

Order dismissing complaint against a Minneapolis, Minn. producer of packaged consumer foods which was alleged to have violated Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act,

by its acquisition of a processor and marketer of frozen packaged seafoods.

Appearances

For the Commission: *Joseph J. O'Malley, Murray L. Lyon and Harold G. Munter.*

For the respondent: *Davis Polk & Wardwell, New York, N.Y. and John Finn, Minneapolis, Minn.*

COMPLAINT

The Federal Trade Commission, having reason to believe that General Mills, Inc., has acquired the Gorton Corporation, in violation of Section 7 of the Clayton Act, as amended, (15 U.S.C., Section 18), hereby issues this complaint pursuant to Section 11 of the Clayton Act (15 U.S.C., Section 21) and Section 5(b) of the Federal Trade Commission Act (15 U.S.C., Section 45(b)), stating its charges in that respect as follows:

I

DEFINITIONS

1. For the purposes of this complaint the following definitions shall apply.

(a) *Food Manufacturing* describes canning, dehydrating, refrigerating and freezing preserved packaged foods customarily sold to consumers through grocery stores and food service outlets.

(b) *Food Service Outlets* are those outlets involved in serving food away from home such as hotels, restaurants, drive-ins, schools and institutions.

(c) *Frozen Packaged Seafood* consists of seafood packed for distribution in one of various types of containers including cartons and preserved by freezing and including fish and shellfish.

(d) *Frozen Fish Sticks*: An elongated piece of frozen fish flesh (generally cut from a frozen block of fillets) weighing not less than $\frac{3}{4}$ of an ounce and not more than $1\frac{1}{4}$ ounces with the largest dimension at least three times that of the next largest dimension.

(e) *Frozen Fish Portion*: A frozen piece of fish flesh generally of uniform size and generally cut from a frozen block of fillets. It has a thickness, including the batter, of $\frac{3}{8}$ of an inch or more, and does not conform to the definition of a fish stick.

(f) *Frozen Fillet*: A flat slice of frozen fish flesh without bone.

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(g) *Frozen Steak*: A cross-section slice of a frozen fish.

(h) *Frozen Breaded Shrimp*: Frozen peeled shrimp coated with breading ingredients. The product may be identified as fantail (butterfly) and round with or without tail fins and last shell segments; and as portions, sticks, steaks, etc., when prepared from a composite unit of two or more shrimp pieces, whole shrimp or a combination of both without fins or shell.

II

RESPONDENT

2. General Mills, Inc., (GMI), respondent herein, is a corporation organized and existing under the laws of the State of Delaware, with its office and principal place of business at 9200 Wayzata Boulevard, Minneapolis, Minn.

3. GMI, incorporated in Delaware in 1928, is a leading producer of packaged consumer foods, preselling customers, principally housewives, through intensive advertising and promotional efforts. GMI produces such consumer items as ready-to-eat breakfast cereals, snacks, prepared mixes and family flour, which are primarily distributed through self-service food stores under the "Big G" label.

4. GMI manufactures a number of bakery mixes and other items which are marketed to members of the food service trade such as wheat gluten, wheat starch, guar and locust bean gums, wheat germ oil, spice base and multi-vitamin enrichment compounds. It also engages in grain merchandising and manufactures and markets a number of ingredient products for the dairy and other segments of the food manufacturing industry. At the same time it operates facilities to supply its own flour requirements and for sale of flour to commercial users.

5. GMI operates eight flour mills, having an aggregate daily capacity of approximately 59,100 hundredweights of flour; a food service mix plant with a daily capacity of about 160,000 pounds; seven prepared cereal mix and other packaged consumer food product plants having an aggregate daily capacity of about 5,500,000 pounds; six plants for the manufacture of specialty chemical products with floor space of about 420,000 square feet; five terminal grain elevators and a number of warehouses. Its subsidiary, the Gorton Corporation, operates plants and warehouses in ten states and Canada with total floor space of about 514,000

square feet. As of May 25, 1969, GMI employed approximately 19,700 employees.

6. For the year ended May 31, 1963, GMI and its subsidiaries' total assets were \$220,350,237, sales totaled \$523,946,000, and net earnings were \$14,912,196. For the year ended May 25, 1969 GMI and its subsidiaries' total assets were \$622,357,000, sales \$885,242,000 and net earnings \$37,547,000. During this same period the company's consumer foods products sales increased from about \$288 million to approximately \$600 million in annual sales. Between 1963 and 1969 the relative change in General Mills' consumer food products sales increased from 55 percent to 67.7 percent of total company sales.

7. GMI, directly and through various completely owned subsidiary corporations, ranks among the nation's leading manufacturers of brand differentiated food products. It is one of the largest flour milling companies in the United States, and is a leading producer of commercial flour. In packaged consumer foods, it ranks among the three largest companies in sales of breakfast cereals. GMI believes itself to be among the leaders in sales of cake mixes and other packaged convenience foods and is first by a considerable margin in sales of family flour. Its packaged food products are marketed largely through grocery stores and food service outlets.

8. As a multi-product producer, GMI enjoys substantial advantages in advertising and sales promotions. It features several products in its promotions, reducing the printing, mailing and other costs for each product. GMI purchases network programs on behalf of several products, enabling it to give each product network exposure at a fraction of the cost per product that a single-product firm would incur.

9. In 1968, GMI was ranked the sixteenth largest national advertiser and the third largest national advertiser of food. GMI's total advertising expenditures in 1968 totaled approximately \$58 million, of which about 73 percent was spent on television advertising.

10. GMI has developed, introduced and marketed successfully several packaged food products sold under the "Big G" label which include the ready-to-eat cereal brands "Cheerios" and "Wheaties," snack product brands "Whistles" and "Bugles," "Betty Crocker" prepared mixes and "Gold Medal" flour for home use. A new ready-to-eat cereal, "Lucky Charms," was claimed by GMI to be one of the fastest growing established brands in the

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industry in 1969. At the beginning of fiscal 1969-70, GMI introduced nationally a presweetened vitamin and iron fortified cereal named "Kaboom."

Among GMI's better known trade names and consumer products are the following:

Betty Crocker Bake and Other Food Products—

Cake Mixes	Muffin Mixes
Pie Crust Mixes	Potato Buds
Brownie Mixes	Noodles Romanoff
Cooking Mixes	Pancake Mixes
Frosting Mixes	Gingerbread Mix
Pound Cake	SAFF-O-LIFE Safflower Oil
Biscuit Mixes	

Bisquick Mix

Snacks—

Bugles	Buttons
Whistles	Bows
Daisys	Pizza Spins
Hotchas	

Breakfast Cereals—

Wheaties	Twinkles
Cheerios	Lucky Charms
Kix	Stax
Trix	Clackers
Jets	Country Corn Flakes
Frosty O's	Cocoa Puffs
Total	Goodness Pack
Kaboom	

Flour—

Gold Medal	White Deer
Softasilk	Red Band
Purasnow	La Pina
Sperry Drifted Snow	Red Star

Sponges—

O-Cel-O

11. GMI was formed for the purpose of acquiring several flour milling companies. Since that time acquisitions and development of new products have played essential roles in the company's growth.

Since 1963, GMI has entered into the production and sale of additional food products through a series of acquisitions of existing food manufacturers. Among such domestic acquisitions in recent years have been the following:

Year	Company	Product or Activity
1964	Morton Foods, Inc.	Potato chips, corn chips, and other snack foods. (GMI sold most of Morton in May, 1970 keeping its pickle operation and some real estate.)
1966	Tom Huston Peanut Co.	Potato chips, corn chips, peanuts, confectionery products and other snack foods.
1967	Cherry-Levis Food Products Corp.	Sausages and pickled meat products.
1968	Jesse Jones Sausage Company	Meat Processor.
1968	The Gorton Corporation	Frozen Seafood
1969	The Donruss Co.	Bubble Gum

GMI has also diversified into other consumer related businesses by recently acquiring firms in the crafts, games, toys and clothing industries.

12. For many years prior to 1968, GMI sought entry into the frozen foods industry which is a large and expanding field. Entry into processing and marketing frozen food products is a natural evolution of GMI's steps for greater convenience to consumers, a process characterized by earlier development of prepared baked goods mixes, canned, dehydrated and refrigerated foods. GMI's leading Betty Crocker brand differentiated food products are vulnerable to inroads from frozen baked goods, entrees and convenience frozen foods. In recent years research and development in frozen and refrigerated foods has been one of the most important programs within GMI's Central Research Laboratories. New products to be developed included frozen entrees in meat, seafood and poultry.

13. At all times relevant herein, GMI sold and shipped and is now selling and shipping, products in interstate commerce throughout the United States; hence GMI was at the time of the acquisition challenged herein, and is now, engaged in commerce as "commerce" is defined in the Clayton Act and the Federal Trade Commission Act.

III

THE GORTON CORPORATION

14. Prior to August 16, 1968 when it was acquired by GMI, the Gorton Corporation ("Gorton"), was a corporation organized and existing under the laws of the State of Delaware with its principal office and place of business located at 327 Main Street, Gloucester, Mass.

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15. For many years Gorton has been an established and respected New England seafood company whose brand names "Gorton's of Gloucester" and/or "Gorton's" are among the oldest seafood brands in the United States and are virtually synonymous with seafood products. Gorton was successful and growing. Its sales increased from approximately \$12 million in 1958 to approximately \$72 million in 1968. In 1968, Gorton earned over \$1.5 million net and had assets of about \$30 million.

16. Gorton processed and marketed frozen packaged foods nationally, principally fish portions, sticks and breaded shrimp, pre-selling customers, largely housewives, through advertising and other promotional efforts. Its products were marketed through retail outlets and food service outlets.

17. In 1967, Gorton ranked first among the independent companies in frozen packaged seafoods. In 1968, Gorton was the leading firm by a significant margin in the production of frozen packaged fish sticks and frozen packaged fish portions, major segments of the frozen packaged seafood industry.

18. Gorton had attained the position of largest independent producer in the frozen packaged fish and other seafood industry through the acquisition of a number of established manufacturers of branded seafood products including among others:

(a) Fishery Products, Inc. (now Blue Water Seafood, Inc.), Cleveland, Ohio, owner of "Blue Water," the leading seafood brand in the food service industry;

(b) Red L Foods Corporation, Providence, Rhode Island, owner of "Red L" a leading brand of frozen prepared foods and seafood dinners;

(c) Fulham Brothers, Inc., Boston, Massachusetts, owner of a full-line dominant brand of seafood, "Four Fishermen;"

(d) Florida Frozen Food Processors Inc., Miami, Florida, owners of the outstanding "Tropic Fair" brand in the institutional breaded shrimp market;

(e) Bayou Foods, Inc., Mobile, Alabama, owner of the leading "Bayou" brand of frozen crab specialties;

(f) Trans World Seafood, Inc., New York, New York, a leading importer of seafood products;

(g) Point Chehalis Packers, Inc., Westpoint, Washington, an established producer of canned and frozen crab and salmon.

19. Gorton began diversifying outside the seafood industry in 1966 with the acquisition of Freeborn Farm, Inc., a producer of

puff-pastry hors d'oeuvre products. This acquisition was the first step towards the formation of a nucleus for the development of a line of convenience foods. In 1968, in the second step toward becoming a significant diversified food products manufacturer, Gorton acquired B. B. Foods Corporation of Kentucky and B. B. Foods Corporation, Paducah, Kentucky, and Akron, Ohio, respectively, producers of frozen onion rings and frozen mushrooms.

20. Gorton was a substantial purchaser of flour products for use in its manufacturing processes. In 1967 purchases of wheat flour alone amounted to a total of 8.8 million pounds valued at approximately \$500,000.

21. At all times relevant herein, Gorton sold and shipped, and is now selling and shipping, products in interstate commerce throughout the United States; hence Gorton was at the time of the acquisition challenged herein, and is now, engaged in commerce as "commerce" is defined in the Clayton Act and in the Federal Trade Commission Act.

IV

TRADE & COMMERCE

A. Generally.

22. The food manufacturing industry consists of manufacturers primarily engaged in processing and packaging food for distribution and sale through retail outlets, such as grocery stores, and/or food service outlets. Consumers spent approximately \$120 billion for food in 1969, or roughly one of every five dollars of consumer disposable income. At manufacturing levels, food sales were about \$97 billion in 1969.

