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In the

Supreme Court of the United States

THOMAS RICCI,

Petitioner,

v.

CHICAGO MERCANTILE EXCHANGE
ET AL.

No 71-858

Washington, D. C.
October 18, 1972

Pages 1 thru 30

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Wednesday, October 18, 1972

The above-entitled matter came on for argument
at 10:03 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

JEROME H. TORSHEN, ESQ., 11 South LaSalle Street,
Chicago, Illinois 60603 for the Petitioner.

LEE A. FREEMAN, ESQ., One North LaSalle Street,
Chicago, Illinois 60602 for the Respondent.

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Lee A. Freeman, Esq., for the Respondent	12

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments now in Number 71-858, Ricci against the Chicago Mercantile Exchange and others.

Mr. Torshen.

ORAL ARGUMENT OF JEROME H. TORSHEN, ESQ.,

ON BEHALF OF THE PETITIONER

MR. TORSHEN: Mr. Chief Justice, and may it please the Court:

This case involves the issue of primary jurisdiction. Specifically the issue is whether a complaint alleging a group boycott to exclude a competitor from the marketplace, per se a violation of the Sherman Act, brought against a commodity exchange, certain of its officers, a member and another individual must first be referred to the Commodity Exchange Commission or to the Secretary of Agriculture for decision or it may be referred to the District Court, the Anti-Trust Court.

Very briefly encapsulated, the facts are that Petitioner purchased a membership on the Exchange, another member claimed to be the owner of it. It is alleged that the other -- the claimant induced the officers of the Exchange to transfer the membership to a third party and as a result, Petitioner was deprived of his trading privileges and excluded from the marketplace willfully, knowingly and

maliciously as a result of the conspiracy between these parties.

The history of the case, too, must be stated so that we can get to the issues and clear away some of the underbrush that appears in the brief. In the District Court this case arose on the pleadings and was resolved on motions to dismiss for lack of jurisdiction, specifically lack of jurisdiction over the subject matter for the reason that the anti-trust laws did not apply.

In the Court of Appeals, the court found unanimously that the complaint did allege a per se violation of the Sherman Act and hence, on the pleadings, reversed the District Court. However, the court so responded without the issue having been argued, briefed or raised at any time during the proceedings in a two to one opinion in both the Doctrine of Primary Jurisdiction and directed that the case be remanded to the District Court with directions that the District Court state proceedings pending reference of the matter to either the Commodity Exchange Commission and/or, in the terms of the court, the Secretary of Agriculture.

I mention those facts because we do have here a case on the pleadings although depositions had been taken by one side and are quoted in the briefs here by Respondent.

The deposition testimony is not properly a part of the record and was rejected by the court below.

We think, your Honors, that the extension of the Doctrine of Primary Jurisdiction in this case involving commodities markets is particularly inappropriate, especially with regard to this claim brought under the anti-trust laws and particularly with regard to the policy in support of private enforcement of anti-trust laws.

It may be well, in determining what the primary jurisdiction -- or jurisdiction, if you will, of the Secretary of Agriculture is to determine what his powers are under the Commodities Exchange Act. First, the Act gives no exemption from the anti-trust laws. Secondly --

Q Let's assume a rule of the Exchange that it was authorized to issue and which was not disapproved by the Secretary. Let us assume that one of those rules, in anybody's parlance, would be a violation of the anti-trust laws.

MR. TORSHEN: Well, I think if a rule would be a violation of the anti-trust laws, I suppose that could be attacked. Here, of course, we are not --

Q You would not say that Congress intended that any rule that the Secretary didn't disprove should be immune from anti-trust attack?

MR. TORSHEN: Absolutely not.

Q I think you should be clear about that.

MR. TORSHEN: The mere disapproval should not -- the mere failure to disapprove should not render --

Q But that is the scheme under this act. They submit the rules and if the Secretary does not disapprove them, the rules are enforced, isn't it?

MR. TORSHEN: With regard to trading requirements and terms and conditions of contracts, this is the case.

