

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 BELL ATLANTIC :

4 CORPORATION, ET AL., :

5 Petitioners :

6 v. : No. 05-1126

7 WILLIAM TWOMBLY, ET AL. :

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9 Washington, D.C.

10 Monday, November 27, 2006

11

12 The above-entitled matter came on for  
13 oral argument before the Supreme Court of the United  
14 States at 10:03 a.m.

15 APPEARANCES:

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17 the Petitioners.

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22 of the Respondents.

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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first today in Bell Atlantic Corporation vs. Twombly. Mr. Kellogg.

ORAL ARGUMENT OF MICHAEL KELLOGG  
ON BEHALF OF PETITIONERS

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

I think the most important point that I can make today is that this is a case about the substantive requirements of antitrust law, and just as in Dura and in Blue Chip Stamps, the Court articulated the substantive requirements for pleading a claim under the securities law, and just as in Anza, it did so under RICO, so too in Associated General Contractors, in Trinko. And in the instant case, the Court is faced with the question of what a plaintiff needs to plead in order to state a claim and show an entitlement to relief under the antitrust laws.

In that regard, I'd like to direct the Court's attention to paragraph 51 of the plaintiff's complaint in this case, which is at page 27 of the joint appendix, and which summarizes the grounds for

1 plaintiffs' allegation that there is a contract  
2 combination or conspiracy in restraint of trade. The  
3 complaint states, and I quote, "in the absence of any  
4 meaningful competition among the defendants," and,  
5 quote, in light of the parallel course of conduct  
6 that each engaged in to prevent competition, the  
7 plaintiffs -- the defendants conspired.

8 JUSTICE STEVENS: Well, but isn't the next  
9 sentence, the substance of the sentence is  
10 "plaintiffs allege upon information and belief that  
11 defendants have entered into a contract combination  
12 or conspiracy to prevent competitive entry in their  
13 respective telephone and/or high speed interstate  
14 markets, and agreed not to compete with one another  
15 and otherwise allocated customers and markets to one  
16 another." Now, does that state a violation of the  
17 Sherman Act?

18 MR. KELLOGG: It does not, Your Honor.

19 JUSTICE STEVENS: It does not?

20 MR. KELLOGG: It does not state a claim.

21 JUSTICE STEVENS: I mean, you could leave  
22 out everything before plaintiff, the part you quoted,  
23 that's not part of the declaration in the sentence.  
24 But the sentence itself alleges a garden variety of  
25 the violation of the Sherman Act, doesn't it?

1           MR. KELLOGG: The sentence recites the  
2 language of the Sherman Act, that is correct. But  
3 what this Court's cases indicate and what Rule 8  
4 requires --

5           JUSTICE STEVENS: It's got the language of  
6 the Sherman Act, a conspiracy to prevent competitive  
7 entry in their respective telephone and/or high speed  
8 markets. That's not in the Sherman Act, that's a  
9 description of the alleged conspiracy in this case.

10          MR. KELLOGG: It is true that they have  
11 described the alleged conspiracy, but what Dura,  
12 Associated General Contractors, and other cases of  
13 this Court require is a statement of facts that  
14 warrants the legal conclusion that the plaintiffs  
15 wish to --

16          JUSTICE GINSBURG: Mr. Kellogg, the  
17 Federal Rules of Civil Procedure assiduously avoid  
18 using the word fact throughout. And from 1938 on, it  
19 has been repeated that it is not necessary to plead  
20 facts. The index of forms, the appendix of forms  
21 shows how simple the plain statement of a claim is,  
22 and you're not required to plead facts. And yet  
23 that's the central -- seems to be the central thrust  
24 of your argument.

25          MR. KELLOGG: Your Honor, every case of

1 this Court dealing with pleading standards has  
2 indicated that it is not sufficient merely to recite  
3 a legal conclusion, and claim an entitlement to  
4 relief therefore. In *Dura*, for example, the  
5 plaintiffs claimed proximate cause and loss  
6 causation, and the Court said --

7 JUSTICE STEVENS: But Mr. Kellogg, that's  
8 not a legal conclusion, it's an allegation of fact  
9 that there was an agreement to prevent competitive  
10 entry into respective markets. There are dozens of  
11 antitrust complaints that are no more specific than  
12 that.