Concentration in food manufacturing has been increasing for almost two decades with the fifty largest food manufacturers accounting for approximately 52 percent of all assets of food manufacturers in 1966 as compared with 42 percent in 1950, an increase of almost 24 percent. This trend toward concentration accelerated between 1966 and 1969 when approximately 225 acquisitions were made in the food industry. These acquisitions represent approximately one third of the more than 700 food industry mergers reported since 1958.

23. This merger movement has affected entry variables in food manufacturing in several ways. Conglomerate power of large food manufacturers may tend to discipline the competitive behavior of their smaller competitors. Entry barriers associated with brand

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differentiation have been or may be increased or entrenched. Cumulatively, the continued merger movement with its attendant effects on structure has contributed to increasing concentration of various segments of the food industry into the hands of a few large firms.

B. Frozen Packaged Seafood.

24. The frozen packaged seafood industry consists of manufacturers primarily engaged in processing frozen seafood for distribution and sale through retail outlets and food service outlets. The value of industry shipments was about \$384 million in 1967, of which the principal frozen products were fish portions, fish sticks and breaded shrimp.

25. (a) High levels of concentration prevail in segments of the frozen packaged seafood industry. In frozen breaded shrimp, the four and eight largest firms held 43.8 percent and 66.7 percent respectively of 1968 production; in frozen fish sticks the four and eight largest firms held 51.1 percent and 69.2 percent respectively of 1968 production; and in frozen fish portions, the four and eight largest firms held 53 percent and 70.8 percent respectively of 1968 production. Gorton ranked first in frozen fish stick and portion production and ranked among the eight largest firms in production of frozen breaded shrimp.

25. (b) At least fifteen mergers and one joint venture involving major seafood companies occurred since 1960. The impact of this merger movement and increased expenditures for product differentiation tend cumulatively to increase and entrench high levels of concentration.

V

THE ACQUISITION

26. On or about August 16, 1968, the Gorton Corporation was merged into GMI completing a transaction obligating GMI to issue 544,672 shares of common stock and pay a cash consideration of about \$9.5 million. The value of this transaction, at the time, was approximately \$30 million.

VI

EFFECTS OF ACQUISITION

27. The effect of the merger of Gorton into GMI has been or may be substantially to lessen competition or to tend to create a

monopoly in the manufacture, distribution and sale of frozen packaged seafood, or segments thereof, in the United States or sections thereof, separately and as a part of the cumulative tendencies toward increasing concentration in food manufacturing described in Section IV of this complaint, in violation of Section 7 of the Clayton Act, as amended (15 U.S.C., Section 18), in the following, among other ways:

(1) GMI, a firm which possesses the capability to become a significant competitor and has demonstrated its intention and ability to expand its position in the manufacture and sale of frozen packaged seafood, has been eliminated as a potential competitor in the manufacture and sale of frozen packaged seafood.

(2) The dominant position of Gorton in the frozen packaged seafood industry has been, or may be further strengthened and entrenched *vis-a-vis* its competitors with the result that the likelihood of any reduction in such dominant position is remote.

(3) The already high levels of concentration in the manufacture and sale of food in general and frozen packaged seafood in particular have been further increased.

(4) Gorton has been eliminated as an independent user of raw materials, supplies and equipment used in processing and producing frozen packaged seafood.

(5) Members of the consuming public have been or may be denied the benefits of free and open competition in the manufacture and sale of frozen packaged seafood by the substitution of the large multi-product food manufacturer, GMI, for the single product Gorton.

(6) The strong position of Gorton and GMI in various segments of the food industry offer the opportunity to GMI-Gorton to tie the sale of various products to the sale of other products sold or distributed by GMI-Gorton.

(7) Barriers to entry into the frozen packaged seafood industry, or segments thereof, may be heightened due to the strong market position, the substantial financial resources, the established or anticipated brand differentiations, the advertising capabilities and the combining of nationally known trade names, the elimination of potential competition, the ability to cross subsidize, the ability to tie-in products, and decisive competition advantages resulting from the size of the combined GMI-Gorton achieved in major part through acquisition and merger.

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VII

VIOLATION

28. The acquisition of Gorton by GMI as alleged above, constitutes a violation of Section 7 of the Clayton Act (15 U.S.C. § 18), as amended.

INITIAL DECISION BY ANDREW C. GOODHOPE
ADMINISTRATIVE LAW JUDGE

FEBRUARY 16, 1973

STATEMENT OF PROCEEDINGS

On February 16, 1971, the Commission issued its complaint against respondent charging it with violation of Section 7 of the Clayton Act, as amended (15 U.S.C. Section 18), and Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. Section 45).

A copy of the complaint and notice of hearing was served upon respondent, and respondent thereafter appeared by its counsel and filed an answer admitting certain of the allegations of the complaint but denying that it had violated Section 7 of the Clayton Act or Section 5 of the Federal Trade Commission Act.

Hearings were thereafter held, at which time testimony and documentary evidence were offered in support of and in opposition to the allegations of the complaint. At the close of all the evidence and pursuant to leave granted by the administrative law judge, proposed findings of fact, conclusions of law, briefs and proposed orders were filed by counsel supporting the complaint and counsel for the respondent.

Proposed findings not herein adopted either in the form or substance proposed are rejected as not supported by the evidence or as involving immaterial matters. Having reviewed the entire record in this proceeding, including the proposed findings and briefs, the administrative law judge, based upon the entire record, makes the following:

FINDINGS OF FACT

Jurisdictional Facts¹

1. General Mills, Inc. (GMI), respondent herein, is a corporation organized and existing under the laws of the State of Dela-

¹ The complaint alleges and the answer admits the essential jurisdictional facts. Hereafter CPF refers to complaint counsel's proposed findings and RPF to respondent's.

ware, incorporated therein in 1928, with its office and principal place of business at 9200 Wayzata Boulevard, Minneapolis, Minn.

2. Prior to August 16, 1968, when it was acquired by GMI, the Gorton Corporation (Gorton) was a corporation organized and existing under the laws of the State of Delaware, with its principal office and place of business located at 327 Main Street, Gloucester, Mass. It was originally incorporated in Massachusetts in 1923 as the successor to Gorton-Pew Fisheries Company, and was reincorporated under Delaware law in 1966.

3. At all times relevant to this proceeding, GMI sold and shipped, and is now selling and shipping, products in interstate commerce throughout the United States; hence GMI was, and is, engaged in commerce as "commerce" is defined in the Clayton Act and the Federal Trade Commission Act.

4. At all times relevant to this proceeding, Gorton sold and shipped products in interstate commerce throughout the United States; and on August 16, 1968 and prior thereto Gorton was engaged in commerce as "commerce" is defined in the Clayton Act and the Federal Trade Commission Act.

5. On or about August 16, 1968, the Gorton Corporation was merged into GMI completing a transaction obligating GMI to issue 544,672 shares of common stock and pay a cash consideration of about \$9.5 million. The value of this transaction at the time was approximately \$30 million.

General Mills, Inc.

6. General Mills, Inc., was formed in 1928 to acquire several flour milling companies, including the Washburn Crosby Company, predecessors of which had been engaged in flour milling since 1866. GMI entered the packaged consumer foods business in the 1920's with the introduction of pancake flour, cake flour and a wheat flake breakfast food known as "Wheaties," but as late as 1934 the company was still basically a commodity company with some 95 percent of its sales consisting of flour milling and commercial food for livestock. (McFarland 1384-85; CX 5, p. 7; CPF 6)

7. In subsequent years, but especially in the post-World War II period, GMI expanded in the packaged consumer goods area, concentrating on ready-to-eat cereals and cake mixes. In the 1950's GMI added more dry, packaged convenience items, such as casseroles, cookie mixes and cake mixes to its line. Over the years, General Mills has developed a strong consumer franchise for its

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branded breakfast cereals, and other products under the "Big G," and "Betty Crocker" labels. (complaint and answer, Par. 3; CX 5, p. 9; CPF 2)

8. GMI has supported some of its consumer products with substantial mass media advertising, especially television advertising. By the time of the subject merger in 1968 GMI was primarily producing dry packaged consumer foods such as breakfast cereals and cake mixes, which it presold to consumers through intensive advertising. These products are primarily distributed through self service retail "supermarkets" under the Betty Crocker and Big G labels. (complaint and answer, Par. 3; CX 5, p. 8; CPF 2)

9. In packaged consumer foods, GMI ranks among the three largest companies in sales of breakfast cereals, and believes itself to be among the leaders in sales of cake mixes and other packaged convenience foods. On certain of its dry grocery products GMI uses the Betty Crocker label and a pictorial representation of Betty Crocker. On other dry grocery products it uses the Big "G" symbol or the Gold Medal "Kitchen - tested" trademark. (complaint and answer, Par. 7; CX 2, p. 11; CX 5, p. 10; CX 6, p. 16; see CPF 3)

10. For the fiscal year ended May 31, 1963, GMI's and its subsidiaries' total assets were \$220,350,237, sales totaled \$523,946,000 and net earnings were \$14,912,196. For the year ended May 25, 1969, GMI's and its subsidiaries' total assets had become \$622,357,000, sales \$885,242,000 and net earnings \$37,547,000. During this same period the company's annual sales of consumer foods products had increased from about \$288 million to approximately \$600 million. (complaint and answer, Par. 6; CPF 11) For the last fiscal year prior to its acquisition of Gorton, GMI ranked 151st on the Fortune Magazine list of the 500 largest industrial corporations. As a result of its acquisition of Gorton, GMI moved to 130th on the next Fortune 500 list. (CX 144, p. 188)

11. Until 1966 the company was one of the country's largest producers of commercial flour. However, margins in the commercial flour business had been unsatisfactory. In consequence, the company closed nine of its seventeen flour mills in 1966. As a result of the sale, GMI dropped to sixth place among flour milling companies in the United States. Most of its production of flour now is for use in its own products. The reduction in activities in the commercial flour business was part of a policy to concentrate the company's manpower and financial resources in consumer

food products where profit and growth potentials for the company were greater. In line with this policy the company withdrew from the formula animal feed business in 1962, from the electronics and oilseed businesses in 1964 and from the refrigerated foods business in 1966. (McFarland 1475; CX 2, p. 11; CX 5, p. 7)

12. In order to replace the volume lost as a result of the withdrawal from its flour, refrigerated and feed businesses, GMI diversified into several new areas of consumer foods. In particular, GMI sought to add more highly prepared convenience products to its line. In pursuance of this policy GMI acquired (CX 3, p. 6):

1964	Morton Foods, Inc.	Potato chips, corn chips, and other snack foods. (GMI sold most of Morton in May, 1970, keeping some real estate.
1966	Tom Houston Peanut Co.	Potato chips, corn chips, peanuts, confectionery products and other snack foods.
1967	Cherry-Levis Food Products Corp.	Sausages and pickled meat products.
1968	the Gorton Corporation	Frozen Seafood.
1969	the Donruss Co.	Bubble Gum.