Q Well, let's just assume one of the rules about trading requirements otherwise would violate the anti-trust laws. Would that rule be vulnerable?

MR. TORSHEN: Yes.

Q Okay.

MR. TORSHEN: We would think that it is. Yes, your Honor.

Here we are not attacking any rule of the exchange. The allegations are that the actions of the exchange in concert with the member -- and, again, we are not talking about the generalized action of the exchange as a concert of its memberships but the action of the exchange and a member in specific violation of the rule constituted a violation of the anti-trust laws and if we examine the statutory scheme to see what the Secretary of Agriculture can do in addition to this ability if he so sees fit to disapprove certain rules pertaining to trading or terms and conditions of contract, he can conduct investigations, make reports, obtain registrations, approve certain rules relating to minimum financial requirements, hold hearings

with regard to manipulations of future prices, false statements and CEA violations. He can suspend from trading and he can report for criminal prosecution violations of the act, although it is specifically provided that he need not report what he considers to be minor violations of the act.

Certainly, here, what we have on the part of the regulatory officer is a generalized supervisory power to guard against certain trading abuses, not the power to set up or to establish any overall scheme or plan or even to enforce or protect against violations of those rules which are set up. It is a very generalized type of system and there is nothing in the character and objectives of the act which is incompatible with the maintenance of a private anti-trust action or those sorts of violations that are alleged in this particular complaint.

There is nothing in the regulatory scheme which might enable the Secretary of Agriculture or the Commodities Exchange Commission, which is sort of an ephemeral body composed of the Secretary of Commerce, the Secretary of Agriculture and the Attorney General or their representatives with power which in any way gives them power to enforce or to consider anti-trust objectives or anti-trust claims.

The court over the years has developed a number of standards or tests relating to the Doctrine of Primary Jurisdiction. Granted, it is a flexible concept and no

particular rule can be applied in any given case but there are standards which the cases have developed. There is a requirement of a pervasive regulatory scheme and I think here we do not have such a pervasive regulatory scheme and the court has been very careful to delineate an exemption from the anti-trust law either specifically stated in the regulatory statute or implied therein and we have no such exemption stated in this statute nor in this general supervisory scheme to perhaps protect somewhat against cornering and manipulation do we have an implied exemption and it is interesting to note in this regard what reference can be made to the legislative history. The Commodities Exchange Act and its predecessors were both drafted by Congresses which were well aware of anti-trust laws and anti-trust implications. The predecessors came about during the debates on the Capper-Volstead Act in which there were specific anti-trust exemptions and the present Commodities Exchange Act was enacted by the Congress and debated contemporaneously with the Robinson-Patman Act. So certainly, here, we are dealing with statutes which were well aware of the anti-trust laws and these statutes give neither to the Secretary of Agriculture or to any other body the power to engrant an immunity from the anti-trust law or to enforce that immunity nor do they give a mechanism to redress a violation or to determine issues which might be brought under

the anti-trust laws.

In fact, it is interesting to note that under the act, if Petitioner felt himself aggrieved, he could bring a complaint before the Secretary of Agriculture but he would not have standing unless he was given the right to intervene to appear in support of that complaint.

Moreover, we have no conduct such as we find in some of the other cases dealing with primary jurisdiction which is of at least debateable legality which can be justified with reference to some broad plans set down by the agency or by agency action or by the need within the particular industry for some sort of non-competitive action imposed upon the members of the industry by the agency. We just don't have it here.

Moreover, action in this ad hoc situation by the district court acting as an anti-trust court cannot in any way disrupt the administration of the Commodities Exchange Act or impinge upon the regulation of this contract market.

We have here an ad hoc decision which we ask to be made in connection with particular facts relating to this Petitioner. There is no question of uniformity of agency rule. We are dealing with a past violation.