13 MR. KELLOGG: Your Honor, in the context  
14 in which this claim is made, the allegation of  
15 agreement or conspiracy is not a statement of fact.  
16 It is an inference that the plaintiffs seek to draw  
17 from the facts that they allege in the complaint.  
18 Context here is everything. In form 9, for example,  
19 Justice Ginsburg, or in the case of *Sherkovitz*, you  
20 had a specific context. You had a time, a place,  
21 individual participants named, a clear injury in form  
22 9, a broken leg as a report --

23 JUSTICE GINSBURG: But negligently drove.  
24 It doesn't say whether it went through a stop light.  
25 Doesn't say whether it was speeding. It doesn't say

1 any one of the umpteen ways one could be negligent.

2 MR. KELLOGG: That is correct, Justice  
3 O'Connor, but you have a direct context -- Justice  
4 Ginsburg, you had a direct context in which an  
5 eyewitness participant in the event is claiming  
6 negligence on behalf of the driver of the car. In  
7 the instant case, we have no injury that's separate  
8 from the alleged conspiracy, and we have no time,  
9 place or participants for the alleged conspirators.

10 JUSTICE BREYER: But you do have a case --  
11 anywhere, forget antitrust. Suppose it's a tort  
12 case, and the following complaint is filed. My foot  
13 hurts. I've gone to Dr. Smith for 15 years. I claim  
14 he is negligent. Is that valid?

15 MR. KELLOGG: I do not think so, because I  
16 don't think --

17 JUSTICE BREYER: All right. Now, if you  
18 think that's valid, I understand that you think this  
19 complaint does just what I said in the field of  
20 antitrust. But is there any case that you've come  
21 across which would say a complaint just as I have  
22 described it --

23 MR. KELLOGG: Yes.

24 JUSTICE BREYER: Either is valid or is not  
25 valid. You'd like to find one that says it's not

1 valid, so what's your best effort in any field of  
2 law.

3 MR. KELLOGG: I would cite, for example,  
4 the Court's decision in the Papasan case, where the  
5 plaintiffs claimed that they were not getting a  
6 minimally adequate education. That sounds like a  
7 factual statement. But what the Court expressly said  
8 in that case is that we do not have to accept legal  
9 conclusions in the guise of factual allegations.

10 JUSTICE KENNEDY: But of course, there the  
11 legal standard was not clear. And the Dura case, I  
12 looked at, and perhaps you disagree based on what you  
13 -- what I have just heard, and I thought Dura was a  
14 lack of proximate cause. They just didn't show any  
15 relation between the injury they alleged to have  
16 suffered, and their own.

17 MR. KELLOGG: Well, I think Dura is --

18 JUSTICE KENNEDY: And that's the way I  
19 read Dura.

20 MR. KELLOGG: I think Dura is an exact  
21 analogy. In Dura, they allege proximate cause, they  
22 allege loss causation. And the Court said, well,  
23 let's look at their statement of facts, which only  
24 showed that they had bought at an inflated price.  
25 And the Court said there was a fatal gap between that



1 factual allegation and the legal conclusion that they  
2 wished to draw.

3 JUSTICE BREYER: You can get into trouble  
4 by alleging too much, I guess, because if you allege  
5 a lot, you might leave something out. And you say,  
6 well, what about that one. But suppose we keep it  
7 very, very minimal. And a person just says, I'm hurt  
8 and the defendant, I claim, negligently injured me.  
9 Period. Period.

10 MR. KELLOGG: That would not provide --

11 JUSTICE BREYER: Well, why not?

12 MR. KELLOGG: The grounds upon which the  
13 claim is based.

14 JUSTICE BREYER: So the only thing that's  
15 missing there are some facts.

16 MR. KELLOGG: Some facts indicative that  
17 the defendant is responsible for the --

18 JUSTICE BREYER: All right. So now you're  
19 saying a complaint has to have facts?

20 MR. KELLOGG: Absolutely.

21 JUSTICE SOUTER: Well, I thought you were  
22 also making a different argument. I thought you were  
23 making the argument that they have, by their  
24 pleadings, in effect, affirmatively indicated that  
25 they don't have enough facts to support a general

1 allegation. I thought you were saying that because  
2 of the preface that you began reading, that in view  
3 simply of the fact that they are not competing, and  
4 in view of parallel conduct, they have violated the  
5 Act.

6           So I guess my question is, would your  
7 position be different if there were no allegation  
8 simply of an absence of competition and parallel  
9 action if -- would your position be different if they  
10 had simply alleged, as Justice Stevens emphasized,  
11 that here were these parties and they had -- they had  
12 taken some action, not specified, which resulted in  
13 violation of the Act?