13. As of 1968, GMI's packaged consumer foods consisted principally of ready-to-eat breakfast cereals; prepared mixes such as cake, frosting, cookie and biscuit mixes; snacks; packaged casseroles; potato products, and family flour. (CX 5, p. 7; CPF 23)

14. As of 1969, "Big G" ready-to-eat cereals were GMI's most important single business. It maintained a number two position nationally, with more than 20 percent of total sales. GMI brands include "Cheerios," the nation's leading children's cereal, "Wheaties," GMI's second largest brand, "Total," and "Trix." (CX 3, p. 6; CX 4, p. 6; CPF 24)

15. Betty Crocker dessert mixes are an industry leader in a retail market approaching 500 million dollars. As of 1969, Betty Crocker cake, frosting, brownie, cookie and other specialties were No. 1 or No. 2 in every category, and were growing stronger. Major gains have been made in the ready-to-spread canned frost-

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ings market, in which GMI is also the leading firm. (CX 3, pp. 7-8; CPF 25)

16. GMI specialty baking products, which include Betty Crocker muffin and pie crust mixes, Softasilk Cake Flour, and Bisquick, have demonstrated growth in a market where GMI has a leading position. (CX 3, p. 8; CX 4, p. 8; see CPF 26)

17. As of 1968, GMI ranked first by a considerable margin in sales of family flour in the United States (CX 5, p. 10), selling primarily under the "Gold Medal" label. (CX 3, p. 7) Its share of this market was increasing, despite the fact that the total market for family flour had shown a declining trend in recent years. (CX 3, p. 7; Tr. 1368) It was for this reason that the company expected its flour business to remain a strong profit contributor. (CX 3, p. 7; CPF 27)

18. GMI entered the snack food business both through acquisition and through internal development of new snack food products. (CX 5, p. 7) In 1964 the company acquired Morton Foods, Inc., makers of potato chips and snack items (CX 3, p. 7; CX 5, p. 7), and in 1966 the Tom Houston Peanut Company, also makers of a broad line of snack foods, was acquired. (CX 5, p. 7) In 1969 GMI acquired the Donruss Co., a bubble gum company. (CX 3, p. 7; CPF 28)

19. Through intensive research efforts and extensive test marketing GMI has marketed several corn-based snack products packaged like ready-to-eat cereals, including "Bugles," "Whistles" and "Daisys." (CX 5, p. 8) A new chip product, "Wheat Chips," was introduced nationally in late 1968, and other products have been test marketed. (CX 4, p. 7; CPF 29)

20. GMI uses a variety of trade names on its consumers' food products. (CPF 30; complaint and answer, Par. 10)

Among these trade names are:

Betty Crocker Bake and Other Food Products—

Cake Mixes	Muffin Mixes
Pie Crust Mixes	"Potato Buds"
Brownie Mixes	Noodles Romanoff
Cookie Mixes	Pancake Mixes
Frosting Mixes	Gingerbread Mix
Pound Cake	"SAFF-O-LIFE" Safflower Oil
Biscuit Mixes	

Bisquick Mix

Snacks—

Bugles	Buttons
Whistles	Bows
Daisys	Pizza Spins
Hotchas	

Breakfast Cereals—

Wheaties	Twinkles
Cheerios	Lucky Charms
Kix	Stax
Trix	Clackers
Jets	Country Corn Flakes
Frosty O's	Cocoa Puffs
Total	Goodness Pack
Kaboom	

Flour—

Gold Medal	White Deer
Softasilk	Red Band
Purasnow	La Pina
Sperry Drifted Snow	Red Star

Sponges—

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21. GMI manufactures a number of bakery mixes and other items which are marketed to members of the food service trade, such as wheat gluten, wheat starch, food grade gums, and wheat germ products.

22. GMI's total institutional business is in the neighborhood of \$20 million, much of it in flour-based items such as muffin mixes, cake mixes, cookie mixes, etc. (McFarland 1446) This constituted only 2 percent of its total sales in the fiscal year ending May 31, 1970. (CPF 11) The total institutional food field is approximately \$15-16 billion. The institutional business is characterized generally by very low margins. (McFarland 1467)

23. Food processing, GMI's major operation, accounted for over \$800 million of its fiscal 1970 sales. Nearly two-thirds of total corporate sales (\$647.3 million) came from consumer foods. This was almost equally divided between cereals and snacks (\$333 million) and mixes, family flour, seafoods, etc. (\$314 million). The only "seafood" sales were those of Gorton. (CX 4, p. 23; CPF 16)

24. The broad policies of GMI are set by the board of directors and chief executive officer with final responsibility for implementation of company policy resting with the chairman of the board and chief executive officer. (McFarland 1467; CPF 17)

25. Under General Mills' profit center operation each subsidiary or division is responsible for its profits, and the salaries of management are, to a great degree, dependent on the independent profits each subsidiary or division shows at the end of the year. (Kinney 1347)

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26. Corporate officers receive their salaries from the Minneapolis general office expenses. Executive vice presidents of divisions have a portion of their salaries allocated to divisions and subsidiaries under their jurisdiction.² The salaries of the president, chairman, some staff people and general counsel do not get allocated, although most of the legal department's total expenses are allocated directly to divisions and subsidiaries. (McFarland 1465-66; CPF 18)

27. Gorton operates autonomously and manages its own plans, programs and budgets with its own total responsibility for sales, profits and the carrying on of the business. (Kinney 1342-3)

The Gorton Corporation

28. For many years Gorton has been an established and respected New England seafood company, having produced and marketed fish and seafood in the United States for more than 100 years. (CX 35, p. 6) Its brand names "Gorton's of Gloucester" and/or "Gorton's" are among the oldest seafood brands in the United States and are virtually synonymous with seafood products. (complaint and answer, Par. 15; CX 31, p. 9) Gorton was successful and growing at the time of the acquisition. (CX 22A-F, 31, 32, 44) Its sales increased from approximately \$12 million in 1958 to approximately \$72 million in 1968. In 1968, Gorton earned over \$1.5 million net and had assets of about \$30 million. (complaint and answer, Par. 15)

29. Gorton processes and markets frozen packaged foods nationally, principally fish portions, fish sticks, fish fillets and steaks and breaded shrimp. Sales are almost equally divided between retail outlets and food service outlets. (Kinney 1318; RX 83; CPF 34)

30. A fish stick is an elongated piece of fish flesh (generally cut from a block of fillets) weighing not less than $\frac{3}{4}$ of an ounce and not more than $1\frac{1}{4}$ ounces with the largest dimension at least three times that of the next largest dimension. Fish sticks are sold by the processor either in a cooked or uncooked state. (CX 124-A; Holas 941, 948; CPF 89)

31. A fish portion is a piece of fish flesh generally of uniform size and generally cut from a block of fillets. It has thickness, including the batter, of $\frac{3}{8}$ of an inch or more, and does not

² The GMI executive vice president in charge of Gorton has part of his salary allocated to GMI and part to Gorton. (Tr. 1466; CPF 18)

conform to the definition of a fish stick. Fish portions are sold by the processor in a breaded or unbreaded state and may be cooked or uncooked. (CX 127-A; CPF 89)

32. Fish fillets are sides of fish cut lengthwise from the backbone and are practically boneless. Fish steaks are cross section slices from large dressed fish, usually about $\frac{3}{4}$ inches thick. Fillets may be sold by the processor in a breaded or unbreaded state and may be cooked or uncooked. (CX 130-A)

33. Fish sticks and portions are cut from fish blocks. A fish block is a frozen mass of between 26 to 70 pieces of boneless fish flesh, *i.e.*, fillets, formed into a rectangular block-type shape. Each fish block is composed of fillets of a particular specie. Fish of that specie are gutted, deheaded and deboned, *i.e.*, filleted, and then placed into a carton which is put into a rectangular frame where it is put into a pressure plate freezer. Once put under such pressure, the albumin in the fish causes the pieces of flesh to pull together and adhere to form a cohesive mass which does not break apart. Fish blocks are made up by the catcher of the fish who ships the frozen blocks to processors such as Gorton. (Holas 942, 988; Hansson 436; CPF 88)

34. Gorton operated its main seafood processing plants in Gloucester, Massachusetts, Cleveland, Ohio, and Wilmington, California. (CX 36, p. 34) These plants were either new or recently renovated and expanded at the time of the acquisition. (CX 26-H) The capacity of the Gloucester plant was doubled in 1967, while the Wilmington plant was opened that same year. (CX 32, "Letter to the Stockholders") It also operated four additional domestic plants and three in foreign countries. (CX 36, p. 34; CPF 41) Gorton had substantial excess capacity at the time of the merger in 1968. (Gerlach 1238)

35. Two of Gorton's three major plants had cold storage capacity, at the time of the acquisition, for 22 million pounds of frozen products. (CX 26H) An adjacent public cold storage warehouse next to its seafood processing plant in Gloucester was able to hold up to nine million pounds of frozen products. The Miami and Cleveland processing plants had company owned freezer space with an aggregate capacity of six million pounds. (CX 36, p. 35) Gorton owned processing plants in other locations and leased public cold storage warehouse space in other areas to speed distribution by locating inventory near its customers. (CX 36, p. 35; CPF 43)

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36. At its fish processing plants, Gorton processes the frozen fish fillets or blocks it imports into fish sticks, fish portions, breaded fillets or seafood specialties such as sole in lemon butter and sole almondine. In those cases where the process starts with blocks, the blocks are sawed, still frozen, into slabs. These slabs are then conveyed into a chopping machine which cuts the slabs into the dimensions of a fish stick or fish portion. (Holas 989) The product is then placed on conveyor belts where it is battered or breaded, sometimes deep fried, and put in adjoining cold storage facilities for distribution (LoBello 1569; CX 36, p. 34; CPF 42)

37. In some instances raw frozen fillets are packaged into individual "snap out" fillets—a process which requires that thin sheets of separating material be wound between the individual fillets so that the housewife can separate one or more fillets without thawing the entire pack. In some cases the individual fillet is separately breaded and cooked in which instance it is virtually the same as a breaded portion. Some portions are cut in an elongated shape to resemble a fillet. The leading processor of retail portions refers to its portion as a "fillet," despite the fact that the product is made from fillet blocks rather than individual fillets. In some instances raw fillets or raw unbreaded portions are used to make up specialty items such as "sole almondine" or "sole in lemon butter." (Holas 956-47; Hansson 436-39; Kulber 484-85)

38. Gorton maintains distribution warehouses at two of its three fish processing plants and at its shrimp processing plant in Miami. Gorton also utilizes public cold storage warehouse facilities in Gloucester, Atlanta and Dallas. Since its products must be kept refrigerated throughout the distribution process. Gorton ships by refrigerated truck from its distribution facilities. Less than full load truck shipments are made possible through pooling arrangements with other manufacturers of frozen products. (LoBello 1522)

39. Gorton sells its products to both the retail and food service trade through brokers. Gorton's sales force in 1968 consisted of a network of approximately 65 retail brokers and 90 food service brokers. The brokers' activities are overseen by approximately 20 regional sales managers, divided evenly between retail and food service, employed by Gorton. (LoBello 1505, 1523; see CPF 44)

40. Over the years Gorton has enjoyed substantial growth both in sales and in the number of products which it offers for sale. A

substantial portion of this growth is accounted for by mergers. The principal merger was the purchase by Gorton of Fishery Products, Inc., of Cleveland, Ohio, in early 1961. This company owned the "Blue Water" label which is still used by Gorton. Blue Water was one of the earliest successful developers of breaded fish sticks and portions and was and still is today a substantial factor in the institutional food business, selling to customers such as drive-ins, schools, restaurants, hotels, motels, universities, hospitals and other types of prepared food operations. (Tr. 499-500, 950-951; CX 25D, 38, 53B)

Geographic Market

41. Both parties and the administrative law judge agree that the geographic market in which to judge the competitive impact of the acquisition of Gorton by GMI is the United States as a whole. GMI, being a national company which distributes its products nationally, was totally committed to entering the frozen food business, or any segments thereof, on a nationwide scale. Gorton, with a nationwide frozen food brokerage network, was the largest frozen fish processor in the country. (Tr. 1451-1453) It was GMI's intent to obtain a competitive advantage in any area of frozen foods by seizing this nationwide brokerage network. (Tr. 1421-1423) The major companies in the packaged frozen fish or other seafood business compete and distribute their products nationally. (Tr. 358, 448, 489, 525-527, 574)

Line of Commerce and the Relevant Markets

42. The relevant line of commerce concerned in this proceeding is the purchase, processing and selling of packaged frozen fish. The various producers in the industry also produce frozen shrimp in various forms. The record contains no meaningful statistics on shrimp and this product is not fundamentally involved in the proceeding. GMI and Gorton were never competitors before the acquisition and no GMI products prior to the acquisition are in any way involved. Packaged frozen fish is of course a segment of the overall food industry and also a segment of the frozen food industry. The record contains no figures on either of these overall industries, and they would be meaningless in any event since they are so broad. Both counsel in support of the complaint and for respondent appear to agree that the basic issue involved is whether GMI's entry into the frozen packaged fish industry by

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purchasing Gorton had the effect proscribed by Section 7 of the Clayton Act.

43. Counsel in support of the complaint emphasize the overall position of Gorton in the packaged frozen fish industry, but do recognize that the total market for such products is made up of two classes of customers, retail and institutional. As a result, their statistics emphasize Gorton's share or position in the important product lines involved, fish sticks, fish portions, fish fillets and fish steaks in the overall market. Counsel for respondent urge that the two markets, retail and institutional, must be assessed independently as to the effect which GMI's entry might have on either market, since there are substantial differences in the way each market is sold, both in technique of selling and products sold. These differences between counsel, while recognized, are not considered fundamental.

