

Complaint

126 F.T.C.

IN THE MATTER OF

GLOBAL INDUSTRIAL TECHNOLOGIES, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT

Docket C-3825. Complaint, Sept. 10, 1998--Decision, Sept. 10, 1998

This consent order, among other things, requires Global Industrial Technologies, Inc. ("Global"), the Texas-based producer of glass-furnace silica refractories, to restructure its proposed acquisition of AP Green Industries, Inc. ("AP Green"), and to divest certain assets of AP Green's silica refractories business to a Commission-approved buyer. The consent order provides that if Global does not complete the divestiture within the time-frame indicated, the Commission may appoint a trustee to complete the divestiture. In addition, the consent order contains a provision requiring Global to maintain the viability and marketability of the Global and AP Green silica refractories businesses pending the divestiture.

Participants

For the Commission: *Gregg Vicinanza, Joseph Krauss, William Baer, Russell Mangum, and Jonathan Baker.*

For the respondent: *D. Stuart Meiklejohn, Sullivan & Cromwell, New York, NY.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission ("Commission"), having reason to believe that Global Industrial Technologies, Inc. ("Global"), hereinafter sometimes referred to as respondent, has agreed to acquire AP Green Industries, Inc. ("AP Green"), in violation of Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. RESPONDENT

1. Respondent Global Industrial Technologies, Inc. is a corporation organized, existing and doing business under and by

virtue of the laws of Delaware with its office and principal place of business located at 2121 San Jacinto Street, Suite 2500 Dallas, Texas.

2. Respondent manufactures and sells refractories, which are heat-resistant materials used to line furnaces in industries that involve the heating or containment of solids, liquids, or gases at high temperatures.

3. For purposes of this proceeding, respondent is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

II. THE ACQUIRED COMPANY

4. AP Green is a corporation organized, existing and doing business under and by virtue of the laws of Delaware with its office and principal place of business located at Green Boulevard, Mexico, Missouri.

5. AP Green also manufactures and sells refractories.

6. For purposes of this proceeding, AP Green is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

III. THE PROPOSED ACQUISITION

7. On or about March 3, 1998, Global and AP Green entered into an Agreement and Plan of Merger pursuant to which Global, through a subsidiary, agreed to acquire AP Green.

8. Global and AP Green are substantial direct competitors in the United States market for glass-furnace silica refractories.

IV. THE RELEVANT MARKET

9. The relevant line of commerce in which to analyze the effects of the acquisition is the United States market for glass-furnace silica refractories, which are heat-resistant materials sold in the form of bricks, shapes, and mortar. Glass manufacturers, including producers of float glass (flat glass for homes, offices, and automobiles), container glass (for bottles and jars), and other types of glass (e.g., for

video screens, light bulbs, lenses, and beakers), require glass-furnace silica refractories to build the roofs and several other areas of the glass-melting furnaces in which they melt raw materials—silica, soda ash, salt cake, and dolomite—into a homogenous mass of molten glass.

10. Glass-furnace silica refractories are used by glass manufacturers because they are resistant to acid slags, have a high melting temperature, resist fumes and dust, and do not spall (*i.e.*, flake) at high temperatures. Glass manufacturers would not substitute other materials for glass-furnace silica refractories even in response to a significant increase in price.

11. Imports of glass-furnace silica refractories into the United States are small. The potential for significant imports is constrained by overseas production costs, and shipping and handling costs. Product availability and product quality issues also limit the competitiveness of most of the glass-furnace silica refractories produced overseas. In any event, customers in the United States would require extensive testing over several years before using glass-furnace silica refractories produced overseas.

12. Total annual sales of glass-furnace silica refractories in the United States are approximately \$4 million.

V. CONCENTRATION

13. Global and AP Green are the only two producers in the United States of glass-furnace silica refractories. Therefore, the United States glass-furnace silica refractories market is extremely concentrated as measured by the Herfindahl-Hirschmann Index, and the acquisition would result in a monopoly.

14. It is likely that Global will obtain unilateral market power in the United States market for glass-furnace silica refractories.

VI. ENTRY CONDITIONS

15. Entry into the glass-furnace silica refractories market would not be timely, likely or sufficient to deter or offset reductions in competition resulting from the acquisition.

16. Obtaining product qualification at glass producers, who require extensive life cycle testing before they will use glass-furnace silica refractories in their plants because these products are so critical to the manufacturing process, would require many years. The total

time from initial entry to significant market impact likely would be many years.

17. Entry would also be unlikely because it would require a large sunk capital investment. Moreover, efficient production would require entry at a scale that would be relatively large compared to the total sales available in the glass-furnace silica refractories market, making entry more risky and unlikely.