Incidentally, it is interesting to note that with regard to the powers of the agency in this case to give redress for wrongs to individuals, there are none. The

agency can issue a cease and desist order. It can suspend from trading. It can apply various similar sanctions or it can refer to the Attorney General for prosecution of a crime. But it cannot give the particular remedy of damages which might redress a private wrong and in this particular case when we are dealing with the resolution of a fact controversy in the application of the anti-trust laws, there is nothing in the history or in the records or in common sense which might give to the agency a greater expertise than the anti-trust court in deciding these issues and it is ironic to note, I think here, as we stand before this Court, that even though people do not like to make work for themselves, agencies are generally jealous of their prerogatives and their powers and we don't see the Secretary of Agriculture here and the only member of the triumverate that we do see here that is a member of the Commodities Exchange Commission is the Attorney General, who has filed his brief in support of Petitioner's claim, as an Amicus.

Again, we are not making an attack on the rules. We think the rules have been violated and they have been violated by the Exchange acting with one of its members, not just because of generalized conduct of the Exchange.

We think, your Honors, that there is no good policy reason that might protect this sort of anti-competitive behavior or to be used to permit the exchange

machinery to be used to suppress competition on the exchange.

We think we have nothing more here than a garden variety conspiracy to exclude a member from the market. Again, referring to Silver and the footnote in the dissent by Mr. Justice Stewart, we are dealing with a specific act of a member of the exchange, setting up an independent violation of the anti-trust laws as distinguished from the generalized conduct.

We think this Court, over the years, has considered the policy of private anti-trust enforcement to be an important one. Certainly here it would not surprise me if the Secretary of Agriculture were to say that this conduct with regard to Petitioner was a minor violation of the exchange. I don't think that it rests upon the government or governmental bodies to seek redress for every anti-trust wrong. I think that is why it has been left to private parties and here we have a case in which there is a good example of the private party seeking redress and seeking enforcement of the anti-trust laws in an area where only he can seek redress.

We think the action of the court below, of the Court of Appeals, in limiting, in seeking to limit treble damage action, or to delay that action over a period of time really does not accomplish the purposes of the anti-trust laws. It certainly does not advance the cause of justice in

this case and in all due conscience and propriety we think that the Doctrine of Primary Jurisdiction, the Doctrine of Judicial Modesty, should not be applied in this case.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Torshen.
Mr. Freeman.

ORAL ARGUMENT OF LEE A. FREEMAN, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. FREEMAN: Mr. Chief Justice, and may it please the Court:

The expression that this is an ad hoc situation does violence to this Court's standing. This Court does not deal with ad hoc situations. Whatever decision is made here will have broad application and involve principles.

What is involved here is the application of the primary jurisdiction principle and in your recent decisions I find the rule expressed as a judicial abstention where the protection of the integrity of the regulatory system dictates primary resort to the agency. This was expressed in Philadelphia Bank and in Carnation Milk and in Silver, a decision to which I will more fully refer.

The important point in this instance is that we don't seek exemption from the antitrust laws. We seek, and the Seventh Circuit did order, a judicial abstention until the administrative agencies had an opportunity to determine

whether or not there was compliance with this particular Exchange, with its rules and with the regulatory system established.

Q Do you agree with your friend that the agency cannot give any monetary redress or not?

MR. FREEMAN: Number one, the Exchange, if I may answer your question obliquely, the Exchange itself has a great many self-regulatory rules which involve penalties and monetary redress. The agency, the administrative agency, does not have the power to award damages but as this Court said in PanAmerican, if the regulatory system is sufficiently comprehensive and if it deals with the issues that are involved, the fact of an absence of remedy or full remedy in that instance did not violate the need for a primary jurisdiction resort and, in that case, Justice Douglas did so hold and there have been several decisions since then.

But let me just briefly, if I may, indicate the scope and character of the commodity futures regulatory system. It involves an important segment of our economy. The quoted prices in a free auction market become the price basis for national and international trade. It becomes the price basis. These quotes from day to day, from hour to hour, from minute to minute are the prices at which the farmers sell their product in the country. The processors and exporters pay for their product and the consumers also

pay for it. The principal feature of this regulatory system is self-regulation by the Exchange, mandated by Congress.

This is an important difference from every other regulatory system that this Court has considered in determining primary jurisdiction, except the Silver case where, also, a self-regulatory system was mandated by Congress with respect to the Securities and Exchange Commission.