Institutional and Retail Markets

44. Frozen packaged fish and other frozen seafood are sold to retail stores for resale to consumers and to hospitals, schools, fast food service chains and other institutions. (Tr. 782-784, 440-443, 516, 587, 351)

45. Method of sale to each of the two groups differs. While almost all frozen fish is sold through frozen food brokers, the sale of the product by brokers is usually divided between retail and institutional sales persons. The basic approach to retail stores is packaging and promotion. The price must be competitive to similar products and the promotions are generally in the form of a reduction in price to the consumer which is attractive to the retail buyer. The institutional buyer is more interested in the quality and price of the product. (Tr. 356, 486-488, 493-494, 512, 513, 516, 530, 573, 762-763, 860, 928-929, 962, 970, 977, 1326; CX 53Z10-12, 55U, 56H)

46. There is no difference in source of supply, type of fish or processing between retail and institutional fish producers. The differences are in packaging equipment needed to pack at retail which requires a minimum investment; and the need for research, promotion and advertising, which requires a substantial and sustained effort.

47. The institutional and retail markets are further distinguished by type of product. Although both fish sticks and fish portions are sold in both markets, fish sticks are primarily a

retail item, while fish portions are preferred by the institutional buyer. (Tr. 511, 665, 1016; CX 53R, 56D; CPF 93, 101)

48. Of the twelve largest producers of fish sticks and fish portions, five: Coldwater, Iceland, Dolly Madison (Sea Pass), Dolphin and Frionor are almost entirely in institutional sales (Tr. 440-441, 482, 564-566, 665, 949, 952; CX 124F, 127F); seven are in both retail and institutional sales. Gorton is the largest firm in either market. (CX 124F, 127F) Only Mrs. Paul's sells fish solely at retail. (Tr. 353)

49. There is a slight overlap between institutional and retail frozen packaged fish. Recently, many supermarkets have been purchasing large institutional packages of fish and either (1) selling them as is, or (2) repackaging the fish in store tray packs. (Tr. 449, 764-765, 957)

50. Every fish processor has a production capability of entering the institutional or retail markets; six of the largest fish stick and fish portion producers are already large producers in both markets (CX 124F, 127F) and with a small investment, many of those selling institutional fish could co-pack for a firm such as GMI, desiring to enter the retail area *de novo*. (Tr. 519)

51. The retail market, nationally, is serviced in most regions of the country by only: Mrs. Paul's, Gorton, O'Donnell-Usen (Taste O'Sea), Sea-Pak, and possibly Booth's Fisheries (Consolidated Foods). (Tr. 351-353, 355-358, 525-527, 948-949)

52. The institutional market is serviced by: Gorton (Blue Water), Coldwater, Iceland, Sea Pass, Dolphin, Sea Pak, O'Donnell-Usen and Frionor. The record indicates that no new firm has entered the national market since 1967, at the latest. (Tr. 435, 441, 448, 490, 574, 948-949)

53. There has been no significant new entry into the retail frozen packaged fish market on a national scale since before the GMI acquisition of Gorton. (CX 124A-F, 127A-F) The only new entrant into retail competition nationally shown by the record in this case is Mrs. Paul's. It entered the fish stick and portion business shortly after World War II. (Tr. 349)

54. Advertising on the retail side of the packaged frozen fish market is not used extensively by any of the suppliers with the exception of Mrs. Paul's which sells fish only at retail. (Tr. 353) The total figure for advertising to sales for the entire frozen packaged seafood industry is less than 2 percent. (RX 165B) And even in the instance of Mrs. Paul's, most of its advertising is directed to nonseafood products in its line. (RX 165E) The rec-

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ord is clear that there are not sufficient margins of profit on the retail side to warrant large advertising expenditures. (Tr. 359, 821, 792, 910, 965, 1017, 1025, 1330, 1542) Early in the fish stick and portion business, private labels became an important factor. As soon as the products became popular, private label brands, such as Captain John's (A&P), Captain's Choice (Safeway), Fresh Store (Kroeger) and A&P Tea Co. appeared. (Tr. 945) The private label products are displayed in the frozen food cabinet along with whatever other company's products are carried and the products are indistinguishable except for the packaging. Consequently, prices must be competitive. (Tr. 547, 1329, 804) Advertising on the institutional side of the market is minimal and consists primarily of ads in trade journals with distribution to the institutional type of buyers. (Tr. 460, 498, 977)

Market Data

55. Appendices 1 through 12, attached hereto and made a part hereof, give an accurate picture of Gorton's position in the packaged frozen fish industry by product, in both pounds sold and dollar value received, as well as Gorton's position in the overall packaged frozen fish industry. Also shown is production by the top four and top eight companies in the industry and Gorton's share compared with these market leaders. (App. 1-9) Appendices 10, 11 and 12 also show Gorton's share and trends in the retail and institutional markets separately. All of the statistics included in the appendices are based upon data submitted by counsel in support of the complaint through their economist. These figures are taken as accurate and represent a true picture of the packaged frozen fish industry. Numerous arguments are advanced by counsel in support of the complaint that these figures are understatements and very conservative; and that they are not reliable since they are overstatements or do not include imports of fillets and steaks proposed by counsel for respondent. These arguments are rejected and the figures are considered to be accurate and a representative picture of the packaged frozen fish industry.

56. Respondent's witness, Dr. Markham, testified that the weighted average of top four firms concentration in all 4 digit SIC manufacturing industries is 37 percent. (Tr. 1693³) He also testified that one could expect a higher average the more nar-

³ Commission economic witness Glassman apparently adopted a 55 percent level of top 4 concentration as the "critical" level of concentration. (Tr. 674)

rowly an industry is defined, as is the packaged frozen fish industry. The available data shows the top four firms concentration of the retail packaged frozen fish market was 40.7 percent (App. 10) and for the institutional packaged frozen fish market 42.8 percent (App. 10) in the year 1968. The figures shown in Appendix 8 show that in 1968, top four firms concentration of production of frozen packaged fish in pounds was 43.75 percent. This is an amount above respondent's witness Markham's estimate of top four firms concentration for all manufacturing industries, 37 percent. GMI-Gorton accounted for 20.96 percent of this total, more than $2\frac{1}{2}$ times the size of the next largest producer. (App. 9; Tr. 1693) Top eight firms concentration was 62.46 percent. (App. 8) Using the dollar share of production, complaint counsel's calculated top four firms production of 47.18 percent is again higher than the 37 percent average advanced by Professor Markham. (App. 8; Tr. 1693). Gorton ranked first with 21.35 percent of total frozen packaged fish production in dollars, with more than twice the share of its largest rival. (App. 9) Top eight firms production was 64.13 percent of the total. (App. 8). In 1968, the top four firms accounted for 37.6 percent of sales of frozen packaged fish in pounds, while GMI-Gorton was the leading seller with 15.1 percent of total sales, almost twice the share of its largest rival. (App. 8-9) Top four firms concentration exceeded the average 37 percent of concentration for all manufacturing. (Tr. 1693)

57. Counsel for respondent, while conceding that Gorton is and has remained the leading producer in the combined retail and institutional packaged frozen fish markets, show that when considered separately, its share of both markets has declined. This reduction in market share is borne out by Appendix 11 which shows that Gorton's share of retail sales of frozen packaged fish in pounds has fallen from 12.7 percent in 1966 to 10.0 percent in 1969 and from 18.4 percent of sales in pounds to the institutional market in 1966 to 13.6 percent in 1969. Gorton remained the largest supplier at retail in 1969 but fell to number 2 to institutions in 1969.

58. The witness Dr. Markham's use of a 37 percent figure for top four firms concentration in 4 digit SIC manufacturing industries is apparently an attempt to use a rule of thumb guide to determine whether an industry is in a state of concentration where it can be called monopolistic or oligopolistic in the various degrees that the cases have discussed oligopoly. The packaged

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frozen fish industry appears to be one which can be described as a fairly tight oligopoly, with only a limited number of manufacturers. This is especially true when one looks to the markets served. As found above, five of the top twelve producers are almost entirely in institutional sales. Seven sell to both the retail and institutional markets and one sells only at retail. (Tr. 353, 440-1, 482, 564-66, 665, 949, 952; CX 124F, 127F)

59. There have been no significant new entrants into the industry since Mrs. Paul's shortly after World War II. However, there are no insuperable barriers to entry into the industry by a new entrant. (Tr. 1569-70) The plant and machinery costs are not prohibitively expensive and a new entrant could have an existing company package frozen fish for it if it so desired. This is being done by a number of retail chains and the frozen fish are sold under private label. (Tr. 452, 519-20) Counsel for respondent make much of a shortage of ground fish as the raw product. This claimed shortage has not yet resulted in a shortage of raw product except in some species and does not appear to be an insuperable barrier to entry.

60. The industry is one of a fairly high degree of concentration. However, as the appendices show, the concentration by the top four and eight members has decreased appreciably and the Gorton share of the market has been declining even though it remains the largest producer in every category of product as well as overall. The purchase of Gorton by GMI has not noticeably increased in any way Gorton's market shares. A study of the market statistics alone does not permit a conclusion that the merger may be to substantially lessen competition or tend to create a monopoly. Consequently, it is necessary to examine whether GMI was a potential entrant into the industry which was eliminated as a result of the merger, or whether GMI's purchase of Gorton will have the effect of entrenching Gorton in its leading position to the competitive detriment of the industry.

61. In the mid-1960's GMI became interested in the frozen prepared food business since it appeared to the principal officers to be a growth area. (CX 17; Tr. 1216, 1404) A number of studies of various companies in the frozen prepared food business were undertaken which ultimately concluded in the merger under consideration. (CX 9, 11, 13, 14, 15, 17 and 17A; Tr. 1428-29) In all of these studies there was little or no consideration given to GMI entering the frozen fish business or the prepared seafood business; principal emphasis was directed to three areas of possi-

ble interest for GMI: frozen dinners, frozen baked goods and frozen specialties. (CX 9Z, 12-14)

62. The principal attraction of Gorton to GMI was its frozen food broker organization in both the retail and institutional markets. In addition, Gorton was organized to handle frozen foods. It had frozen food warehouses throughout the United States from which it distributed its packaged frozen fish and these could be used to handle additional frozen products produced by GMI. Gorton's brokers were among the best frozen food brokers in the major markets of the United States and could well handle frozen products of GMI in addition to the packaged frozen fish of Gorton. (Tr. 1415, 1333, 1214-25, 1230, 1348, 1356, 1511-18, 1526; RX 33, 52; CX 56)

63. Counsel in support of the complaint state that they "do not claim primarily that GMI exercised any disciplining force in the frozen packaged fish industry by virtue of its potentiality of entry." They do insist that the merger is anticompetitive and that had GMI wished to enter the frozen packaged fish industry, it should have done it either by internal development or by the acquisition of a much smaller company giving it a so-called toe-hold in the industry. This contention must be rejected since it is clear from the testimony and documents that what GMI did when it acquired Gorton was to attempt to achieve for itself a competitive standing in the frozen prepared food industry. GMI was never considered to be a potential entrant into the packaged frozen fish industry. (Tr. 994, 983, 990-91, 1033, 925-26, 1571, 515, 789, 846, 552) And its entry by the purchase of Gorton has not resulted in the elimination of a potential entrant into the packaged frozen fish industry.

64. What the merger has in fact accomplished is to bring a new and substantial entrant into the frozen prepared food industry. This industry, of course, is a much broader one than the frozen packaged seafood industry, and there are no statistics in the record upon which to evaluate what effect GMI's entry into the frozen prepared food industry might be. However, it is conjectured that it should be salutary since GMI's entry results in the introduction of a substantial competitor into that industry.

Consequently, the arguments that GMI was a strong potential entrant into the packaged frozen fish industry and eliminated itself by its purchase of Gorton must be rejected.

65. Counsel in support of the complaint urge that the result of the merger will be further entrenchment of Gorton in its domi-

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nant position in the packaged frozen fish industry, and that barriers to entry into the market are further heightened. These contentions must be rejected. In the first place the discussion above of the market data in the record makes it clear that Gorton was not at the time of the merger in a dominant position in the packaged frozen fish industry. It was very strong in the frozen fish stick market, but not dominant. In the rest of the fish products and in the retail and institutional markets, Gorton certainly was a leader. However, this leading position has recently been eroded somewhat and Gorton is not as strong as it was at the time of the merger and beforehand.

