IN THE MATTER OF AN ICC ARBITRATION
ICC ARBITRATION No. 565/23

INTERNATIONAL CHAMBER OF COMMERCE
INTERNATIONAL COURT OF ARBITRATION

Helikon Health, Inc. (U.S.A.)

Claimant

Against

Parnass Corporation (Greece)
Respondent

REQUEST FOR ARBITRATION

20 March 2023

Legal Counsel of Helikon

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I. INTRODUCTION

1. Helikon Health, Inc. (USA) herewith submits a request for arbitration pursuant to the 2021 ICC Arbitration Rules against Parnass Corp. in Smyrna (Greece).

II. THE PARTIES AND THEIR COUNSEL

2. The Claimant is Helikon Health, Inc. (U.S.A.) with the address in 340 Arlington Highway, Arlington, VA 22100 and the email address Helikon@gmail.com. The Claimant is incorporated in the United States of America.

3. The Claimant is represented by its Legal Counsel. (Power of Attorney attached – [*omitted*])

4. The Respondent is Parnass Corporation, established in Naga Higis Ave., in Smyrna (Greece). The email of the corporate counsel of Parnass Corporation is Parnasslegal@Parnass.com. Parnass is incorporated in Greece.

5. In this document, the Claimant and the Respondent are jointly referred to as "the Parties."

III. THE AGREEMENT TO ARBITRATE

6. Article XIV of the Agreement provides for ICC Arbitration. The relevant provision provides as follows:

> *All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules. The Emergency Arbitrator Provisions and the Expedited Procedure Provisions shall not apply.*

If in the context of a claim under this Agreement a dispute arises as to the existence or legal capacity of any of the parties, or scope of the power of attorney to represent any of the parties during the signing of this Agreement or the application of this Agreement, such dispute shall be decided by the competent courts of the place of incorporation of those companies.

If any legal action, arbitration, proceeding, hearing, or motion is brought by any party to this Agreement to enforce the terms and conditions of this Agreement, whichever party shall prevail shall be entitled to an award of reasonable attorney's fees, paralegal fees, costs and expenses.

IV. APPLICABLE RULES OF LAW AND THE PLACE AND LANGUAGE OF THE ARBITRATION

A. Rules of Law

7. Article XV of the Agreement provides that the Agreement is to be governed by the law of New York.

B. Place and Language of the Arbitration

8. Claimant proposes that the arbitration be legally seated and the hearing be held in Washington, D.C. The language of the arbitration shall be English.

V. CONSTITUTION AND APPOINTMENT OF THE ARBITRAL TRIBUNAL

9. Claimant proposes that this dispute shall be resolved by an Arbitral Tribunal of three (3) Arbitrators, with each party selecting one Arbitrator and the Presiding Arbitrator to be selected by the two party-appointed arbitrators. If either Party fails to nominate an Arbitrator, or if no agreement is reached with respect to the third

Arbitrator, such Arbitrator(s) shall be appointed by the Court of the International Chamber of Commerce (ICC Court).

10. Pursuant to Article 12 of the ICC Rules, the Claimant hereby nominates Mr. Thomas Black for appointment by the ICC Court. Mr. Black's contact information is as follows:

Thomas Black
Hortensia Street, 12
Washington, D.C.
(202) 777 4433
Tommy.Black@coldmail.com

11. Helikon Health, Inc. presents attached to the present request for arbitration the CV and declaration of conflicts of Mr. Black [*annex omitted*]. Please note that this arbitrator has disclosed that he is currently involved in one other pending arbitration involving Helikon, which started six months ago. The arbitrator also sat on an arbitral tribunal appointed by the LCIA in which Helikon was a party. That arbitration finished in a settlement between the parties 18 months ago. Helikon has no objection to this person being appointed as arbitrator in the present case, as these other appointments do not constitute any conflicts of interest.