Q What was there that the Commodity Exchange Commission could decide would in any way help this antitrust bid?

MR. FREEMAN: Thank you, Justice Marshall, I was going to answer Justice White's inquiry.

The Commodities Exchange Authority has delegated to the agency and to the Exchange almost complete authority to deal with all of the antitrust problems that might be involved. Let me enumerate them:

Number one, the act prevents or seeks to prevent manipulation of prices and imposes the first duty on the Exchange to do that. This is price-fixing; eliminate price-fixing. It does provide for the prohibition of restraints of trade in that it provides against, specifically provides against various predatory practices, various unfair methods of competition and imposes that responsibility on the

Exchange which these --

Q Put it another way. Suppose they rule with you on every point you say. Does the antitrust violation go?

MR. FREEMAN: Does the antitrust violation --?

Q Does that insulate?

MR. FREEMAN: There would be justification.

Q Would it insulate you from an antitrust case?

MR. FREEMAN: In the event the rule that I seek to apply here is that in the event the Exchange were proceeding in good faith in fulfillment of its Congressionally-mandated self-regulatory system and imposed a limit on competition or even a per se, what would normally be a per se antitrust violation, it would be justified and it would be immunized.

Let me give you an example: The Exchange has various types of rules. For example, there is a rule that prohibits the fluctuation of daily futures prices beyond certain limits, a cent and a half a day up or down. This is --

Q Is there anything in any of this that says specifically that this is in lieu of antitrust violations?

MR. FREEMAN: No, none, there is no reference to the antitrust laws anywhere in the statute.

Q How can that possibly immunize you?

MR. FREEMAN: There is no immunization by express grant but the whole system --

Q Where is your primary jurisdiction if it doesn't immunize you?

MR. FREEMAN: Well, your Honor, the system that has been established here -- and I might say that I want to answer your question directly -- Silver, you see, found that the Securities and Exchange Commission did not have the statutory power to review particular instances of enforcement of Exchange rules.

In 1968, Congress amended the Commodities Exchange Act. The Commodities Exchange Act, incidentally, was enacted in 1922. It was the forerunner of the Securities and Exchange Act. It was the pioneer of marketing devices that were introduced then and were ultimately adopted by the Securities Exchange Act and the Commission and in 1968 in view of Silver, which had been announced several years prior, the statute was amended, number one, to specifically stand for Secretary and the administrative agency, the power to disapprove rules that were adopted and promulgated by the agency -- by the Exchange.

Secondly, and most important, to impose a duty upon the Exchange to enforce those rules.

And, thirdly, to require, with you, of the enforcement of those rules by the administrative agency and in the event of failure of the enforcement, to provoke disciplinary action. This disciplinary action could take the form of a

cease and desist order, suspension as a designated contract market on which futures trading only can be legally performed, or revocation. Now, the primary jurisdiction --

Q Or damages?

MR. FREEMAN: No damages. But you see, in the Silver case, the Court recognized that there was not this agency review. The Court as a matter of fact spoke specifically about seeking an antitrust function to be performed either by the administrative agency in review of the Exchange's functions or by the Court. Failing to find administrative review, the Court then turned to the antitrust laws but was quick to say that a different case would occur if agency review was found and also said, your Honor, that in the event the agency review occurred, the Court would find that under the aegis of the rule of reason the Exchange would have sufficient breathing spell or breathing space to function as a self-regulatory agency in a very important field and avoid the implications of antitrust claims.

The functions that the Commodities Exchange Authority and its Exchange -- in this instance, the Chicago Mercantile Exchange -- performed are very, very important and, as I was pointing out, they do have the functions of avoiding price-fixing, of avoiding restraints of trade, of avoiding monopolization because of this obligation to avoid corners of the market. There are specific provisions in the act

providing for the prevention and prohibition of unfair methods of competition and of predatory practices. There are specific provisions in the act permitting the Exchange to pass rules that limit competition. For example, the Exchange and the agency causes a cessation of futures trading for a period of time in the contract month to permit delivery of the cash commodity.