66. Counsel in support of the complaint urge that the merger here involved is virtually the same as was involved *In the Matter of Procter & Gamble Co.*, 63 F.T.C. 1465 (1963), and that Gorton will enjoy the same benefits from GMI as Clorox derived from Procter & Gamble; namely,

(1) economies in point-of-sale promotions, coupon and other promotional mailings, and in newspaper, magazine, and television advertising;

(2) the utilization of Procter & Gamble's direct sales force;

(3) additional "leverage" with retailers because of the large volume of products involved;

(4) a much greater source of capital to fund advertising, promotions, and to finance aggressive price cutting to drive out new competitors; and

(5) the benefits nationally derived from association with a firm having a well regarded image in the industry. 63 F.T.C. at 1565-1568.

The difficulty with this argument is that in the *Procter & Gamble* case, it was found that Clorox was clearly the dominant firm in the liquid bleach industry. Gorton, while a leader, is not dominant in the packaged frozen fish industry. In addition, advertising to the consuming public was very substantial in the liquid bleach industry as well as in the low-priced, high-turnover household consumer items sold through grocery, drug and department stores by Procter & Gamble. Consumer advertising as found herein is of only marginal value in the packaged frozen fish industry. It is true that GMI is a well established, and highly regarded name in its industry, but the record provides no basis for finding that there will be any real rub-off of this fact to increase Gorton's position in the packaged frozen fish industry. Nor will the record permit a finding that GMI's substantial financial position will

permit price cutting to drive out competition, new or old. Gorton itself had ample resources to sustain its growth without assistance from GMI. (Tr. 1077, 1088-89, 1237-38, 1248-49) Nor does GMI have any "leverage" with retailers which will help Gorton increase its position in the retail market. (Tr. 1529-30, 1506-07)

67. The record does not permit a conclusion that Gorton will receive any substantial benefit from GMI's market and product research facilities. Prior to the acquisition Gorton used outside research firms when needed and has not increased its research since the acquisition in either marketing or product development. (Tr. 1488-90, 1774-76, 941, 948, 1490-91)

68. Counsel in support of the complaint cite as an example of GMI's ability to increase Gorton's sales over its competitors a promotion introduced by GMI and Gorton late in 1971 and during 1972 of a "Superfish" promotion. "Superfish" was a fish portion cut in the form of a fish. An ambitious newspaper advertising campaign was used and the promotion was also assisted by placing 20 million coupons offering "Superfish" T-shirts in boxes of GMI's Cheerios, the largest selling children's cereal in the United States. (CX 11, 21, 112U, 112Z 10) During 1972 while the "Superfish" campaign was in progress Gorton advertised other products each week in the food supplement of the Washington Post. (CX 153, 154, 155, 156) It was estimated that the cost of an independent mailing through the Postal Department of 20 million coupons would be about \$180,000. (Tr. 363) The cost to Gorton of the coupons in the Cheerios boxes was less than \$11,000. The total cost of the newspaper advertising was \$36,000. (Tr. 1357-58) There was no proof of purchase of any Gorton product necessary to get the "Superfish" T-shirt and in fact it was necessary to send Gorton \$1.50 to obtain the T-shirt. (Tr. 1559-60, 1596-97) This was not a cents-off promotion and no price discount or other incentive was offered as a part of the promotion. The promotion was apparently a failure since "Superfish" has not been a successful product since it is more expensive to manufacture and consequently sells at a higher price than regular frozen fish sticks and portions. (Tr. 1565, 770, 973, 837-38, 551, 1562, 1565) This is the only promotion in which Gorton and GMI have cooperated and it will not support a finding that GMI is in a position to give Gorton any substantial help or advantages in selling packaged frozen fish.

69. Counsel in support of the complaint contend that the acquisition of Gorton by GMI has eliminated Gorton as an independent purchaser of breeding material for use in conjunction with such

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products as breaded fish sticks and fish portions. Apparently the basis for this is the fact that in 1967 Gorton purchased about \$500,000 worth of wheat flour to use in its breading material and since Gorton is a substantial user of breading material, it will purchase the flour from GMI to the exclusion of competitors of GMI. Gorton produces its own batter and has never purchased flour or batter or breading from GMI for its packaged frozen seafood products. (Tr. 1530, 1884) GMI does not make the type of flour used by Gorton for its batter or breading and the flour has regularly been bought more cheaply from other flour suppliers who vary from year to year. (Tr. 1530) The record contains no support for the claim of substantial foreclosure of Gorton as a result of the acquisition from purchasing flour from other producers than GMI.

70. Respondent contends that there is no likelihood that it will ever engage in any type of cross-couponing with Gorton or insertion of any coupon device in any of its products which refer or relate to Gorton products, since it has entered a stipulation not to engage in such activity in a private treble damage action brought by Mrs. Paul's. This contention is rejected since any stipulation entered into in that proceeding could have no bearing or effect upon this proceeding. (RPF 293-299)

CONCLUSIONS

1. The record herein does not support a conclusion that the effect of the merger of Gorton into GMI may be substantially to lessen competition, or to tend to create a monopoly.
2. The marketing data in the record does not permit a conclusion that the packaged frozen fish industry was unduly concentrated at the time of the merger nor that it became more concentrated as a result of the merger, nor that it may, in the future, become more concentrated as a result of the merger.
3. GMI at the time of the merger was a strong potential entrant into the overall frozen food industry, but not into the packaged frozen fish portion of that industry.
4. GMI is not in a position to entrench Gorton in a dominant or a leading position in the packaged frozen fish industry.
5. There has been no foreclosure of Gorton for the purchase of flour or any other products from competitors of GMI as a result of the merger.

ORDER

It is ordered, That the complaint in this matter be dismissed.

APPENDIX 1

CONCENTRATION OF THE PRODUCTION AND SALES OF FROZEN FISH STICKS,
1963-1968

Year	Top 4 Sales (pounds) RX 93	Top 4 Production (pounds) CX 126A	Top 8 Production (pounds) CX 126A	Top 4 Production (dollars) CX 126B	Top 8 Production (dollars) CX 126B
1963	----	51.51%	79.17%	57.48%	87.29%
1964	----	56.01	79.65	63.17	85.98
1965	----	58.56	81.98	63.86	87.68
1966	58.2%	58.20	83.46	64.88	89.88
1967	63.3	56.87	83.05	64.00	90.92
1968	54.8	52.84	76.70	59.01	82.55

APPENDIX 2

MARKET SHARES AND RANKS OF GMI-GORTON IN THE PRODUCTION AND
SALES OF FROZEN FISH STICKS, 1963-1969

Year	% Share of Sales (pounds) RX 93	Rank*	% Share of Production (pounds) CX 126A	Rank*	% Share of Production (dollars) CX 126B	Rank*
1963	---	---	17.61%	(1)	18.82%	(1)
1964	---	---	23.19	(1)	23.77	(1)
1965	---	---	25.82	(1)	27.82	(1)
1966	20.0%	(1)	22.73	(1)	26.43	(1)
1967	21.5	(1)	22.86	(1)	26.50	(1)
1968	17.7	(1)	19.67	(1)	22.26	(1)
1969	14.1	(1)	----	---	----	---

* CX 124A-F; CX 125A-F; CX 157; RX 93.

APPENDIX 3

CONCENTRATION OF THE PRODUCTION AND SALES OF
FROZEN FISH PORTIONS, 1963-1968

Year	Top 4 Sales (Pounds) RX 95	Top 4 Production (Pounds) CX 129A	Top 8 Production (Pounds) CX 129A	Top 4 Production (Dollars) CX 129B	Top 8 Production (Dollars) CX 129B
1963	---	70.73%	83.45%	69.15%	83.64%
1964	---	70.23	85.15	66.34	84.54
1965	---	63.34	78.59	62.69	78.80
1966	60.1%	59.50	76.13	56.37	74.30
1967	54.1	53.33	71.78	53.38	71.64
1968	53.8	54.75	74.89	56.05	75.76

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APPENDIX 4

MARKET SHARES AND RANKS OF GMI-GORTON IN THE PRODUCTION AND
SALES OF FROZEN FISH PORTIONS, 1963-1969

Year	% of Market (Rank) Sales (Pounds)		Production (Pounds)		Production (Dollars)	
	RX 95	Rank*	CX 129A	Rank*	CX 129B	Rank*
1963	---	---	36.79%	(1)	36.72%	(1)
1964	---	---	40.05	(1)	36.24	(1)
1965	---	---	34.82	(1)	35.35	(1)
1966	30.6%	(1)	30.39	(1)	27.02	(1)
1967	27.1	(1)	29.03	(1)	27.43	(1)
1968	26.8	(1)	26.94	(1)	26.14	(1)
1969	21.6	(1)	---	---	---	---

* 127A-F, 128A-F, CX 157 and RX 95.

APPENDIX 5

CONCENTRATION OF THE PRODUCTION OF FROZEN FISH FILLETS AND STEAKS,
1963-1968

Year	Top 4 Production (Pounds)	Top 8 Production (Pounds)	Top 4 Production (Dollars)	Top 8 Production (Dollars)
	CX 132A	CX 132A	CX 132B	CX 132B
1963	22.37%	31.24%	24.68%	34.97%
1964	22.44	33.17	23.46	35.36
1965	23.61	33.68	26.77	36.98
1966	22.71	33.80	24.74	35.98
1967	23.38	32.39	23.17	33.04
1968	31.83	47.48	30.69	44.96

APPENDIX 6

MARKET SHARES AND RANKS OF GENERAL MILLS-GORTON IN THE DOMESTIC
PRODUCTION OF FROZEN FISH FILLETS AND STEAKS, 1963-1968

Year	Production (Pounds)	Rank*	Production (Dollars)	Rank*
	132A		132B	
1963	2.10%	(7)	2.70%	(5)
1964	2.63	(7)	3.25	(5)
1965	3.68	(4)	5.14	(4)
1966	3.34	(3)	5.20	(3)
1967	2.23	(7)	3.95	(4)
1968	7.76	(2)	10.03	(1)

* CX 130A-F and CX 131A-F.

APPENDIX 7

TOP FOUR AND GMI-GORTON SHARES OF SALES OF FROZEN FILLETS
AND STEAKS, 1966-1969

Year	Top 4 Sales (Pounds) RX 97	GMI-Gorton Sales (Pounds) RX 97	GMI-Gorton Rank RX 97
1966	32.1%	7.1%	(3)
1967	35.7	8.5	(3)
1968	35.0	7.4	(2)
1969	32.3	5.7	(4)

APPENDIX 8

CONCENTRATION OF THE PRODUCTION AND SALES OF FROZEN PACKAGED FISH
(FISH STICKS, PORTIONS, FILLETS AND STEAKS), 1963-1968

Year	Top 4 Production (pounds) RX 99	Top 4 Production (pounds) CX 135A	Top 8 Production (pounds) CX 135A	Top 4 Production (dollars) CX 135B	Top 8 Production (dollars) CX 135B
1963	---	39.30%	55.69%	42.32%	61.18%
1964	---	42.96	58.72	45.29	62.01
1965	---	43.80	59.45	45.87	62.35
1966	37.2%	42.70	58.22	43.35	59.76
1967	38.7	40.27	57.56	43.61	59.19
1968	37.6	43.75	62.46	47.18	64.13

APPENDIX 9

MARKET SHARES AND RANKS OF GMI-GORTON IN THE TOTAL PRODUCTION
AND SALES OF FROZEN PACKAGED FISH (FISH STICKS, PORTIONS,
FILLETS AND STEAKS), 1963-1969

Year	Sales (Pounds) RX 99	Rank*	Production (Pounds) CX 135A CX 133A-F	Rank*	Production (Dollars) CX 135B CX 134A-F	Rank*
1963	---	---	19.20%	(1)	20.31%	(1)
1964	---	---	23.50	(1)	22.51	(1)
1965	---	---	23.44	(1)	24.87	(1)
1966	15.7%	(1)	20.77	(1)	20.79	(1)
1967	16.5	(1)	20.76	(1)	21.09	(1)
1968	15.1	(1)	20.96	(1)	21.35	(1)
1969	12.0	(1)	----	---	----	(1)

* RX 99, CX 133A-F and CX 134A-F.