VI. FACTUAL BACKGROUND

12. The Claimant was formerly called Parnass Diagnostics, Inc. and was an entity owned by the Respondent. It is a developer, manufacturer and marketer of various products for people with diabetes, including a portfolio of blood glucose monitoring supplies and technologies. In 2019, the Respondent sold the Claimant to the Greek Health Industry Investment Company Limited ("Gyrocare") (see the Preamble of

the Agreement). As part of the sale, the Respondent entered into the Agreement with the Claimant.

13. The negotiations which led to the sale by the Respondent of the Claimant to Gyrocare (and with it, amongst other matters, the entering into the Agreement) were conducted by executives within the Claimant. At that time, those executives were effectively Respondent's employees and were negotiating the putative deal with their future masters in Gyrocare. Those executives relayed the course of the negotiations to persons further up the hierarchy of the Respondent as these went along, and, ultimately, the deal was finalized. External legal advice was given by the international law firm Noble & Jackson to those executives in the course of their negotiations with Gyrocare for the purposes of the putative deal. Those executives then became the employees of Gyrocare. It appears to be common ground that the Respondent knew and concurred with the fact that its then employees were negotiating, on its behalf, with the putative purchaser (Gyrocare). That putative purchaser would later be the effective employer of those negotiating. This approach does not appear to have caused the Respondent any pause for thought.

14. The Agreement is signed by Tina Andrach (one of the negotiators) and Michael Sipylus (President of the Respondent). Tina Andrach was, up to the moment of the finalization of the deal, an employee of the Respondent, and thereafter was an employee of Gyrocare. The Agreement is not isolated or separate from the sale of the company but is specifically part thereof as noted in the text of the second paragraph of its Preamble. The negotiations were, at all times, as between the

Respondent (through its chosen negotiating team, which was led by Ms. Andrach) and Gyrocare.

15. The performance of the first two Contract Years passed without any problems. Problems started to arise when the Parties started contemplating Contract Year Three (which was calendar year 2021).

16. By email dated October 4, 2020, the Claimant reached out to the Respondent as follows:

> *I am working on 2021 units projections. Can you share with us Parnass estimated units volume for 2021 for our Budget process?*
>
> *Please let me know.*

17. By email dated October 26, 2020 (C-005), the Respondent replied as follows:

> *As I informed by SMS to you in this week, let me inform you about estimated purchase qty for 2021 as below. Thank you for waiting.*
>
> *After consideration about the current situation of our Helikon business, our strips purchase qty target will be 27Mpcs, means 540,000 vials of 50ct test strips in 2021.*
>
> *The number is estimated presuming that Helikon will not directly sell the product our [sic] existing customers.*
>
> *If you are planning such sales, please let us know. Then we may propose different number at that time.*
>
> *Thank you for your kind attention. Kindly confirm by return for your acceptance.*

18. This proposal on the part of the Respondent was, by comparison to the Annual Minimum Purchase for Contract Year Two, a reduction of 85% on the then current year.

19. There was a short follow-up email from the Respondent to the Claimant on November 6, 2020. By email dated November 8, 2020, the Claimant replied to the Respondent as follows:

> *We reviewed your estimated units purchase for 2021 and we were startled to see the 85% reduction compare to 2020.*
> *Please provide Parnass Offices 2021 estimated units purchase by product (Item Code) and country for our review.*

20. The Respondent, that day, replied and stated that it would not be possible to give "Item code wise break down", and gave a regional break down ("EU: 20Mpcs Latam: 5Mpcs Asia: 2Mpcs (For Au, we assume to supply till mid of 2021, but if new tender supply will delay, we need to buy additional qty. Since we cannot expect to get new tender in AU in 2021 with you produts [sic])".

21. On November 21, 2020, the Claimant asked the Respondent by email for units forecast by month and item code for the purpose of 2021. The following day, the Respondent replied to the effect that it only had the data it provided as per its purchase forecast, and asked whether they could consider that the 2021 volume as agreed at its requested amount. By email dated December 8, 2020, the Claimant pressed the Respondent for the information sought on November 8, 2020, so that it could "have a more substantive discussion with the senior team at [the Claimant] and then communicate back to you next steps."

