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

RESPONDENT'S ANSWER TO THE REQUEST FOR ARBITRATION

15 June 2023

Legal Representative of Parnass Corp.

On behalf of Respondent, Parnass Corp.

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I. INTRODUCTION

1. This is Parnass' answer to the Request for Arbitration submitted on behalf of Helikon, Inc. (U.S.A.). Parnass would like to inform the ICC Secretariat that since June 1, 2024, its address has changed to the newly built headquarters at 3, Rue Montblanc, in Delphi (Greece).

2. For the purpose of this proceeding Parnass accepts service via email at infolegal@parnass.gr, with copy to Legal Counsel Brian Besserwisser at balleswisser@parnass.gr.

II. RESPONDENT´S COMMENTS CONCERNING THE COMPOSITION OF THE ARBITRAL TRIBIUNAL

3. In its Request for Arbitration, Claimant nominated Mr. Thomas Black. However, Respondent wishes to point out that it found out that on June 2, 2023 Mr. Thomas Black was appointed by the LCIA Court in another, non-related, dispute that involves the Claimant party. Neither Mr. Black nor Claimant have informed the ICC nor Respondent of this appointment. Respondent considers that this additional appointment of Mr. Black disqualifies him from sitting also as arbitrator in the present case. With now two already ongoing arbitrations involving Claimant, and one prior that already terminated, Mr. Black does not appear to be lacking conflicts of interest with Claimant. Mr. Black may also obtain Claimant's confidential information in the context of the arbitrations he already served and serves, which will make it impossible for this person to serve with integrity, independence and impartiality on the present panel. Respondent therefore requests the ICC Court of

International Arbitration to reject the appointment of Mr. Black and instead appoint another, suitable, arbitrator on Claimant's behalf.

4. As Respondent's party-appointed arbitrator, Respondent wishes to nominate Ms. Natalia Armstrong. Her CV is attached hereto [*annex omitted*]. Her address is as follows: [*address omitted*]. Natalia Armstrong has no conflicts whatsoever with any party related to this dispute.

III. RESPONDENT´S COMMENTS AS TO THE PLACE OF ARBITRATION, THE APPLICABLE RULES OF LAW AND THE LANGUAGE OF THE ARBITRATION

a) The Seat of Arbitration

5. Claimant proposes that the seat of arbitration be in Washington, D.C. However, Claimant has proposed this seat out of its own comfort and convenience. Claimant Helikon Health, Inc. has its headquarters in Arlington, which is almost in downtown Washington, D.C., which will make it easy for it to appear before any arbitral tribunal with legal counsel and staff support. Respondent, in contrast, is headquartered in Delphi (Greece), which requires a 15-hour voyage, including transfers at Athens and Frankfurt airports, to travel to the US, with the related immigration requirements and limitations for Respondent's employees that do have diverse citizenships and who will have to apply for special visas to come for any hearing.

6. Respondent therefore proposes the city of Geneva, in Switzerland, as the seat of arbitration. Geneva is an international hub where many ICC arbitrations take place, and it is located at 5 hours' travel away from Delphi, and 7.5 hours away from

Arlington, VA. In addition, arbitral awards rendered in Switzerland are equally valid and enforceable in all relevant jurisdictions in this case.

b) Governing Law

7. Respondent has no objection to Claimant's assertion that the Agreement be governed by the law of New York, excluding its conflict of law rules. However, Respondent wishes to explicitly clarify that this does not extend to the law governing the arbitration agreement. In Respondent's view, clause XIV of the Agreement is governed by common federal principles of contract law as recognized in the United States.

c) The Language of Arbitration

8. The agreement is silent as to the language of the arbitration. Claimant proposes English as the language. Respondent would also propose the use of the English language as the procedural language, although for different reasons than Claimant. In Respondent's view, English should be the language of the arbitration because Respondent is certain it will win this arbitration and will be able to enforce the final award against Claimant for the costs claimed. It will save money and time to have the award rendered in English, since no translation will be required for enforcing the award at the place of Claimant's incorporation, i.e. in Arlington, VA.

IV. THE TRIBUNAL LACKS JURISDICTION OVER THIS DISPUTE

9. The tribunal lacks jurisdiction because the Agreement effectively binds the Greek Health Industry Investment Company Limited ("Gyrocare") and Parnass. The Agreement states that Gyrocare purchased Helikon (the Claimant in this Request

for Arbitration). To start this arbitration, Gyrocare directly should have filed the Request for Arbitration. In 2019, Parnass sold what today is the Claimant company to Gyrocare. The Claimant company was the object of the sales agreement, but, in Respondent's view, as such it cannot invoke the rights granted to the purchaser.

