berg conspired to falsely and fraudulently conceal from
8 Herbalife that they were secretly conspiring to divert the BCDR business to Eastern,
9 including by creating a fraudulent PO, and concealing such activities from Herbalife (nor
10 could Herbalife have discovered them).

11 69. When Berg and Eastern entered into the conspiracy, Defendants failed to
12 disclose such fraudulent conduct to Herbalife. Defendants knew their actions to be
13 fraudulent, and Defendants concealed the truth from Herbalife with the intent to defraud
14 and deceive Herbalife and with the intent to induce Herbalife to act in the manner herein
15 alleged.

16 70. At the time of the fraudulent omissions by Berg, with the participation and
17 knowledge of Eastern, and at the time Herbalife engaged in the actions herein alleged,
18 Herbalife was ignorant of the actions being undertaken by Defendants, believed that
19 Defendants were acting in the best interests of Herbalife, and relied upon Defendants in
20 continuing to employ and compensate Berg and Eastern.

21 71. Herbalife did not discover the fraudulent concealment advanced by Eastern
22 and Berg until Dell contacted Herbalife in the summer of 2021.

23 72. Berg and Eastern intended to deceive Herbalife by concealing their
24 conspiracy and fraudulent PO. Berg and Eastern were careful not to create a “paper trail”
25 of its fraudulent conduct. There are no emails on the Herbalife computer system
26 referencing or even mentioning the multi-million dollar order that Herbalife allegedly
27 placed with Eastern. Furthermore, Berg failed to disclose during the RFP process that
28 Eastern had already ordered the equipment that was subject to the RFP. When Berg

1 approved the PAR on January 27, 2021, Berg failed to disclose to anyone at Herbalife that
2 he believed that Eastern had already ordered the equipment from Dell. Moreover, when
3 Deloitte was retained in early 2021 to evaluate potential solutions for BCDR, Berg failed
4 to mention that tens of millions of dollars of equipment had already been ordered by
5 Eastern from Dell. Berg did not obtain any of the required approvals to make an
6 equipment order. Berg's concealment caused significant damage to Herbalife in an
7 amount to be proven at trial.

8 73. Throughout 2020 and 2021, Berg acted as if Eastern had not been allegedly
9 awarded the BCDR bid and that Eastern had not placed an equipment order with Dell.
10 Berg participated in the Board presentation, the RFP process, the PAR approval process,
11 and attended meetings with Deloitte, without ever mentioning his understanding that the
12 BCDR project had already been awarded to Eastern and that Eastern had already placed
13 the equipment order.

14 74. Had Herbalife known of the actions being undertaken by Defendants,
15 Herbalife would have behaved differently.

16 75. As a result of Defendants' wrongful conduct, Herbalife has suffered and
17 continues to suffer economic loss, and other general and specific damages, including, but
18 not limited to, Eastern's invoice(s) for equipment return, financing charges, and/or
19 restocking fees, among other damages, all in an amount to be determined according to
20 proof at the time of trial.

21 76. Defendants committed the wrongful acts maliciously, oppressively, and with
22 intent to defraud and permanently deprive Herbalife of its property, and their concealment
23 was a substantial factor in causing Herbalife's harm. Herbalife is entitled to punitive and
24 exemplary damages in an amount to be ascertained according to proof at the time of trial.

25 77. WHEREFORE, Herbalife prays for relief as set forth below.
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SECOND CAUSE OF ACTION

Breach of Fiduciary Duty

(Against Defendants)

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2
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4 78. Herbalife incorporates herein by reference each of the allegations set forth
5 above as though fully set forth herein.

6 79. At all relevant times, Berg was a Vice President and officer of Herbalife and
7 had a fiduciary duty to (1) use reasonable care in the performance of his duties, (2)
8 exercise undivided loyalty to his employer, and (3) maintain the confidentiality of his
9 employer's documents.

10 80. Berg conspired with Eastern to breach his fiduciary duty to use reasonable
11 care in the performance of his duties by, among other things, participating in a scheme to
12 order tens of millions of dollars of equipment from Eastern without advising anyone at
13 Herbalife or Deloitte of such orders. Berg also failed to disclose to Herbalife during the
14 RFP process or the PAR approval process that the equipment subject to the bidding had
15 already been ordered by Eastern.

16 81. As a Vice President and officer of Herbalife, Berg owed Herbalife his
17 undivided loyalty. Berg breached his fiduciary obligation to provide Herbalife his
18 undivided loyalty by conspiring with Eastern to the detriment of Herbalife. Berg had a
19 fiduciary obligation to disclose to Herbalife that Eastern had ordered tens of millions of
20 dollars of equipment on behalf of Herbalife. Instead, Berg secretly corresponded with
21 Eastern, using non-Herbalife emails or devices, so that no one at Herbalife could discover
22 that the BCDR order had been placed by Eastern. Berg did not obtain any of the required
23 approvals to make an equipment order. During the RFP process, Berg never disclosed
24 that Eastern had already ordered BCDR equipment from Dell. Moreover, when Deloitte
25 was suggesting other alternative BCDR solutions, Berg never disclosed that BCDR
26 equipment had already been ordered. All of these acts, among others, violated his duty of
27 loyalty to Herbalife.