22. By email dated December 21, 2020, the Claimant told the Respondent that the latter's proposal (85% less than Contract Year Two) was not acceptable, and that a higher volume commitment was needed "by the end of this calendar year or per the [Agreement] we will revert back to the last year's volume for 2021".

23. By email dated December 28, 2020 (**C-002**), the Respondent set out its position in respect of Contract Year 3. Respondent essentially explained that it did not consider itself bound by the contract purchase volumes and that it could unilaterally establish the purchase amount. Respondent further stated that it could even entirely cease to purchase from Claimant and instead source the products elsewhere from competing companies.

24. On January 4, 2021 **(C-003**), the Claimant replied to the Respondent protesting against that position and providing an option to nevertheless go forward by relying on the sales numbers for Year 1 instead of Year 2.

25. This proposal was not accepted by the Respondent and its email of January 15, 2021 (**C-004**) to the Claimant, the Respondent further developed on its own understanding of the Agreement.

26. Claimant sent a letter to Respondent on January 16, 2022 (**C-005**) to request adherence to the trademark provisions in the Agreement and to state that Respondent's obligation to honor the Year 2 minimums is not contingent on good faith negotiations.

27. Claimant considers that the interpretation of clause 2.2 and Schedule C of the Agreement entails that nothing in the language of the IDA suggests that good-faith negotiations are a "condition precedent" to invoking these carryover minimums. New York law requires that a condition precedent be clearly identified in a

contract's language.[1] The IDA contains no such "clear language" making good-faith negotiations a condition precedent. In fact, the language used in Section 2.2- "provided, however" -demonstrates the opposite proposition, expressly modifying the annual negotiation requirement to preserve a minimum carried over each year of the contract independent of the parties' reaching an agreement on a new minimum. Carrying over the prior year's minimum is not contingent on good-faith negotiations; it is a contingency in the event no such negotiations take place or no agreement is reached.

28. Moreover, Parnass cannot redefine "good faith" to require Helikon to negotiate below the minimums it is guaranteed in each year of the contract. While Helikon did, in fact, negotiate in good faith with Parnass, good faith did not require Helikon to abandon its own economic self-interest.[2] Helikon was under no duty to accept or even counter Parnass's absurdly low offer to purchase 27 million strips (a decrease of 153 million strips from the minimum guaranteed to Helikon in the IDA). But it did make a counteroffer, and Parnass rejected Helikon's generous good faith offer.

29. Parnass agreed to a contract that obligated it to purchase at least 180 million strips in Year Three (as well as Years Four and Five). Parnass failed to do so, and thus breached its obligations under the IDA. That Parnass, a sophisticated international

[1] See, e.g., *Tyndallv. Tyndall*, 42 N.Y.S.3d250, 251-52 (N.Y. App. Div. 2016) (CLA-488) ("A contractual duty ordinarily will not be construed as a condition precedent absent clear language showing that the parties intended to make it a condition." (citation omitted); id. ("It must clearly appear from the agreement itself that the parties intended a provision to operate as a condition precedent. If the language is in any way ambiguous, the law does not favor a construction which creates a condition precedent." (internal quotation marks and citations omitted).
[2] See *Gas Nat*.,33 F. Supp. 3d at 382 (acting in self-interest is not bad faith).

corporation, may now regret the agreement it executed, has no bearing on whether it is required to live up to its contractual obligations.

30. Claimant considers that the interpretation of what a good faith negotiation should look like ought to be done in accordance with New York law, since this law is applicable to the Agreement as per agreement of the parties. The meaning of a good faith negotiation is, in consequence, an objective one.[3]

31. In addition, the entire premise, that even in the event of good faith negotiations (whether leading to an agreed amount for any of Contract Years Three-Five, or triggering the fall- back of the prior year's amount), no obligation arose on the part of the Respondent, does not accord with an objective reading to the contract, as required under New York law. The Claimant would, on the Respondent's theory, be left with only one avenue and that would be to terminate the Agreement. However, that would be, on the Respondent's theory, of no benefit to the Claimant as it would not give rise to any compellable right on its behalf to further sales to the Respondent. In the context of a contract of a five-year duration, an objective interpretation of the contract does not support the conclusion that once one was past the first two years, performance on the part of the Respondent as regards purchases become, effectively, optional.