10. In addition, as Claimant recognizes in para. 13 of its own Request for Arbitration, there was no valid representation of the actual purchaser of the company, Gyrocare, when the Agreement was signed. The representative who signed the Agreement was indeed an employee of Parnass. In any case, Helikon, Inc., cannot now claim rights in its own favor from the agreement that explicitly binds Parnass with Gyrocare. This case should either be dismissed, or Gyrocare should be added as a necessary party to this arbitration.

11. Alternatively, Respondent asks this tribunal to decline jurisdiction on this matter until such time as the local courts of New York have ruled on the interpretation of the legal capacity of the parties and Gyrocare, pursuant to Article XIV, para. 2, of the arbitration clause.

V. RESPONDENT HAS NOT BREACHED ITS LEGAL OR CONTRACTUAL OBLIGATIONS

a) The Agreement should either be rewritten or should be considered terminated by the conclusive actions of the parties

12. Respondent is seeking to have the Agreement adjusted so that it, effectively, has no obligation to purchase any product from the Claimant for Contract Years Three-Five inclusive. The Respondent asks the Tribunal in this case to clarify the terms of the Agreement (henceforward called "IDA") to include an express limitation on

liability such that Helikon may not obtain monetary damages from Parnass when and if Parnass fails to purchase the Annual Minimum Purchase amounts in Contract Years Three, Four and/or Five.

13. The Respondent does not agree with the Claimant's submission in regard to the minimum purchase requirements as set out in Schedule C of the Agreement. First, the Claimant overstates, considerably, the position with phrases such as "minimums it [was] guaranteed in each year of the contract". Respondent does not agree that any such guarantees existed, nor is there any language which is objectively capable of bearing such a meaning. Secondly, the Claimant engaged in overstatement when it suggested that the Respondent "agreed to a contract that obligated it to purchase at least 180 million strips in Year Three".

14. Alternatively, Respondent seeks to entirely (or partially) rescind the Agreement. Respondent asks the Tribunal to excise from the Agreement any express obligation which might lead to it having to buy anything, beyond that which it chooses to purchase, in Contract Years Three-Five inclusive. Respondent argues that these effective minimum requirements are almost non-existent in light of the clear wording of the Agreement.

15. Respondent argues that when its lead negotiator, Ms. Andrach, sent it a draft of the Agreement on October 17, 2018, following her negotiations with Gyrocare, it immediately pushed back on a number of matters, including the proposed volume commitment and imposition of damages for any failure to purchase those volumes.

16. The draft of the Agreement has a provision by which the Parties were to agree, not less than 90 days prior to the expiration of a particular contract year, the annual quantity for the following year *(i.e.* a roughly similar position to that which made its way into the Agreement). However, in the event of there being no agreement to such annual quantity, the default position (clause 2.2.) was that 120% of the minimum quantity of the current year would apply. Schedule C to that draft provided for Contract Year One minimum annual quantity of 225,000,000 strips, but no further specific figures for subsequent years, save that, curiously, in the event of there being no agreement the minimum annual quantity would be 110% (not 120%) of the prior Contract Year.

17. The Respondent refers to an email of October 19, 2015 whereby it tells Ms. Andrach that it has comments "back from Parnass Corp. Global Division as follows: '*There should not be any volume commitment and penalty clause associated with the committed volume. Parnass will freely appoint distributer, by this volume commitment cannot be made*.'"

18. Ms. Andrach emailed the Respondent on October 20, 2015, to indicate her views on the comments and she makes it clear that *"[If] Parnass wants me to push back on this I will, I firmly believe this still stop the process, lower the purchase price of Parnass Diagnostics and potentially risk the deal*".

19. Following a conversation which Ms. Andrach then had with Gyrocare, she sent an email dated October 21, 2015, to the Respondent: *"[T]oday I had a conference call with them, to negotiate and finalize. Allow me to share the results.* ***1. Parnass will***

***only commits (sic.) to purchases for years one and two. Future years will be negotiated annually. a. No penalty for years 3,4, or 5*"**.

20. On October 24, 2015, Adamas Messogis (of the Respondent, but at the relevant time was based in the United States assisting Ms. Andrach and communicating with the then parent of the Claimant, the Respondent) sent an email to John Morea and Luigi Scardanelli (both in Greece). Mr. Messogis told his colleagues that "*Annual Minimum Purchase Volume for 3rd year and after will be 100% of those of each previous year in case both parties cannot agree, and there will be no penalty to purchase the lacking volume even if it does not reach to the volume*".