This is an imposition, a restraint on competition.

Secondly, as I pointed out, there is this provision that the Exchange has always had, a hundred years of limiting the fluctuation of prices on a daily basis. This, in the parlance of antitrust, is a per se violation but completely justified. The Exchange does provide for hours of trade, time of trade, manner of trading in futures contracts, and all to assure that a free auction market is maintained where the quoted prices truly reflect the competing, contending, conflicting opinions of traders based upon informed judgment on economic factors that are reasonably presented in a very complex, a very complex and dynamic marketing situation.

Q Now to help me out, would you relate --

MR. FREEMAN: Yes, sir.

Q -- what you have just been outlining to the issues of this case under the complaint?

MR. FREEMAN: In this instance there is nothing more or less than a dispute over membership. The Exchange's

entire duty and responsibility was exercised through its members; the statute so provides. The members are required to report and keep records subject to inspection and not manipulate and all of the circumstances that you can think of.

The membership becomes an important fulcrum through which this self-regulatory duty is achieved.

In this particular instance, Ricci claimed a membership and there was a membership dispute. The rule provides that where there is an authorization to transfer, it becomes almost an administrative decision of the Exchange to acknowledge the transfer and make a transfer of membership. In this instance, Ricci objected after he had been notified that there was such a movement afoot.

Q Hypothetically, if you had a situation where there was a claim that a membership was in process of transfer, transfer by a forgery --

MR. FREEMAN: Yes?

Q That would be under the disciplinary reach of the Commission from your point of view?

MR. FREEMAN: Oh, yes. Well, first, you see, there is the Exchange procedure, which has tremendous amount of procedural due process. There is the Exchange provision for arbitration, for instance, which was rejected here. There are all of these Exchange provisions. And then if the Exchange decides wrongly, there is the administrative review

and the Commission and there is judicial review from the Commission.

There is a system established and the system has worked very well for these 50 to 100 years and the antitrust issues that have been inherent in the system; for example, you must decide that the Exchange has the power to pass a rule which, in the orthodox sense, might be restrictive of competition, because if you don't, then you are completely rejecting the Congressional mandate that this should be a free and an open auction market which will avoid sudden and violent fluctuations in prices where you are dealing with traders on a daily and almost-momentary basis and let me tell you about the regulation that --

Q Well, you don't want us to go any farther than Silver, do you?

MR. FREEMAN: No, I want you to apply Silver here. Silver -- the dictates of Silver -- of course, the primary jurisdiction issue was not reached in Silver and it was not reached in Silver because --

Q Yes, but Silver said that to the extent some rules are necessary to carry out the objectives of the act, that should be a decent answer to an antitrust case.

MR. FREEMAN: Of course, and that is all I would suggest and, as a matter of fact, I am -- I feel that Justice Stewart, in his dissenting opinion in Silver, which

was referred to by my colleague -- Justice Stewart quite properly points out that there must be a delicate balance, that the Court is anxious for this mandated self-regulatory agency, the balance between fulfilling the responsibility of self-regulation which is an onerous and daily duty unhindered by the harassment of antitrust claims at every step of the way, subject, however, to redress if it is derelict in its duties and the rule being that if it acts in a good faith or bona fide manner in fulfillment of its self-regulatory duties, it should have some -- it should have immunity from the antitrust laws. There is -- you should apply the rule of reason.

For instance, Justice Brandeis, in a case about 50 years ago, Board of Trade versus United States, found that an exchange that had imposed a restriction on buying or selling at above a certain price after the market closed, he found that that was a reasonable regulation of competition which actually promoted competition in the sense of maintaining an open acution market.