VII. EFFECTS OF THE ACQUISITION ON COMPETITION

18. The acquisition of AP Green by Global may substantially lessen competition and tend to create a monopoly in the United States market for glass-furnace silica refractories because, among other things:

- a. It will increase concentration substantially in a highly concentrated market;
- b. It will eliminate substantial head-to-head competition between Global and AP Green;
- c. It will leave Global as the sole producer of glass-furnace silica refractories in the United States, allowing Global unilaterally to exercise market power;
- d. It will likely result in increased prices for glass-furnace silica refractories; and
- e. It will likely result in diminished product innovation in glass-furnace silica refractories.

VIII. VIOLATIONS CHARGED

19. The acquisition agreement between Global and AP Green described in paragraph five violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

20. The proposed acquisition of AP Green by Global would, if consummated, violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

21. The proposed acquisition of AP Green by Global, if consummated, would allow Global to monopolize the United States markets for glass-furnace silica refractories in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of the proposed acquisition by the respondent named in the caption above of AP Green Industries, Inc., and respondent having been furnished thereafter with a copy of a draft complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of Section 5 of the Federal Trade Commission Act ("FTC Act"), as amended, 15 U.S.C. 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. 18; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent of all the jurisdictional facts set forth in the aforesaid draft of the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that respondent has violated the said Acts, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Global Industrial Technologies, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of Delaware with its office and principal place of business located at 2121 San Jacinto Street, Suite 2500, Dallas, Texas.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I.

It is ordered, That, as used in this order, the following definitions shall apply:

A. "*Respondent*" or "*Global*" means Global Industrial Technologies, Inc., its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; and its subsidiaries, divisions, groups and affiliates controlled by Global Industrial Technologies, Inc., and the respective directors, officers, employees, agents and representatives, successors, and assigns of each.

B. "*AP Green*" means AP Green Industries, Inc., a corporation organized, existing and doing business under and by virtue of the laws of Delaware with its office and principal place of business located at Green Boulevard, Mexico, Missouri.

C. "*Commission*" means the Federal Trade Commission.

D. "*Acquisition*" means the acquisition described in the Agreement and Plan of Merger, dated as of March 3, 1998, between Global and AP Green pursuant to which Global has agreed, through a subsidiary, to acquire AP Green.

E. "*Silica Refractories*" means refractory silica products, including silica bricks and shapes, and silica mortar, but excluding fused, foam, and vitreous silica.

F. "*Hile Plant*" means the manufacturing facility located in Northeast, Maryland that is currently owned and operated by Harbison-Walker Refractories Company ("HWR"), a subsidiary of Global.

G. "*Lehi Plant*" means the manufacturing facility located in Lehi, Utah that is currently owned and operated by AP Green.

H. "*Divested Assets*" means the assets required to be divested pursuant to paragraphs II and III of this order.

I. "*Acquirer*" means the entity to whom Global shall divest the Divested Assets.

J. "*Assets and Businesses*" means assets, properties, businesses, and goodwill, tangible and intangible, relating to the research, development, production, sale, or distribution of Silica Refractories, including, without limitation, the following:

1. All plant facilities, machinery, fixtures, equipment, vehicles, transportation and storage facilities, furniture, tools, supplies, stores, spare parts, and other tangible personal property;
2. All customer lists, vendor lists, catalogs, sales promotion literature, advertising materials, research materials, technical information, dedicated management information systems, information contained in management information systems, rights to software, technology, know-how, ongoing research and development, specifications, designs, drawings, processes and quality control data;
3. All intellectual property rights, patents, patent rights, patent applications, formulas, inventions, copyrights, trade secrets, trademarks, and trade names;
4. Raw material and finished product inventories and goods in process;
5. All right, title and interest in and to owned or leased real property, together with appurtenances, licenses, and permits;
6. All right, title, interest, and contractual rights in and to sources of raw material for Silica Refractories;
7. All right, title, and interest in and to the contracts (together with associated bids) entered into in the ordinary course of business with customers, suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees;
8. All rights under warranties and guarantees, express or implied;
9. All separately maintained, as well as relevant portions of not separately maintained books, records and files;
10. All federal, state, and local regulatory agency registrations, permits, and applications, and all documents related thereto; and
11. All items of prepaid expense.

K. "*AP Green Silica Refractories Properties to be Divested*" means AP Green's Lehi Plant, and all other Assets and Businesses of AP Green relating to the research, development, production, sale, or distribution of Silica Refractories, but excluding AP Green's manufacturing facility in Sproul, Pennsylvania provided however that, at the option of the Acquirer, Global shall install at the Lehi Plant prior to the divestiture the mixing equipment necessary to manufacture silica mortar.