14           MR. KELLOGG: Our position would not be  
15 different. It's the uniform view of the cases that I  
16 cited, the Courts of Appeals and a requirement of  
17 Rule -- Rule 8 that you do more than simply parrot  
18 the words of the cause of action or announce legal  
19 conclusions. But as you point out, in this case --

20           JUSTICE SOUTER: So that would not be good  
21 enough, but are you saying that this is worse  
22 because, in effect, they have gone some steps towards  
23 specification. And the specifications that they have  
24 made affirmatively show that they don't have enough  
25 for the agreement.

1           MR. KELLOGG: It is certainly true that  
2 all they have alleged is conduct from which they seek  
3 to draw an inference of conspiracy. And they have  
4 made that quite clear, that they have made no direct  
5 allegation.

6           JUSTICE SOUTER: And you're saying that  
7 inference cannot be drawn from the particular facts  
8 that they have alleged.

9           MR. KELLOGG: That is correct. Our  
10 position is that as a matter of substantive antitrust  
11 law, what this Court said in Matsushita is that  
12 antitrust law limits the range of permissible  
13 inferences that can be drawn from parallel conduct.  
14 And if all you have is parallel conduct that's  
15 consistent, on the one hand, with conspiracy, or on  
16 the other hand, with ordinary business judgment, you  
17 cannot draw an inference of the sort that the  
18 plaintiffs depend upon in this case.

19           JUSTICE STEVENS: Of course, that may be  
20 true on summary judgment, you may be dead right on  
21 the merits, but are you telling me that an allegation  
22 that the defendants have agreed not to compete with  
23 one another is not a statement of fact?

24           MR. KELLOGG: I am. I would say that  
25 that's a -- that's a conclusion --

1 JUSTICE STEVENS: Well, what if they said  
2 they agreed in writing not to compete with one  
3 another, would that be sufficient? Or if they have  
4 agreed orally not to compete with one another, would  
5 that be sufficient?

6 MR. KELLOGG: If there were a specific  
7 context and they said --

8 JUSTICE STEVENS: If they said they have  
9 agreed orally not to compete with one another, would  
10 that be a statement of fact, an allegation of fact?

11 MR. KELLOGG: Yes. Because you require --

12 JUSTICE STEVENS: Then why did you leave  
13 the words orally out? Why is it not a statement,  
14 allegation of fact?

15 MR. KELLOGG: Because the plaintiffs here  
16 were very careful, in light of Rule 11, not to make  
17 any direct allegations of conspiracy, not to suggest  
18 that there was a time and place --

19 JUSTICE STEVENS: But that's a direct  
20 allegation of conspiracy, that very statement.

21 MR. KELLOGG: But they make it clear in  
22 that paragraph that it's an inference.

23 JUSTICE STEVENS: They make it fairly  
24 clear that they may only have the evidence of  
25 parallel conduct that you describe, and that may not

1 be sufficient, and maybe for that reason, you get a  
2 summary judgment. But how you can say this is not an  
3 allegation of fact, I find mind-boggling.

4 MR. KELLOGG: I'm saying that it's not  
5 sufficient to state a claim. Just as the allegation  
6 that there was lost causation in *Dura*, or that there  
7 was harm to the union in *Associated General*  
8 *Contractors* or there, that there was harm --

9 JUSTICE BREYER: Now you're, that's the  
10 part precisely which you're following that I don't,  
11 that I actually don't know, is the extent to which  
12 you have to put in a complaint, in whatever field of  
13 law, you can allege a fact. You say the person ran  
14 over me --

15 MR. KELLOGG: Yes.

16 JUSTICE BREYER: Or you say, they treated  
17 me negligently. That's a fact. That means something  
18 happened there. But suppose you write the complaint  
19 and there is just no notion that you have a what and  
20 when, how, under what circumstances. It's just  
21 totally out of thin air, and the defendant doesn't  
22 know what, what period of time he is supposed to be  
23 thinking about, what, what happens to such a  
24 complaint? There must be some law on it in torts or  
25 someplace?

1           MR. KELLOGG: Well, ordinarily in a  
2 complaint like that, you could file a 12(e) motion  
3 and ask for more specificity. Our problem --

4           JUSTICE BREYER: Well, why couldn't you do  
5 the same?

6           MR. KELLOGG: Our problem with the current  
7 complaint is not a lack of specificity, it's quite  
8 specific. It provides color maps and such. The  
9 problem is that the facts specifically alleged simply  
10 don't amount to an antitrust violation because they  
11 don't support the inference that the plaintiffs ask  
12 the Court to draw.

13           JUSTICE BREYER: Oh, but they're --  
14 they're using the fact that there was parallel  
15 behavior as a basis for thinking there was more than  
16 parallel behavior. They are using it as a basis for  
17 thinking that once, on some occasion that's relevant,  
18 there were people meeting in a room and saying things  
19 to each other. So they are not just saying that it's  
20 sufficient. They are saying it's evidence that  
21 something else occurred.