With respect to Silver, I again emphasize that in Silver, first the Court -- for the first time, had before it a self-regulating, marketing system. The Securities and Exchange Act which is quite parallel to the Commodities Exchange Act and, as I say, the Commodities Exchange Act was the forerunner of it and was copied. In Silver, the

Court recognized that if there was a case for agency review, that this would dispense with the necessity of antitrust courts involvement subject always to the fact that if there was some area that went beyond merely the concerted action of the Exchange within the bona fide and good faith operation of its self-regulatory duties, if there was some charge or some action beyond that, sure, it is subject to the antitrust laws and if there was a remedy -- the damages issue that your Honors have raised -- if there was a remedy that the agency could not grant after the agency had determined that there were violations here, that there were violations of the rules or violations of antitrust principles that were not covered by a good faith compliance with self-regulatory duties, then the case should go back to the court -- to the antitrust court -- for the administration of that remedy.

And the Seventh Circuit, I think, very closely followed the Silver dictates by providing for a stay of the District Court's proceedings until the agency had completed its determination and the agency here is in daily contact with the Exchange. We have two or three investigators on our floor every day, all the time. We are constantly subject to reporting and investigating process. And the Exchange has a whole staff, which we call the "Department of Investigation and Audits" which is constantly involved in the marketing process.

It is a delicate process. It is a subtle process. It is not necessary to secure a price quote that does truly reflect the competing opinions on economic supply and demand factors rather than some arbitrary factor. And arbitrary factors have a way of entering into the marketplace from time to time and all of this function is performed through our members and therefore, the Ricci problem, standing alone, is not that important. It is a membership dispute. But looking at it in the context of the issue that is now presented to this Court, it means the difference between encouraging the Exchange to proceed forcibly in these self-regulatory duties under the control of the agency and subject to judicial review. The agency is always subject to judicial review -- or to be subject to a great many harassments.

Let me just point to the dilemma that faces the Chicago Mercantile Exchange right now. In the last several years, two or three years, we have been subjected to possibly seven or eight or ten suits, some for violation of our rules, some for antitrust violations. Two of them pending in the Seventh Circuit I think highlight what I would like to emphasize.

In one case, the Exchange's investigative staff watched the trading in a particular commodity and at the end of the contract month instituted proceedings --

disciplinary proceedings -- made charges of manipulation of the market and violation of its rules against a series of members. There were six weeks of hearings before the full 12-man board of governors that we have and everyone attended for six weeks. When we got through, we imposed the severest penalties in the history of regulation of the Exchanges.

Yet, we are subject to a law suit in the District Court for having violated our rules on the antitrust laws.

Take the other side of the coin, another case pending in the Seventh Circuit. In this particular instance, another commodity and another time, in the midst of trading, we found a very large concentration of position growing up which would have distorted price quotations which have prevented this market (from) operating properly.

So the board entered an order requiring liquidation of position, a divestiture of interest, in the antitrust terms, liquidation of position. It was a proper move, we thought. It did result in the market orderly liquidation. No violent price fluctuations occurred. But we are subject to an antitrust suit there, both cases pending in the Seventh Circuit and we refer to them in our brief.

Now, the Commodities Exchange Authority and the Secretary of Agriculture and the Commission are on our backs all the time with respect to all of these operations. They are constantly urging us to deal promptly, vigorously, with

any instance of market disturbance but when we do, we are damned and when we don't we are damned and this is the dilemma that faces us if we are subject to constantly harassing antitrust cases.

Now, this Court has an opportunity of providing us with a principle that will permit us vigorous self-regulatory powers and duties and functions and yet subject us to whatever penalties are necessary because of any Exchange dereliction. We don't profess to be perfect and the system is not perfect, but it has worked and it has worked well and these -- now, injections of antitrust attack and in this instance with a complaint that is demonstrably false on the basis of depositions that were taken by both sides, not one side; depositions that were taken by both sides and presented to the District Court by both sides in their briefs which demonstrate that there was notice to this individual, that there was an attempt to arbitrate and there was no denial.

Q It has been my understanding that the District Court disregarded those depositions and that, therefore, the Court of Appeals also did and took the allegation of the complaint as though true.