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APPENDIX 10

CONCENTRATION OF SALES OF FROZEN PACKAGED FISH (FROZEN FISH STICKS,
PORTIONS, FILLETS AND STEAKS) IN RETAIL AND INSTITUTIONAL
MARKETS, 1966-1969

Year	Retail Top 4 (pounds) RX 103	Institutional Top 4 (pounds) RX 101
1966	39.8%	41.6%
1967	41.0	43.9
1968	40.7	42.8
1969	36.8	41.9

APPENDIX 11

MARKET SHARES AND RANKS OF GMI-GORTON SALES OF FROZEN PACKAGED
FISH (FROZEN FISH STICKS, PORTIONS, FILLETS AND STEAKS)
IN RETAIL AND INSTITUTIONAL MARKETS, 1966-1969

Year	Gorton's Retail Share (Pounds)		Gorton's Institutional Share (Pounds)	
	RX 103, RX 124	Rank*	RX 101, RX 126	Rank*
1966	12.7%	(1)	18.4%	(1)
1967	13.2	(1)	19.3	(1)
1968	12.3	(1)	17.3	(1)
1969	10.0	(1)	13.6	(2)

* RX 101 and RX 103.

APPENDIX 12

GMI-GORTON'S RANK IN VARIOUS MARKETS, 1963-1969

Market	1963	1964	1965	1966	1967	1968	1969
Fish Sticks—							
Sales (lbs.)	NA	NA	NA	1	1	1	1
Production (lbs.)	1	1	1	1	1	1	NA
Production (\$s)	1	1	1	1	1	1	NA
Fish Portions—							
Sales (lbs.)	NA	NA	NA	1	1	1	1
Production (lbs.)	1	1	1	1	1	1	NA
Production (\$s)	1	1	1	1	1	1	NA

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Market	1963	1964	1965	1966	1967	1968	1969
Fish Fillets and Steaks—							
Sales (lbs.)	NA	NA	NA	3	3	2	4
Production (lbs.)	7	7	4	3	7	2	NA
Production (\$s)	5	5	4	3	4	1	NA
Frozen Packaged Fish—							
Sales (lbs.)	NA	NA	NA	1	1	1	1
Production (lbs.)	1	1	1	1	1	1	NA
Production (\$s)	1	1	1	1	1	1	NA
Retail Fish—							
Sales (lbs.)	NA	NA	NA	1	1	1	1
Institutional Fish—							
Sales (lbs.)	NA	NA	NA	1	1	1	2

OPINION OF THE COMMISSION

BY DENNISON, *Commissioner*:

This matter is before the Commission on an appeal by counsel supporting the complaint from the initial decision of Administrative Law Judge Goodhope who dismissed the complaint after holding evidentiary hearings.

The complaint in this matter charged respondent General Mills, Inc., with violation of Section 7 of the Clayton Act in its acquisition of the Gorton Corporation, a New England seafood company. General Mills, of course, is a leading seller of cereals (Wheaties, Cheerios, and other brands), cake mixes, and various assortments of other dry packaged food products usually sold under the Betty Crocker, Big G symbol or Gold Medal trademarks. It also has diversified into non-food lines, usually by acquisition.

Until 1966 General Mills was one of the country's largest producers of commercial flour for bakeries and institutional markets. However, in view of the fact that it viewed profit margins in the commercial flour business as unsatisfactory, it closed nine of its seventeen flour mills in 1966. As a result it dropped to sixth place among flour milling companies in the United States. Most of its flour production now is for use in its own consumer products.

In line with a new policy to concentrate General Mills' energies in food products where profit and growth potentials for the company were greater, it also withdrew from the formula animal feed business in 1962 and from the electronics and oilseed businesses.

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It also withdrew from the refrigerated foods business in 1966 after unsuccessful attempts to promote a refrigerated dough product.

To replace volume lost as a result of withdrawal from these businesses, General Mills sought to add other food lines to its business. In pursuance of this policy, it acquired Morton Foods in 1964 and Tom Houston Peanut Company in 1966, both manufacturers of potato chips and other snack items; Cherry-Levis Food Products Corporation (1967), a seller of sausages and pickled meat products; the Gorton Corporation in 1967; and the Donruss Company (1969), a bubblegum manufacturer.

Also, through internal research efforts it developed new food products, including corn-based snack products ("Bugles," "Whistles," and "Daisys").

As of 1969, General Mills' annual sales of consumer food products approximated \$600 million. Total sales were \$885 million and total net earnings \$37.5 million. In that year it ranked number two nationally in ready-to-eat cereals, ranked either number one or number two in cake mixes, frosting, and cookie mixes. It still ranked first in sales of family flour in the United States. However, the total market for packaged family flour had shown a declining trend as households consumed more and more prepared or convenient food items.

Prior to its acquisition in 1968 by General Mills, Gorton was an independent seafood company, having produced and marketed fish and seafood in this country for more than 100 years. Its brand names, "Gorton's of Gloucester" and "Gorton's," appear on its frozen packaged fish portions, fish sticks, fish fillets and steaks, and breaded shrimp sold to the consumer via grocery outlets. About half of Gorton's business is to the institutional trade, *e.g.*, restaurants, schools, hospitals, etc.

Gorton was successful and growing at the time of the acquisition. Its sales increased from about \$12 million in 1958 to \$72 million in 1968. It operated its main seafood processing plants in Gloucester, Massachusetts; Cleveland, Ohio; and Wilmington, California. A substantial amount of its recent growth had occurred as a result of mergers. Its principal acquisition was of the Fishery Products Company (Cleveland, Ohio) in 1961, a successful and substantial factor in the supply of frozen fish products to the institutional trade.

In August 1968 Gorton was merged into General Mills, completing a transaction obligating General Mills to issue 544,672 shares

of common stock and pay a cash consideration of about \$9.5 million. The value of this transaction at the time was approximately \$30 million.

On February 16, 1971, the Commission issued its complaint charging that this acquisition may substantially lessen competition in the manufacture and sale of frozen packaged seafood, or segments thereof, by eliminating General Mills as a likely and significant potential competitor in that line of commerce. The complaint also alleges that Gorton already had reached a dominant position in the frozen packaged seafood industry and that the acquisition entrenched its position in that industry by heightening entry barriers and had other adverse effects on the structure and conditions in that industry.

Evidentiary hearings were held and on February 16, 1973, the administrative law judge dismissed the charges, finding that General Mills was never considered a potential entrant into packaged frozen fish by others in that industry and that General Mills did not have plans to enter that industry outside of the instant acquisition.¹ He found that the testimony of General Mills' officials and documents preceding and contemporaneous to the acquisition showed that General Mills acquired Gorton as a vehicle for the purpose of achieving a competitive standing in frozen *prepared* foods, such as frozen dinners, frozen baked goods, frozen desserts and other specialties.

The law judge found that the principal attraction of Gorton to General Mills was its frozen food broker organization ("among the best in the major markets") and the fact that it had frozen food warehouses throughout the United States which could be used to handle frozen prepared food products to be developed by General Mills. He concluded (initial decisions, p. 20 [p. 721 herein]):

What the merger has in fact accomplished is to bring a new and substantial entrant into the frozen prepared food industry. This industry, of

¹ Complaint counsel's evidence as to market concentration of the frozen packaged fish market consisted of production and sales figures of frozen packaged fish sticks, portions, fillets and steaks. Shrimp were excluded. The retail market is served in most regions of the country by five "national," or nearly national, companies: Mrs. Paul's, Gorton, O'Donnel-Usen (Taste O'Sea), Sea-Pak, and Booth's Fisheries (owned by Consolidated Foods). The institutional market is mostly served by some eight firms. The law judge found that these markets are moderately concentrated. The production of the top four producers (in dollars) amounted to 47 percent of total U.S. sales in 1968; the top eight had 64 percent; Gorton ranked number one with 21 percent of the market (retail and institutional combined). Respondent's figures, which include imports of packaged fish and use pounds as a measurement, show the top four firms having 37.6 percent and Gorton (still number one) with 15 percent of the market in 1968.

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course, is a much broader one than the frozen packaged seafood industry, and there are no statistics in the record upon which to evaluate what effect GMI's entry into the frozen prepared food industry might be. However, it is conjectured that it should be salutary since GMI's entry results in the introduction of a substantial competitor into that industry.

The law judge also dismissed charges that the acquisition had the effect of entrenching Gorton as a dominant firm in the packaged frozen fish industry, distinguishing cases such as *Procter & Gamble*, 63 F.T.C. 1465 (1963), *aff'd* 386 U.S. 568 (1967), on the ground that Gorton was not in fact "dominant" in the industry and that unlike the facts in *Procter & Gamble*, consumer advertising is only of marginal value in the frozen fish industry. He also dismissed arguments that Gorton has been eliminated as an important independent purchaser of wheat flour.

In their appeal, complaint counsel ask the Commission to reverse the administrative law judge and enter an order of divestiture.

A. ALLEGED ELIMINATION OF POTENTIAL COMPETITION

As we noted in *Beatrice Foods Co.*, Docket No. 8814, Slip Opinion, September 28, 1972, p. 15) [81 F.T.C. 481, 527] injury to competition solely by removal of a potential entrant can come about in one or both of two ways. First, the existence of what is perceived to be a significant potential competitor at the edge of a concentrated market may act as a restraint upon high prices in that market even though actual entry never occurs or has been internally rejected by management. Removal of one of a few such "perceived" entrants may dilute this competitive force. *United States v. Falstaff Brewing Corp.*, 410 U.S. 526 (1973).

Secondly, aside from whether it is viewed as a potential competitor by firms in the market, elimination of a potential entrant by acquisition of a leading firm in that market will eliminate the competition that would have been added had the acquiring firm entered the market *de novo* or by toehold acquisition.²

In their appeal complaint counsel concede that the evidence will not support any finding that the first of the above types of injury has occurred here. Indeed, executives of frozen fish companies testified that they were surprised when they learned of General Mills' acquisition of Gorton as they never viewed respondent to be

² As recognized in our *Beatrice* decision, both situations assume that barriers to entry are high, so that the number of likely entrants is not large. Otherwise, loss of one among a large number of potential entrants would ordinarily not be significant.

a likely entrant into the frozen fish industry. Consequently, counsel supporting the complaint are relegated to the argument that, notwithstanding lack of industry recognition of General Mills as a potential entrant into frozen fish, it was nevertheless a likely entrant and the instant acquisition removed competition it would have added had it entered as a *de novo* or by toehold-acquisition.³

1. Subjective Evidence

The paramount issue on this appeal is whether the record shows that General Mills was a likely entrant into the frozen fish market aside from the instant acquisition. On this issue complaint counsel rely primarily on "subjective" evidence, beginning with documents showing that in the early 1960's General Mills recognized the importance of entering some phase of the rapidly growing frozen food industry in order to maintain its competitive position among the nation's food processors, especially in view of the direct competition by some frozen foods to General Mills' products. The company's corporate development department made a number of studies of the frozen food industry and its component parts, some of which recognized internal entry and "acquisition plus development" as possible avenues of entry.⁴

According to complaint counsel's interpretation of the record, General Mills' interest in entering frozen foods had narrowed down to frozen dinners and entrees and frozen seafood by 1965 and the interest in frozen seafood continued up until the time of the acquisition.

On the other hand, we have examined these documents and find no interest expressed in frozen seafood or fish as such. Although frozen seafood was mentioned, along with frozen fruits, vegetables, poultry, meats, prepared foods, and concentrates, and sales trends in these areas were recorded, the conclusion was consistently reached that *prepared* frozen food products was the kind of business General Mills should seek to develop should it ever go into frozen foods.

The record indicates that by frozen "prepared foods," General Mills' people initially were referring to frozen dinners; frozen

³ See *Beatrice Foods Co.*, *supra*, and *Ekco Products v. Federal Trade Commission*, 347 F.2d 743, 752-753 (7th Cir. 1965). Cf. *United States v. Falstaff Brewing Corp.*, *supra*, 410 U.S. at 537.

⁴ On the other hand, respondent claims management never made a firm decision to enter some part of the frozen food market in one way or another. Its chief executive officer testified that shortly before the Gorton acquisition management adopted a recommendation (RX 76H) of a frozen foods committee that if it were not possible to acquire an appropriate vehicle for entry into frozen foods, efforts to enter *de novo* should be abandoned (Tr. 1427).