Unauthorized Use by Respondent of Claimant's proprietary information and trademarks

32. Claimant notified Respondent by a letter dated January 16, 2022, of specific infringements and "immediately cease misuse of Helikon's trademarks". This letter

[3] See the case of *L-7 Designs, Inc. v. Old Navy, LLC,* 964 F. Supp. 2d 299, 307 (S.D.N.Y. 2013).

put the Respondent on notice to cease all infringing activity, and not just specifically identified infringing activity.

33. Even if the Respondent ceased the specifically identified infringing activity within a 30 day cure period, the Respondent continued to infringe upon the marks such as through "upgrade advertisement," on its website. To substantiate this infringement caused by the "advertisement," Claimant provides a screenshot from the Respondent's website from February 28, 2022 [*annex omitted*]. The Claimant also argues that the Respondent failed to take action to correct the information that was provided to consumers in "thousands of copies of the [infringing] flyers [which] were distributed".

VII. CAUSES OF ACTION

34. This Request for Arbitration respectfully asks the arbitral tribunal to grant damages for two main reasons: (1) the lack of compliance with the distribution contract (the Agreement) as to the minimum purchase requirements, and (2) the unauthorized use by Respondent of Claimant's proprietary information and trademarks.

1. As to the damages for contract breach as to the minimum purchase requirements, the basis for Claimant's claim for damages is Respondent's conceded failure to purchase the Annual Minimum Purchase amount as required by the Agreement in 2021 (Contract Year Three and Four). Moreover, Claimant sustained separate damages for failure by the Respondent to provide purchase forecasts in 2020 as set forth in the Agreement.

2. Claimant also lost sales as a result of the misuse of its trademarks. Respondent should have ceased to use, display, and show to potential clients all trademarks

belonging to Claimant that Respondent at the time of the facts did not any longer distribute. In fact, Claimant's allegation is that Respondent used Claimant's trademarks and proprietary information to distribute different products, not related to Claimant.

VIII. DAMAGES CLAIM, INCLUDING INTEREST

35. Claimant seeks damages for Contract Years 3-5 of the Agreement (2021, 2022 and 2020) using a fairly straightforward methodology. This methodology includes as follows. STEP 1: Compare the Annual Minimum Purchase requirement (3,600,000 for each year, as per the default position under Schedule C for the Annual Minimum Purchase calculation) with the actual amount of purchases (less permissible deductions as per the Agreement) for each year to determine the claimed shortfall amount. STEP 2: Determine the price per unit ($5.25) less applicable cost per unit to calculate the lost profit per unit. STEP 3: Multiply that amount by the claimed shortfall for each year.

Aristotle Slide 12

Contract Year	Claimed AMP Requirement	Effective Purchases	Claimed AMP Shortfall	Plato Adjusted Lost Profit per Strip	Plato Adjusted Lost Profits
3 (2021)	3,600,000	2,795,958	804,042	$3.40	$2,733,742.80
4(2022)	3,600,000	1,260,081	2,339,920	$3.40	$7,896,694
5 (2020)	3,600,000	0	3,600,000	$3.40	$10,796,659
	10,800,000	5,056,039	5,939,920		**$21,427.095**

Impact on Sales due to delayed purchases by Respondent:

Contract	Claimed	Plato Adjusted Reduced Profits	Plato Adjusted Reduced

Year	Purchases	Impacted Sales	per Unit	Profitability
3 (2021)	1,558,588	1,558,588	$0.76	$1,177,615
Adjusted AMP Breach Claim				**$22,604,710.80**

36. The damages suffered by the Claimant as a result of the Respondent's breach of the Agreement is USD 22,604,710.80 as set forth on Aristotle Slide 12.