21. As regards the exact circumstances of the execution of the Agreement by the Respondent, we present Mr. Scardanelli's testimony who is ready to declare that "*to the extent that the decision- makers and the signatory at Parnass had any idea as to what was in the IDA and what was supposed to be in the IDA, it was based on what was in the Tractatus."*

22. The "Tractatus" is a detailed memorandum prepared by Mr. Scardanelli describing the deal as a whole. The Tractatus sets out his summary of the Agreement prior to its signature by the Respondent. Adjacent to "Schedule C" is the following summary (emphasis added):

> *Annual minimum purchase quantity (strip)*
>
> *First year: 3.4 million vials (170 million pieces)*
>
> *Second year: 3.6 million vials (180 million pieces)*
>
> ***no commitment in and after 3rd year.***
>
> *If existing customers start to buy directly from Gyrocare within 2 years, deduct from the minimum purchase quantity*

Additionally, damages or a penalty as recompense for a breach is not contemplated by the mechanics of section 3.2 of the Agreement. The trigger contained within section 3.2 for an obligation on the part of the Respondent to do certain things in the event of a Purchase Shortfall, is, as already noted, unambiguously confined to the first two Contract Years. Those Contract Years are now over, and, therefore, it must follow that the specific trigger contained therein for an obligation on the part of the Respondent to *(x) purchase quantities of the applicable Products equal to the Purchase Shortfall; or (y) pay an amount to [Claimant] equal to the Purchase Shortfall multiplied by the applicable prices for the Products as set forth on Schedule A* is spent. It is in the past, and the Agreement has, to that limited and precise extent, run its course.

23. As to the contents of a good faith effort to agree on new minimums for years 3, 4, and 5, Respondent considers that the following definition should apply:

> *the concept of a good faith negotiation should be taken in the context of what a Greek company would expect. There is an expectation that those negotiations would be wholesome, fulsome and they would include market conditions.*

24. This concept of good faith negotiation is even in consonance with the same New York case raised by Claimant, namely, *L-7 Designs, Inc. v. Old Navy, LLC,* 964 F. Supp. 2d 299, 307 (S.D.N.Y. 2013).

25. As applied to the facts of the present dispute between Respondent and Claimant, the Respondent opened with an 85% reduction on the Contract Year Two amount.

26. On October 26, 2020, Gados emailed Saluka and provided a good faith estimate for Parnass's product needs in Year Three (2021)-i.e., 27 million strips. By 2020, both Parnass Europe and Parnass Australia knew that Helikon would be selling its latest product, the TRUEMeter Air, directly to Parnass's customers in those territories in 2021 (Year Three). Parnass also could not sell the same quantity as Year One because Helikon was now selling directly into markets such as Germany, the U.K. and Australia at lower prices than Parnass equivalent products made by Gyrocare, and various competitor products had entered the market which tested a broader range of criteria and dramatically reduced Parnass's ability to sell the older products.

27. Consequently, the TRUE line of products was no longer a viable option for Parnass Europe and Parnass Australia, and Parnass's estimate of 27 million strips factored in this market reality.[1]

28. Respondent had a very difficult position because during the negotiations, unbeknownst to it, the Claimant had a nefarious agenda to string these out but never intending to come to an agreement. Helikon attempted to "leverage" the negotiations with Parnass, rather than engage in honest and meaningful discussions to try to reach agreement. Helikon wanted the Year Two minimum to automatically apply to Year Three regardless of Parnass's actual business needs, and objective market situation, so it ensured no agreement would be reached.[2] Respondent

[1] Parnass's estimated Year Three AMP quantity was also reduced because Parnass had excess inventory of 40-50 million strips from a large order it placed at the end of Year Two to meet the AMP quantity.

[2] See the set of hand-written notes of Dean Messina (of the Claimant) which shows a strategy laid out by him from November 2020 through to January 2021 to end up with no agreement.

further argues that Helikon's offer failed to take into account Parnass's actual business needs or Helikon's competitive sales efforts.

b) Claimant's claim that Respondent Used Claimant's Proprietary Information and Marks is unsubstantiated

29. Immediately upon receiving notice, Respondent stopped the enumerated activities by removing the Parnass Australia FAQ webpage and ceasing dissemination of the complained-of letter and flyer. Actually, Claimant did not specifically raise in the notice of infringement the other infringements that continued after the 30-day cure period and that Claimant now wants to raise before this arbitral tribunal. Moreover, these are largely non-contractual claims that can not be brought under the IDA and for that reason they cannot be submitted under the Agreement's arbitration clause to this arbitral tribunal.

30. The Claimant has failed to prove this claim, both as a matter of liability and of quantum. Claimant has not proven that it lost any sales, so even if, for the sake of argument, it could demonstrate some predicate liability (which it has not) there would still be the insurmountable obstacle of no proven loss.