MR. FREEMAN: Your Honor, I am forced to say that this particular District Court, you would have great difficulty understanding what the judge was doing, but I cited to a

transcript which indicates that he did take it into effect. The important point is that the briefs that were filed on the motion to dismiss -- and they were motions to dismiss, not summary judgments -- the briefs that were filed did, both briefs, made mention of the depositions and he did dispose of it and he asked us to file findings of fact, which we did, which would have been under a motion for summary judgment, then decided that he would just make an oral judgment on it.

Q So I am not mistaken, then, in my understanding that the Court of Appeals, at least, understood that he did not take into consideration the depositions?

MR. FREEMAN: The Court of Appeals read the same transcript and said that they didn't believe -- they found that he did not take into account anything beyond a motion to dismiss.

Q And it was a motion to dismiss, so therefore --

MR. FREEMAN: And it was a motion to dismiss and we haven't attacked the Court of Appeals' decision.

Q -- and therefore, even though you may be quite right that this is a frivolous and wrong-headed lawsuit with no merit to it, nonetheless, in the posture of the case here, we have to take the allegations of the complaint as though true, don't we?

MR. FREEMAN: And if you take the allegations of the complaint as true, you will find that there is an

indication that notice of the exchange action did occur but there is also the weasel expression that they didn't get notice of the transfer to John Reich. Well, John Reich is somebody nobody knows and maybe they didn't get notice of the transfer to him but they were notified that the transfer issue was before the board and that is why they came up with an attempt to revoke that authorization.

Q Well, let me put it this way. Do you deny that the allegations of the complaint, just reading them, state a colorable cause of action under the antitrust laws?

MR. FREEMAN: Yes, I do deny it because I feel that the allegations of the complaint are merely conclusory allegations in an attempt to get to a federal court instead of a state court where there may have been a commercial dispute between these two parties which could have been answered in a state court but, instead, they added a few words of willful conspiracy and so on and my colleague here, in presenting his case quite properly pointed out, all it was is a dispute between his client and the other client and we decided it, and every decision that the Exchange makes, there has got to be a losing party who can contend that we were conspiring with the other side in violation of the antitrust laws.

Q Well, as I understand it, you think the Court of Appeals was wrong in holding that the complaint did

allege a cause of action under the antitrust laws and that ---

MR. FREEMAN: I think ---

Q --- and that the District Court was -- the Court of Appeals should simply have affirmed the dismissal by the District Court.

MR. FREEMAN: I think the Court of Appeals was wrong, first, in finding that the complaint stated the proper course of action and, secondly, in not finding that the matter was handled by the District Court as a motion for summary judgment.

Q Yes, but Mr. Freeman, let us assume that we disagree with you on that. Do you think you have lost your case?

MR. FREEMAN: No. No. I -- I --

Q I would suppose that if you take the complaint as true it also states that the rules of the Exchange were violated.

MR. FREEMAN: The -- the --

Q Because if the rules of the Exchange were violated, there is an agency to present a complaint to, isn't there?

MR. FREEMAN: Yes, your Honor.

Q Which is different than Silver. There was no place you could go in Silver.

MR. FREEMAN: No place in Silver, a place here and

I -- I would -- I mean, I think that the issue of primary jurisdiction should be decided by this Court rather than to throw this matter out as a frivolous complaint. I think the issue is presented and we must assume that the Court of Appeals -- because that issue has not been disputed here -- that the Court of Appeals has decided that the complaint does state an antitrust violation and you must come to grips with the problem of whether or not the agency should review to determine that the Exchange was acting in good --

Q Well, the Court of Appeals said it stated a good cause of action and it also said it stated a violation of the Exchange rules that --

MR. FREEMAN: That's right.

Q -- and that the agency should deal with it first.

MR. FREEMAN: And the agency should deal with that issue first, yes, your Honor, and I think in that way judicial time is saved, the agency can -- there isn't a proper accommodation between the two systems. The integrity of the regulatory system, which is the Commodities Exchange Authority and the Commission and the Secretary, is preserved and you follow the dictates of the various decisions that have recently been rendered.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Freeman.

Mr. Torshen, do you have anything further?

MR. TORSHEN: I don't think that a reply is necessary, your Honor.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 10:43 o'clock, a.m., the case was submitted.)

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