L. "*HWR Silica Refractories Properties to be Divested*" means Global's Hile Plant, and all other Assets and Businesses of Global relating to the research, development, production, sale, or distribution of Silica Refractories, but excluding Global's manufacturing facility in Calhoun, Georgia provided however that, at the option of the Acquirer, Global shall install at the Hile Plant prior to the divestiture the mixing equipment necessary to manufacture silica mortar.

II.

It is further ordered, That:

A. Respondent shall divest, absolutely and in good faith, at no minimum price, the AP Green Silica Refractories Properties to be Divested as an ongoing business. The divestiture shall be made either:

1. Within thirty (30) days of the date this order is accepted by the Commission for public comment to Robert R. Worthen and Dennis R. Williams (jointly or through a corporation or partnership to be established by them) in a manner that receives the prior approval of the Commission; or

2. Within ninety (90) days of the date this order is accepted by the Commission for public comment to an Acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.

B. The purpose of the divestiture of the Divested Assets is to ensure the continued use of the Divested Assets in the same business in which the Divested Assets are engaged at the time of the proposed Acquisition, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint.

C. Pending divestiture of the Divested Assets pursuant to paragraph II or paragraph III of this order, respondent shall take such actions as are necessary to maintain the viability and marketability of the Divested Assets and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Divested Assets except for ordinary wear and tear.

III.

It is further ordered, That:

A. If respondent has not divested, absolutely and in good faith and with the Commission's prior approval, the AP Green Silica Refractories Properties to be Divested within ninety (90) days of the date this order is accepted by the Commission for public comment, then the Commission may appoint a trustee to divest, at the option of the Trustee, the AP Green Silica Refractories Properties to be Divested, or the HWR Silica Refractories Properties to be Divested. In the event the Commission or the Attorney General brings an action pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. 45(l), or any other statute enforced by the Commission, respondent shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief (including, but not limited to, a court-appointed trustee) pursuant to the Federal Trade Commission Act or any other statute enforced by the Commission, for any failure by respondent to comply with this order.

B. If a trustee is appointed by the Commission or a court pursuant to paragraph III.A. of this order, respondent shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:

1. The Commission shall select the trustee, subject to the consent of respondent, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to respondent of the identity of any proposed trustee, respondent shall be deemed to have consented to the selection of the proposed trustee.

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the AP Green Silica Refractories Properties to be Divested and the HWR Silica Refractories Properties to be Divested in order to accomplish the divestiture required by this order.

3. Within ten (10) days after appointment of the trustee, respondent shall execute a trust agreement that, subject to the prior approval of the Commission (and, in the case of a court-appointed trustee, of the court), transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture required by this order.

4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph III.B.3. of this order to accomplish the divestiture required by this order, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve (12) month period, the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission (or, in the case of a court-appointed trustee, by the court); provided, however, the Commission may extend this period for no more than two (2) additional terms of twelve (12) months each.

5. The trustee shall have full and complete access to the personnel, books, records, and facilities related to the AP Green Silica Refractories Properties to be Divested and the HWR Silica Refractories Properties to be Divested, or to any other relevant information, as the trustee may request. Respondent shall develop such financial or other information as such trustee may request and shall cooperate with the trustee. Respondent shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by the respondent shall extend the time for divestiture under paragraph III.B.4. of this order in an amount equal to the delay, as determined by the Commission (or, in the case of a court-appointed trustee, by the court).

6. The trustee shall use his or her best efforts to expeditiously negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to respondent's absolute and unconditional obligation to divest at no minimum price. The divestiture shall be made only to an Acquirer or Acquirers that receive the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission as set out in paragraph II of this order; provided, however, if the trustee receives bona fide offers from more than one acquiring entity, the trustee shall submit all bids to the Commission, and if the Commission approves

more than one such acquiring entity, then the trustee shall divest to the acquiring entity or entities selected by respondent from among those approved by the Commission.

7. The trustee shall serve, without bond or other security, at the cost and expense of respondent, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have authority to employ, at the cost and expense of respondent, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission (and, in the case of a court-appointed trustee, by the court), of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of respondent and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement based on sales price and contingent on the trustee's accomplishing the divestiture required by this order.

8. Respondent shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, recklessness, willful or wanton acts, or bad faith by the trustee.

9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in paragraph III of this order.

10. The Commission (or, in the case of a court-appointed trustee, the court) may on its own initiative or at the request of the trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this order.

11. The trustee may divest such additional ancillary assets related to the Divested Assets and effect such ancillary arrangements as are necessary to satisfy the requirements or purposes of this order.