37. Claimant seeks pre-judgment interest at the New York state law rate of 9%. The Claimant disputes these points and relies on the New York CPLR 5001 and 5004 in particular.

IX. RESERVATION OF RIGHTS

38. The Claimant expressly reserves its right to elaborate the claim further through subsequent written submissions, including as may be necessary to respond to any claim or defense that the Respondent may raise.

X. CLAIMANT HAS PAID THE REGISTRATION FEES

39. Claimant declares that it has paid the registration fee to the ICC Secretariat. Receipts have been submitted to the Secretariat. The Secretariat registered the notice as Case 565/23, and we refer to this case in this and all following communications.

XI. CLAIMANT'S REQUEST FOR RELIEF

40. For the reasons set forth above, the Claimant respectfully requests that the Arbitral Tribunal to be constituted in this case render a final award in the following terms:

1. Grant Helikon's claim that Parnass breached the IDA by failing to make the Annual Minimum Purchase for Contract Year Three thereby resulting in termination of the IDA and award expectancy damages under New York law for Contract Years Three through

Five. See IDA Sections 1.1; 2.1; 2.2; 3.2; Article V; Schedule A; Schedule C; Schedule D.

a. Respondent conceded that the Annual Minimum for Contract Year Three should be the same as Contract Year Two. The Contract Year Two Annual Minimum was 3,600,000 fifty (50)-count vials of strips (180,000,000 strips) equaling $18,900,000 in purchases. As a result of Respondent's breach and resulting termination of the IDA, the Contract Year Two Annual Minimum also applies for Contract Years Four and Five. Respondent failed to purchase the required 50-ct. equivalent test strip vials of product in Contract Year Three.

b. Helikon's expert report details the damages requested. Helikon also requests the expectancy damages relating to the breach of the agreement of failing to meet the Annual Minimum Purchase requirement are as follow:

Contract Year Three: $12,240,000
Contract Year Four: $12,240,000
Contract Year Five: $12,240,000

- **Total: $36,720,000**

These numbers are present value numbers. In addition, under New York law, Helikon is also entitled to prejudgment interest at a rate of 9%.

2. Grant Helikon's claim for breach of the IDA for Parnass's misuse of Helikon's trademarks in violation of the parties' agreement (which entitles Helikon to expectancy damages in the amount, at least, of the damages relating to Contract Years Three through Five of $36,720,000 as set forth above because it was forced to terminate the IDA as a result of the breach).

3. Grant Helikon's trademark infringement claims and award related damages including treble, punitive and statutory damages as allowed by law. As set forth in Expert, Plato's supplemental report [*annex omitted*], Helikon Request an award of $30,000,000 in damages.

4. Grant Helikon's request for treble, statutory and punitive damages.

5. Grant Helikon's claim for injunctive relief based on Parnass's infringement and misuse of Helikon's trademarks and permanently enjoin Parnass's acts of trademark infringement.

6. Grant Helikon's claim for breach of the IDA by failing to provide requested forecasts for Contract Year Four and award related damages. As a result of Parnass's breach of the IDA, Helikon was forced to terminate the IDA.

7. Grant Helikon prevailing party attorney's fees, costs and expenses associated with this matter as provided for in Article XIV of the IDA.

8. Grant pre-judgment interest pursuant to New York law, which is presently at a rate of 9%.
9. Grant such other relief to Helikon as the Tribunal may conclude is just and proper.

Respectfully submitted on behalf of the Claimant by its Counsel.

Signature

_____

Counsel for the Claimant

TABLE OF EXHIBITS

Abbreviation	**Full Term**
Exhibit No. C-001	Agreement (Excerpts)
Exhibit No. C-002	Email of December 28
Exhibit No. C-003	Email of January 4
Exhibit No. C-004	Email of January 15
Exhibit No. C-005	Letter of January 16