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meat pies; frozen entrees; frozen baked goods; frozen nationality items; frozen fruit and cream pies; highly prepared frozen vegetables; prepared frozen poultry dinners; frozen soups; and prepared frozen seafood items. "Prepared seafood" consisted of items such as sole in lemon butter, lobster newburg, crab au gratin, "fish and chips"—items more specialized than the staple frozen fish items (sticks, portions, fillets, and steaks)—the items alleged in the complaint as the relevant line of commerce for this case.

A General Mills' study of the frozen food industry made in February 1965 reached the conclusion (CX 9J):

3. Non-prepared categories: Are mostly commodity type products; are produced by many marginal operators; have severe price competition.

4. This leaves prepared frozen foods: Largest single category; excellent growth (18.8% combined); greater technological requirements; more opportunity to differentiate; highest frozen food margins; easier to establish quality image.

Prepared foods was the only segment referred to in the balance of the report.

The next frozen food study was done in August of 1965 and again set out the entire frozen food universe. But it also concluded (CX 11H):

Commodity type products should be avoided—

Relatively undifferentiated

Severely price competitive

This leaves prepared frozen foods—

Largest single category

Excellent growth record

Higher technical requirements

More product differentiation

Generally better margins

Chance to establish quality image

Again the emphasis in the study was on *prepared* frozen foods. The report reiterated the attractions of this market (CX 11Q):

Frozen Prepared

Selected areas less competitive

Greater technology requirements

Chance to differentiate

Easier to build quality image

and reached the conclusion that:

Although frozen food is very competitive, its growth and impact strongly suggest the need for GMI taking a position in selected and institutional areas.

On the page of the report devoted to answering the question: "What specific areas are best?," the study concludes that General Mills should "seek middle to high prices * * * in order to assure adequate margins, product differentiation, building quality image, reaching best market." In that connection the report identifies "preliminary areas" within the prepared food market (CX 11V):

1. Entrees —Casseroles, etc. (boil-in-bag)
2. Nationality —Italian, Chinese, etc.
3. Baked —Selected products
4. Specialties —Hi-ball, sauces, etc.
5. ISP —Consumer and institutional products
6. Institutional—Special areas

Objective: To develop areas permitting product differentiation and adequate marketing margins.

It is true that the report later mentions the Gorton Company along with seven other companies as acquisition possibilities, but the F.M. Stamper Company was the only one discussed in detail, and that company specialized in frozen prepared foods such as frozen dinners, entrees, meat pies, and dessert pies, sold under the name "Banquet." There was no discussion of the seafood or frozen fish business other than the simple notation that Gorton was in that business.

The next document dealing with the frozen food area was written in January 1966 (CX 15). Again it concentrated exclusively on *prepared frozen* foods and recommended that in any entry General Mills should concentrate on top quality products, good margins for retailers and sufficient margins for the producer (CX 15B):

* * * to aggressively advertise and establish the necessary images. This has been the pattern of such successful operations as Sara Lee, Swanson and Stouffers. It is the kind of marketing we know best. Any entry by us must follow this pattern. * * *

Although Gorton was again listed along with others such as F.M. Stamper and Stouffer as possible acquisition candidates, it seems clear from testimony later given at the hearing that Gorton was considered a possible candidate not because General Mills was anxious to get into frozen seafoods as such, but rather to gain access to frozen food cabinets in grocery stores via Gorton's established brokerage distribution system.

This was brought out by the next study and report (CX 14) which lists possible areas of "prepared foods" for development,

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but stresses that plans for internal development should be made only if an appropriate major acquisition of a frozen food distributor is made. Although Gorton was again listed as one among several possible acquisition candidates, special note was taken of its low profit rate ("1.1% on sales").

The next document evincing interest in frozen food (CX 16) is a memorandum dated April 28, 1966, showing that management had authorized "an all out effort to evaluate and acquire either (1) Stouffer Foods, or (2) F.M. Stampers," the two firms that specialized in highly prepared frozen food products.

Finally, a top management memorandum dated September 7, 1966 (CX 17) sets forth the author's "rethinking of past proposals in the frozen food area:

The relevant question * * * is not whether the total market [frozen foods] is expanding. The real question is whether there is a segment of this business that is expanding at a rate sufficient to make it attractive. The answer would appear to be "yes"—particularly in the 800 million dollar *prepared food* area, which we estimate to be growing at a compound annual growth rate of about 8% * * * this classification includes all types of meals—dinners, entrees, nationality foods, meatpies, prepared seafood, poultry and finished baked goods * * *

* * * [T]here are relatively few worthwhile acquisition possibilities left in the frozen food field. Either the companies are too small, have inadequate distribution systems, or are completely lacking in management to give us any assurance that we would be getting anything worth buying. The exceptions to the above are firms such as Stamper, Stouffer, and Green Giant.

* * * We feel that General Mills should concentrate its efforts in the frozen food business within the prepared food segment—an area growing most rapidly and in which there is the greatest opportunity for brand identification, product points of difference, and margins adequate to support consumer advertising programs * * *

In conclusion, we recognize that we are banking heavily on our internal development program, specifically meat and cheese toastwiches, for an entry into the frozen food business."

There was no indication in this report, or in any of the other studies as to entry by internal development or toehold acquisition into the frozen fish market. The only possible basis for complaint counsel's contentions that General Mills had "narrowed its interest to * * * frozen seafood" is the fact that Gorton and Mrs. Paul's (another leading independent seller of frozen fish) were named as possible acquisition candidates along with several other companies in frozen foods. These references, however, were made in the context of recommendations that an acquisition should be made to aid in the internal development and distribution of frozen

prepared foods. As more fully discussed below, it was felt that acquisition of an established frozen food company was needed to secure brokers who could successfully handle the distribution of such items.

In 1966 General Mills tried to acquire Stouffer Foods which enjoyed high margins and a quality image as a seller of quality dinners and entrees. However, it was unable to acquire this company and it turned next to the F.M. Stamper Company. Stamper was a large privately-owned company in the frozen prepared food business, specializing in dinners, meat pies and dessert pies. Negotiations with Stamper were lengthy but eventually fell through in December 1967.

At this time, General Mills had been spending approximately \$200,000-\$400,000 a year on research in frozen prepared foods. Products being worked on were toaster products—toaster pizza, “toastwiches” and frozen sandwiches. Efforts to develop a skeletal brokerage network in a few test markets to handle such frozen prepared food products as it could develop had been a failure. After these unsuccessful attempts to acquire Stouffers and F.M. Stamper, the president of General Mills established an *ad hoc* frozen foods committee to determine whether there was any other vehicle by which the company could feasibly enter the frozen food business. They were to look for “an organization in the frozen food business who had a national distribution competence that could enable us to move into the prepared frozen food area involving our abilities.” The committee was also asked whether it was worthwhile to continue research efforts in frozen products if a suitable vehicle could not be found.

The committee reported back that it was necessary to make an acquisition of a company with national distribution competence; otherwise internal development should be stopped. The names of three frozen food companies were presented, one of which was Gorton's. The other two were not in the frozen fish business. General Mills' officials initially were negative to the idea of entering the fish business even by acquisition. Gorton was eventually selected despite its relatively low profit margins on sales because it had an established national network of frozen food brokers, its growth potential was deemed favorable and it had sound management.

Complaint counsel suggest that the testimony that a principal reason Gorton was acquired was to serve as a vehicle for distribution of frozen prepared foods developed by General Mills should

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not be believed because the notion never appeared in contemporaneous writings. This is not accurate. A General Mills' memorandum reporting favorably a meeting between the president of Gorton and General Mills on whether Gorton would be a sound investment for General Mills stressed that in addition to Gorton's having good management and record of growth, "we would have an opportunity to add new products to their line and it would aid their expansion *outside the seafood area*" (CX 25C, emphasis added). In reporting on Gorton, the president of General Mills wrote the chairman of the board that the company would "provide us with a nation-wide distribution system for any new frozen food products developed by GMI" (CX 26B). These and the other documents cited herein support the testimony by respondent's officials that Gorton was viewed as a vehicle for General Mills to distribute frozen prepared foods that were developed by it.⁵

That Gorton was to be used as a vehicle for non-seafood items was confirmed by Mr. Kinney, then president of Gorton, who testified as follows as to its pre-merger talks with respondent's officials about the kinds of frozen products General Mills indicated it was interested in developing (Tr. 1355):

They wanted to develop products that were similar to their kind of business, only frozen. They wanted something that would marry in with their cake business because they foresaw a declining cake business, the market not growing. They are in the flour business.

They had hoped to and are working currently on something that will in that division have a product that will be a baked bread, a dessert business which is a substantial part of General Mills' business. They wanted a frozen entry into the dessert business and in the breakfast business; surprisingly enough, they wanted a frozen breakfast, something you could heat in the oven, and currently they are working on a product that they hope the consumer will like and, of course, will distribute through Gorton's.

And they are right because this whole business is changing. Some of these markets are not growing. The dessert business, strange as it may seem, is not growing. This flour business, as I have told you, is declining. Their thinking was all right. They also understand enough about the business to want our kind of brokerage system.

It was brought out at the hearing by witnesses for both sides

⁵ In their proposed findings, complaint counsel themselves acknowledged that a principal interest of General Mills in entering frozen foods was to protect its position with respect to food items, most of which would not compete with frozen seafood for the consumer's palate:

"GMI was facing increased competition from frozen foods during the 1960's. Frozen baked goods were competing with GMI's cake mixes and flours. GMI's casseroles were in direct competition with frozen dinners and entrees. Based on the research efforts of GMI in frozen foods, the company's executives became convinced that 'frozen breakfast-type items would replace the traditional cereals' marketed by GMI. (Tr. 1216-1217; CX 17A, 17F, 21A)." proposed finding p. 55.

that it would take four or five years to put together a national network of top-flight frozen food brokers. It is also clear that in the absence of having such frozen food brokers it is difficult to get entry into the limited freezer cabinet space of grocery stores. Evidence was adduced that it is nearly impossible to utilize dry-grocery sales personnel to gain access to the freezers. Certain brokers, on the other hand, have developed the expertise and have the manpower necessary for the intense selling effort at the retail level that is required for frozen foods (Tr. 1505-11, 964). Given the uncertainties of introducing new frozen prepared items, it seems logical (and this was supported by testimony of frozen food distributors) that a company such as General Mills, desirous of competing with new concepts of frozen prepared items, needed access to an established, self-sustaining brokerage distribution system, rather than attempt to work on an "in-and-out" basis with brokers, or on a limited regional basis. The importance of having access to a *national* brokerage network was stressed as follows by one official:

Q. Given the types of products which you understand General Mills is introducing in the frozen prepared area—we talked about that yesterday—would it be feasible to introduce those kinds of things, the toastwich or a breakfast item? Would it be feasible to introduce those kinds of items on a regional basis for General Mills in your opinion?

A. No, because these large companies are very alert. They are very sensitive to major competitors. If you linger too long in a region, what they do is that they duplicate and if it is fairly successful, what they do is duplicate the product. Since they have national distribution and sales forces, what they do is just scoop the remainder of the market.

Really what they do is neutralize any benefits that you have had in that regional market.

Q. They pick up your product and go national with it? A. Right. They monitor products all the time. So, it would be marketing suicide for a company to just talk in terms of regional product, regional company, with a meaningful product, a product that had substance, a product that had potential. (Tr. 1539).

Subsequent to the acquisition, respondent has used Gorton's broker network to get distribution for its frozen toaster pizzas and toastwiches. Although these products were ultimately taken off the market, this was because of lack of consumer acceptance, not because of other marketing problems. According to respondent, new frozen prepared food items are continuing to be developed for marketing through Gorton's brokers. For fiscal 1973, General Mills plans to spend \$900,000 in the development of

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frozen products in such areas as breakfasts, desserts, flour, and snacks (Tr. 1424-25).

2. Objective Considerations

Even if evidence of subjective intentions of corporate management show no plans to enter a particular market, examination should not stop there since testimony and documents could be self-serving or express only transitory views of management. Therefore, we have also attempted to determine from the objective facts known of the frozen fish business whether entry into that market would be a natural area of internal expansion by a firm such as General Mills. We have concluded that it is not.