12. The trustee shall have no obligation or authority to operate or maintain the AP Green Silica Refractories Properties to be Divested or the HWR Silica Refractories Properties to be Divested.

13. The trustee shall report in writing to respondent and the Commission every sixty (60) days concerning the trustee's efforts to accomplish the divestiture.

IV.

It is further ordered, That within thirty (30) days after the date this order becomes final, and every sixty (60) days thereafter until respondent has fully complied with the provisions of paragraphs II and III of this order, respondent shall submit to the Commission verified written reports setting forth in detail the manner and form in which respondent intends to comply, is complying, and has complied with paragraphs II and III of this order. Respondent shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with paragraphs II and III of the order, including a description of all substantive contacts or negotiations for the divestiture and the identity of all parties that have contacted respondent or that have been contacted by respondent. Respondent shall include in its compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

V.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries, or any other change in the corporation that may affect compliance obligations arising out of this order.

VI.

It is further ordered, That, for the purpose of determining or securing compliance with this order, upon written request, respondent shall permit any duly authorized representative of the Commission:

A. Access, during office hours and in the presence of counsel, to inspect any facilities and to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of respondent relating to any matters contained in this order; and

B. Upon five (5) days' notice to respondent and without restraint or interference from them, to interview officers, directors, or employees of respondent.

VII.

It is further ordered, That this order shall terminate on September 10, 2008.

IN THE MATTER OF

NUTRIVIDA, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3826. Complaint, Sept. 10, 1998--Decision, Sept. 10, 1998

This consent order prohibits, among other things, the New York-based corporation and its officer from making any unsubstantiated claims regarding the health benefits, performance or efficacy of Cartilet (a dietary supplement comprised of shark cartilage), or any food, drug or dietary supplement. In addition, the consent order prohibits the use of testimonials, unless they reflect the typical experience of consumers or the required disclosure is made, and the consent order requires the respondents to disclose that radio or video presentations are paid advertisements.

Participants

For the Commission: *Donald D'Amato, Carole Paynter, Denise Tighe, and Michael Bloom.*

For the respondents: *Gary Hailey, Venable, Baetjer, Howard & Civiletti, Washington, D.C. and Jeffrey Rubin, Rubin & Shang, New York, NY.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Nutrivida, Inc., a corporation, and Frank Huerta, individually and as an officer and director of the corporation ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

PARAGRAPH 1. Respondent Nutrivida, Inc. ("Nutrivida") is a New York corporation with its principal office or place of business at 25 Chapel Street, Brooklyn, New York. Nutrivida produces and distributes program length television advertisements, or "infomercials." These infomercials include an advertisement for Nutrivida's "Cartilet" shark cartilage capsules, a dietary supplement which purports to treat or cure, among other things, cancer, arthritis, and diabetes.

Respondent Frank Huerta is an officer and director of the corporate respondent. Individually or in concert with others, he

formulates, directs, participates in, or controls the policies, acts, or practices of the corporation, including the acts or practices alleged in this complaint. His business address is 25 Chapel Street, Brooklyn, New York.

PAR. 2. Respondents have manufactured, labeled, advertised, offered for sale, sold, and distributed products to the public, including Cartilet shark cartilage capsules. This product is a "food" and/or "drug" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act, 15 U.S.C. 52 and 55.

PAR. 3. The acts and practices of respondents alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

PAR. 4. Respondents Nutrivida and Frank Huerta have disseminated or have caused to be disseminated advertisements for Cartilet shark cartilage capsules, including, but not limited to, the attached Exhibit A (partial transcript of a program length television advertisement). Advertisements for Cartilet shark cartilage capsules have been broadcast in Spanish language television media, including Telemundo's New York metropolitan cable channel. These advertisements contain the following statements:

Narrator (male): "[F]rom the complexities of the ocean to the wonders of the natural. Shark cartilage. The shark does not sleep. We bring our cartilage from clean waters, without contamination. Its [shark cartilage's] marvelous properties are already known. It [shark cartilage] has been used in studies against cancer, arthritis, diabetes, and other illnesses."

Copy on Screen: "It has been used in studies against:
Cancer Arthritis Diabetes"

Dr. J. Casas: "My friends, as you all know, for there to be a tumorous process, for a fibroid, for a tumor in the body to grow, survive, it definitely needs nourishment. How do you nourish a tumor? How do you nourish a fibroid? Well, you only and exclusively nourish it through the blood vessels. It must have blood irrigation -- the main -- the best that shark cartilage has is that it inhibits the formation of blood vessels that irrigate and cause the tumor to grow. [T]his is a basic principle which has been documented various times, it is written in many books how shark cartilage has a predilection and goes directly to inhibit the growth of the