31. In conclusion, Claimant has filed unsubstantiated claims against Respondent, in a clear showing of procedural bad faith. Respondent asks hereby the tribunal to assess reputational damages against Claimant and the reimbursement of attorney's fees and the costs of compiling the letters and other pieces of evidence to show that Respondent had complied with the notice of infringement.

c) Damages and Interest

32. Respondent entirely rejects the considerations of Claimant as to damages, as unsubstantiated. Respondent is not liable for a contract that it clearly intended to be agreed for two years, and where only good faith negotiations would have led to new purchase amounts for years three to five. Respondent also has not infringed Claimant's trademarks, and hence there is no liability.

33. Respondent also wishes to make some comments about Claimant's assertions as to interest. Under New York law an arbitrator is considered "at least as unrestrained as a chancellor in equity" with broad discretion and flexibility to determine whether or not pre-judgment interest is appropriate and fashion such an award for each particular case. New York common law provides the Tribunal with discretion to award pre-judgment interest at a rate it sees fit to compensate a contracting party for losses it suffered as a result of a breach, but such an award is not mandatory and may not be punitive.

VI. RESPONDENT'S REQUEST FOR RELIEF

34. **WHEREFORE,** Parnass respectfully requests that a final award be issued as follows:

i. A ruling in Parnass's favor declaring that Helikon may not obtain a monetary damage award for any failure by Parnass to purchase the Annual Minimum Purchase amounts for Contract Years Three through Five that was caused by (i) Helikon 's wrongful conduct, and/or (ii) mutual mistake, related to the formation of the parties' IDA; and

ii. An award in Parnass's favor that:

1. Reforms the IDA to include an express limitation on liability such that Helikon may not obtain monetary damages from Parnass if Parnass fails to purchase the Annual Minimum Purchase amounts in Contract Years Three, Four and/or Five; and/or

2. Rescinds the IDA such that the IDA is not enforceable for Contract Years Three through Five; and/or

3. Rescinds the Annual Minimum Purchase obligations in the IDA to the extent they otherwise could give rise to any monetary damages claim under the IDA in Contract Years Three, Four and/or Five; and/or

4. Rescinds the Annual Minimum Purchase obligations in the IDA for Contract Years Three, Four, and Five, as reflected in the following severable terms of that agreement:

    a. Commencing from the second Contract Year, in the event that the parties have not agreed on the Annual Minimum Purchase for the next Contract Year during the initial or any renewal term, then the parties shall use good faith efforts to mutually agree on the Annual Minimum Purchase for the next Contract Year prior to the end of the then current Contract Year; provided, however, that in the event the parties are unable to agree on the Annual Minimum Purchase for the next Contract Year prior to the end of the then current Contract Year, then the Annual Minimum Purchase for the next Contract Year shall be the same as that of the then current Contract Year. IDA, §2.2.

    b. The Annual Minimum Purchase for each subsequent Contract Year shall be as agreed to in writing by the parties ninety (90) days prior to the end of the then current Contract Year. In the event the Parties have not mutually agreed on the Annual Minimum Purchase for any Contract Year, the Annual Minimum Purchase for such Contract Year will be the same as the prior Contract Year. IDA, Schedule C; and/or

5. Otherwise fashions equitable relief, including but not limited to any combination of the actions set forth in (i) - (iv), for the purpose of preventing Helikon from benefitting from its wrongful conduct, and/or mutual mistake, by seeking recovery of monetary damages under the IDA for any failure by Parnass to purchase the Annual Minimum Purchase amounts in Contract Years Three, Four and/or Five;

iii. An award in Parnass's favor denying Helikon's claims and prayers for relief in their entirety:

1. Denying Helikon's claim that Parnass breached the IDA by failing to make the Annual Minimum Purchase for Contract Year Three;

2. Denying Helikon's claim that Parnass misused Helikon 's trademarks in breach of the IDA;

3. Denying Helikon's claim that Parnass breached the IDA by failing to provide sales forecasts for Contract Year Four;

4. Denying Helikon's claim for breach of contract damages sought for Contract Years Three through Five, including claims for damages in the amount of $12,240,000 for each of the Contract Years Three, Four, and Five, and the claim for prejudgment interest;

5. Dismissing Helikon's non-contractual trademark infringement claims as beyond the scope of the Tribunal's jurisdiction and, in the alternative, denying said claims on the merits;

6. Denying Helikon's claim for damages for trademark infringement, including treble, punitive and statutory damages, and denying Helikon 's claim for disgorgement and lost profits;

7. Denying Helikon's claim for injunctive relief;

8. Denying Helikon's claim for attorneys' fees, costs and expenses;

iv. An award in Parnass's favor declaring that Parnass is the prevailing party in this Arbitration;

v. An award in Parnass's favor granting Parnass attorney's fees, costs and expenses;

vi. An award in Parnass's favor granting such other relief to Parnass as the Tribunal may conclude is just and proper.

Respectfully submitted on behalf of the Respondent by

Signature

_____

Counsel for Respondent