Frozen fish do not appear to be in any sense complementary to General Mills' products. They are not produced or distributed in the same way, they have not been differentiated by brand in the consumer's mind to any great extent, and they are not bought by the same retail store personnel. Compared to the heavily advertised dry convenience food items usually promoted by General Mills, selling margins and profit margins in frozen fish are low. Price competition appears to be prevalent in most frozen fish products with a high portion of sales under supermarket private labels. Gorton's profit margin shortly before the merger was less than 2 percent of sales. Industry consumer advertising-to-sales ratio is 1.4 percent. Both ratios are low compared to General Mills' experience which was to sell high margin items that could be promoted through advertising.

Lack of heavy advertising and product differentiation in frozen fish does not appear to be due to lack of competitors in the market able and experienced in such marketing techniques. Booth Fisheries is a subsidiary of Consolidated Foods, one of the largest food companies in the country. Chicken-of-the-Sea is a subsidiary of Ralston Purina, another major company. Sea-Pak is a subsidiary of W.R. Grace. All of these companies surely have the capability of creating strong brand differentiation if that could be accomplished with this type of product.

In short, it appears clear that frozen fish sticks and portions were not a natural "product extension" for General Mills. Its reputation and experience as a seller of breakfast cereals and "Betty Crocker" cake mixes and casseroles would not seem to give it any predilection for the frozen fish business.

Complaint counsel contend, however, that a firm cannot enter the "frozen prepared food" business without also entering some

staple item segment of frozen foods, such as frozen fruits, vegetables, meats, seafood, etc. (This proposition is not universally true since some firms, *e.g.*, Stamper and Stouffer, specialize only in prepared frozen food items.) It is argued that General Mills should therefore be viewed as having been a potential entrant into any and all segments of the frozen food industry, including fish, since entry into one part could have led it into frozen prepared foods.

Even if this view is accepted, it does not follow that the acquisition of Gorton eliminated a potential entrant into packaged frozen fish, since we have found no reason to believe that, except for this acquisition (or perhaps an equivalent acquisition of another leading frozen fish company), General Mills would have entered the frozen fish industry. As we stated in *Sterling Drug Co.*, CCH Trade Reg. Rep. ¶ 19,962 at 21,983 (1972) [80 F.T.C. 477 at 606] :

[I]n the absence of evidence that the acquiring company might have entered the market internally or by another [toehold] acquisition we cannot agree with complaint counsel that Section 7 of the Clayton Act prohibits *per se* the acquisition of a leading firm in a concentrated market.⁶

Or, looking at the matter from a somewhat different perspective, it appears unlikely that if we ordered divestiture of Gorton, General Mills would attempt to re-enter the frozen packaged fish industry by internal expansion or equivalent means.

B. ALLEGED ENTRENCHMENT OF GORTON

Complaint counsel argue that regardless of whether General Mills was a potential entrant into the packaged frozen fish market, the merger would still be unlawful because of (1) the elimination of potential competition from anyone else due to the raising of entry barriers, and (2) General Mills' demonstrated ability and willingness to use its power to increase Gorton's leading position in the market.

Although there may be barriers to entry into the frozen packaged fish industry, it is clear that such barriers as exist are not ones which General Mills is likely to affect by virtue of this acquisition. It appears from the record that the major obstacle to

⁶ This statement assumes, of course, that the acquiring company was not perceived by other firms to be a potential *de novo* entrant (regardless of actual intentions) and its presence had no* existing disciplinary effect on prices. As previously noted, complaint counsel conceded that this was not the case here.

* Amended pursuant to order of the Commission issued Nov. 20, 1973.

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any new entry in recent years has been the difficulty of obtaining adequate supplies of fish. Intense international competition in recent years for supply has endangered the fisheries of the most popular species (Tr. 880-85; 1301-04; 978-83). Negotiation of supply arrangements poses a major problem for seafood processors. Success appears to be built on personal relationships with industry representatives built up over a period of time (Tr. 457-59; 553-54; 1499-1501, 1318-20). Thus, Gorton was able to negotiate a valuable long-term supply contract with Poland in part by teaching their fishing people how to produce frozen fish blocks and furnishing them equipment and experts (Tr. 1319-21).

There is no reason to believe that General Mills, which has no experience or contracts among fish catchers, could give Gorton any advantage which they did not have already in this area. No "heightening" of this entry barrier could result from the acquisition.

Similarly, there is no reason to believe General Mills could provide Gorton with production or distribution know-how or economies which might raise entry barriers for other firms. Frozen fish products must be distributed by frozen trucks and stored in special warehouses. General Mills did not engage in either production or distribution of frozen foods.

Nor does it appear that General Mills had advantages in the selling force area that could benefit Gorton. The record indicates that every company in the frozen fish business but one relies exclusively on specialized brokers to sell its frozen fish products. The one exception is Mrs. Paul's, and that company has recently made a major move in the direction of using brokers rather than a direct sales force. The record is replete with testimony as to the advantages which a seller with a frozen food broker network enjoys over one with a direct sales force in selling frozen packaged fish. Frozen fish are usually sold to the frozen food buyer of the retail outlet, often the meat buyer, while General Mills' previous products were sold to dry grocery buyers. The frozen food buyer operates independently with different concerns usually from those of the dry grocery products buyer. A marketing executive testified that the distributor of frozen fish must be expert in frozen food distribution techniques and must constantly service the retailer, a function he thought could not be performed by General Mills' sales staff (Tr. 1510-11).

The record shows that because freezer space is limited and so expensive to the retailer, the frozen food buyer will not waste

freezer space by, for example, authorizing promotional displays as a favor to a leading dry grocery seller, or by authorizing distribution of a product that is not likely to sell in his store. Because of this factor, we find little reason to believe that General Mills could exercise "leverage" in selling frozen products to retailers by virtue of its position in dry grocery areas.

As for preselling to consumers by way of advertising, the record is clear that product differentiation simply has not been a significant factor in this market. Frozen fish sticks, portions, and fillets are essentially "commodity" items that do not command much brand allegiance. Even if some product differentiation develops with specialized prepared frozen fish dishes, there is no reason to believe that the presence of General Mills in the market will make it difficult for others to advertise competitively. As previously indicated, a number of Gorton's competitors are parts of large corporations such as Ralston Purina and Consolidated Foods, which are fully capable of financing advertising campaigns, should a trend in that direction develop. Similar competitive balance appears to exist as to research facilities for development of new products.⁷

Complaint counsel suggest that such a trend and heightening of entry barriers may be started by General Mills. They cite the fact that Gorton's advertising expenditures increased from \$238,000 in 1968 (the year of acquisition) to \$652,000 in 1969. But the record shows that Gorton was introducing a new "fish and chips" product in the American market that Gorton believed was different enough to warrant a test to determine whether advertising would help sales. It turned out that it did not, and Gorton advertising fell back to prior levels. Gorton's vice president in charge of sales testified that the idea for the advertising was Gorton's and was never discussed with General Mills' officials (Tr. 1540-42).

Also relied upon by complaint counsel was a promotion in the spring of 1972 regarding "Superfish," a fish-shaped frozen fish

⁷ Complaint counsel argue that respondent can run TV commercials featuring multiple products, enabling it to give television exposure to each product at a fraction of the cost per product that a small firm would. Although this was an important factor in our *Procter & Gamble* and *General Foods* decisions (63 F.T.C. 1465 and 69 F.T.C. 380), prior to the trial in this case the Commission made findings in another merger case that the TV networks have abandoned quantity discounts and since December 1970 offered 30-second spots, eliminating advantages of "piggy-back" commercials by large companies. *Sterling Drug Inc.*, Docket No. 8797 (April 7, 1972) [80 F.T.C. 477]. Complaint counsel has not suggested why that finding is not fully applicable here.

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portion developed by Gorton. Superfish was promoted by inserts enclosed in about 13 million boxes of General Mills' Cheerios breakfast cereal. The insert was not a "cents-off" type offer, but offered a Superfish T-Shirt for \$1.50. The insert did not require submission of proof of purchase of Superfish and the promotion was self-liquidating, *i.e.*, the \$1.50 covered the cost to Gorton of the T-Shirt.

Although cross-couponing practices by a large multi-product firm could give the company an unfair advantage over smaller companies concentrating their efforts in one product area, we do not believe that this single instance indicates a threat that new barriers to entry are in the offing as a result of cross-couponing practices in this industry. In point of fact, Superfish was a failure in terms of sales ("a total disaster," according to one Gorton broker).

The risk that Gorton will cross-coupon with other General Mills' divisions by offering "cents-off" coupons which must be redeemed at the store seems unlikely. Margins have usually been too narrow to justify "cents-off" coupons in the frozen packaged seafood business. Neither Booth's Fisheries (Consolidated Foods), nor Chicken-of-the-Sea (Ralston Purina), have used cross-coupons despite the fact that both have large multi-product food companies for parents (Tr. 974-75, 982).

Finally, complaint counsel submit that Gorton will now have available to it the resources of a parent with access to capital at low interest rates to finance expansion. But they themselves concede that capital requirements are not high to enter the frozen fish business. What advantages Gorton might have as far as interest rates on any loans would not appear to be significant in this industry, which is not capital intensive. *Cf. Beatrice Foods Co.*, Docket No. 8814 (1972) [81 F.T.C. 481].

Furthermore, the record reveals that at the time of the acquisition Gorton already enjoyed a sound financial situation—it had completed recent plant expansions, and a representative of the financial community testified that it could easily have raised funds for additional expansion if it had so desired.⁸ Contemporaneous documents show that General Mills believed Gorton had

⁸ Gorton had negotiated a \$1.5 million 15-year unsecured loan in 1962 and a \$3.5 million 15-year loan in 1964. In 1965 it successfully issued a \$3.5 million subordinated note. According to the financial institution which advanced these loans, in 1968 Gorton was qualified to incur another \$3 million in long-term debt and could have raised an additional \$3 million through issuance of common stock (Tr. 1088-89).

sufficient investment and working capital so that Gorton could continue to expand with internally generated funds (CX 56A). No showing has been made how General Mills' "deep pocket" would restructure this industry or give Gorton an unfair advantage over rivals.

We agree with the administrative law judge that the condition of new entry has not been adversely affected as a result of this acquisition, and the record will not permit a finding that it will "entrench" Gorton as a dominant or leading firm.

C. VERTICAL FORECLOSURE

Finally, complaint counsel appeal from the initial decision's dismissal of charges that the acquisition will lessen competition in the sale of wheat flour as the result of the fact that General Mills is a supplier of that product and Gorton is a substantial user of wheat flour as a breeding material in the processing of frozen packaged fish.

The law judge's dismissal of this part of the complaint is so clearly correct we can only wonder why an appeal is taken on this point. Gorton's purchases of wheat flour in 1967 is valued at only \$500,000. It is true that in the production of frozen portions and sticks (usually breaded) Gorton has about 20 percent of United States production. But there is no data as to what degree of foreclosure in a relevant market might occur if Gorton purchased all of its flour requirements from its new parent. Thus, there is no evidence as to whether there is a separate market for fish breeding flour, what the geographic scope of the market is, or what the total production might be. In fact, Gorton has been operated as a separate and largely autonomous division of General Mills under a "profit center" method. It does not purchase flour or breeding material from General Mills. According to its officials, General Mills does not make the type of flour or breeding material used in Gorton's operations and cannot supply Gorton with flour as cheaply as more proximately located suppliers because of substantial differences in freight costs (Tr. 1530). Even if in the future, circumstances change and Gorton does buy its requirements from General Mills, there is insufficient data to measure any possible anticompetitive effect.

In conclusion, we find no basis to believe this acquisition violated Section 7 of the Clayton Act. An appropriate order will be entered dismissing the complaint.

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FINAL ORDER

This matter having been heard by the Commission upon briefs and oral argument in support of and in opposition to the appeal of counsel supporting the complaint from the administrative law judge's dismissal of the complaint herein, and the Commission, for the reasons stated in the accompanying opinion, having concluded that the appeal should be denied and that the findings and conclusions contained in the initial decision should be adopted,

It is ordered, That the administrative law judge's initial decision be, and it hereby is, adopted as the decision of the Commission, and

It is further ordered, That the complaint in this matter be, and it hereby is, dismissed.