28 82. Berg had a fiduciary duty to maintain the confidentiality of Herbalife's

1 documents. In breach of this fiduciary duty, Berg conspired with Eastern and forwarded
2 the Deloitte deck to Eastern 18 days after he was fired. Berg gave Eastern confidential
3 information regarding BCDR strategy.

4 83. Herbalife was harmed by Berg's breach of his fiduciary duties and Berg's
5 conduct was a substantial factor in causing Herbalife's harm.

6 84. Defendants committed the wrongful acts maliciously, oppressively, and with
7 intent to defraud and permanently deprive Herbalife of its property, and their concealment
8 was a substantial factor in causing Herbalife's harm. Herbalife is entitled to punitive and
9 exemplary damages in an amount to be ascertained according to proof at the time of trial.

10 85. WHEREFORE, Herbalife prays for relief as set forth below.

11 **THIRD CAUSE OF ACTION**

12 **Breach of Contract**

13 **(Against Defendants)**

14 86. Herbalife incorporates herein by reference each of the allegations set forth
15 above as though fully set forth herein.

16 87. Eastern entered into two agreements with Herbalife, the MSA and the NDA.
17 True and correct copies of these agreements are attached hereto as Exhibits 2-3.

18 88. Berg entered into two agreements with Herbalife, the Confidentiality
19 Agreement and the Proprietary Information Agreement. True and correct copies of these
20 agreements are attached hereto as Exhibits 1 and 4.

21 89. Herbalife has satisfied all of its obligations under the MSA, the NDA, the
22 Confidentiality Agreement, and the Proprietary Information Agreement.

23 90. By engaging in the misconduct and other wrongful acts set forth above,
24 Eastern has materially breached the MSA and the NDA, and Berg has materially breached
25 the Confidentiality Agreement and the Proprietary Information Agreement.

26 91. As a result of Eastern's breaches, Herbalife has suffered and continues to
27 suffer economic loss, and other general and specific damages, including, but not limited
28 to, Eastern's invoice(s) for equipment return, financing charges, or restocking fees, among

1 other damages, all in an amount to be determined according to proof at the time of trial.

2 92. WHEREFORE, Herbalife prays for relief as set forth below.

3 **FOURTH CAUSE OF ACTION**

4 **Conversion**

5 **(Against Defendants)**

6 93. Herbalife incorporates herein by reference each of the allegations set forth
7 above as though fully set forth herein.

8 94. Herbalife has an advantage over its competitors because of its confidential,
9 proprietary Confidential Information. Berg and Eastern were entrusted with the
10 Confidential Information in connection with their employment and vendor status,
11 respectively, at Herbalife. Berg and Eastern conspired to wrongfully convert the
12 Confidential Information by improperly and secretly diverting business to Eastern for
13 Defendants' financial gain.

14 95. As a result of Defendants' wrongful conduct, Herbalife has suffered and
15 continues to suffer economic loss, and other general and specific damages, including, but
16 not limited to, Eastern's invoice(s) for equipment return, financing charges, or restocking
17 fees, among other damages, all in an amount to be determined according to proof at the
18 time of trial.

19 96. Defendants committed the wrongful acts maliciously, oppressively, and with
20 intent to defraud and permanently deprive Herbalife of its property. Herbalife is entitled to
21 punitive and exemplary damages in an amount to be ascertained according to proof at the
22 time of trial, which is appropriate to punish and set an example.

23 97. WHEREFORE, Herbalife prays for relief as set forth below.

24 **FIFTH CAUSE OF ACTION**

25 **Declaratory Relief**

26 **(Against Defendants)**

27 98. Herbalife incorporates herein by reference each of the allegations set forth
28 above as though fully set forth herein.

1 a. From disclosing or utilizing any confidential, proprietary, or
2 protected information obtained from Herbalife including, but not limited to, information
3 obtained during the RFP process, including the Deloitte “executive readout” deck.

4 b. To return to Herbalife any confidential, proprietary, or protected
5 information or other property or information misappropriated from Herbalife by
6 Defendants.

7 2. For compensatory and general damages according to proof;

8 3. For special damages according to proof;

9 4. For consequential damages according to proof;

10 5. For prejudgment interest at the maximum legal rate;

11 6. For punitive and exemplary damages according to proof;

12 7. For costs of the proceedings herein;

13 8. For attorney’s fees as provided by the MSA, the NDA, and the
14 Confidentiality Agreement;

15 9. For such other and further relief as the Court deems just and proper; and

16 10. For a jury trial pursuant to law.

17
18 Dated: January 17, 2022

MANATT, PHELPS & PHILLIPS, LLP

19
20 By: /s/ Robert H. Platt

Robert H. Platt

Attorneys for Plaintiff

HERBALIFE NUTRITION

INTERNATIONAL OF AMERICA, INC.