22           MR. KELLOGG: That's correct. That's  
23 exactly what they are saying and what Matsushita and  
24 the other courses, cases of this Court dealing with  
25 parallel conduct indicate, is that that's not a fair

1 inference from parallel conduct.

2 JUSTICE GINSBURG: Wasn't that a summary  
3 judgment case and hadn't there been discovery before?  
4 The Matsushita decision?

5 MR. KELLOGG: That is correct. But the  
6 Court announced that as a principle of substantive  
7 law. They said substantive antitrust law limits the  
8 range of permissible inferences. We are not  
9 suggesting that the plaintiffs need the sort of  
10 specificity or certainly any evidence at the  
11 pleadings stage. For example --

12 JUSTICE SCALIA: They just have to say  
13 orally, I wish you would reconsider that? Because if  
14 that's, if that's all you're arguing, I don't see  
15 anything to be gained by -- by such a holding. It  
16 doesn't tell you -- you know, this is a suit against  
17 a number of large corporations, nationwide  
18 businesses, thousands of employees. And on this  
19 complaint you have no idea who agreed with whom,  
20 where, when, any of that.

21 I can understand that you're saying that  
22 does not give us enough notice to prepare a defense.  
23 But if you say oh, but it would be perfectly all  
24 right so long as they said orally. I mean -- forget  
25 about it.

1           MR. KELLOGG: I -- I should not agree to  
2 that. That's simply adding the word orally. It's  
3 certainly fair when you are talking about a  
4 nationwide class over a period of 10 years attacking  
5 an entire industry to suggest that the plaintiffs  
6 have to give some indication of what it is that the  
7 defendants have done that is wrong. Some concrete  
8 basis for the Court to believe there is a reason to  
9 go forward to the --

10           JUSTICE KENNEDY: So in the negligently  
11 drove case, the plaintiff negligently drove over --  
12 the defendant negligently drove over the plaintiff,  
13 if it's not specific as to time and place it must be  
14 dismissed? If it's specific as to time and place  
15 it's, it withstands the motion?

16           MR. KELLOGG: Well certainly, Form 9 is  
17 very specific. It gives a specific corner, it gives  
18 a time, it gives the names of the participants.

19           JUSTICE KENNEDY: What if it does say  
20 within the last 10 years.

21           MR. KELLOGG: I don't think that's  
22 sufficient, Your Honor. But with a -- with a --

23           JUSTICE KENNEDY: Do you have a case, do  
24 you have a case I can look to that tells me that?

25           MR. KELLOGG: With a negligence case a



1 12(e) motion could then specify the actual time and  
2 place, but the plaintiffs here have had ample  
3 opportunity to amend their complaint to supplement.  
4 If they had any specifics indicating that there was  
5 such an agreement as opposed to lawyer speculation  
6 and a desire to engage in expensive discovery they  
7 would have produced that.

8 JUSTICE SCALIA: Did you seek a more  
9 specific statement?

10 MR. KELLOGG: We did not, Your Honor.

11 JUSTICE SCALIA: Why not? Why didn't you  
12 ask when and where was this agreement.

13 MR. KELLOGG: Well again the whole way  
14 this was litigated below by the plaintiffs was that  
15 they, they acknowledged they had no specifics. They  
16 simply asked that an inference be drawn from the  
17 parallel conduct they alleged. And that is our  
18 central point that you simply cannot infer an  
19 agreement from this conduct. If the Court has no  
20 questions, I reserve my time.

21 CHIEF JUSTICE ROBERTS: Thank you,  
22 Mr. Kellogg. Mr. Barnett.

23 ORAL ARGUMENT OF THOMAS G. BARNETT,  
24 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,  
25 IN SUPPORT OF PETITIONERS

1 MR. BARNETT: Mr. Chief Justice, and may  
2 it please the Court.

3 The fundamental concern of the United  
4 States is that the decision of the Second Circuit can  
5 be read to hold that a Section 1 Sherman Act  
6 complaint will survive a motion to dismiss merely by  
7 alleging parallel action or inaction in attaching the  
8 bare assertion of an agreement. Such a result fails  
9 to appreciate that parallel action or inaction is  
10 ubiquitous in our economy and often reflects  
11 beneficial competitive forces.

12 JUSTICE SCALIA: What do you mean can be  
13 held, can be thought to hold that? Is there any  
14 interpretation of what they did.

15 MR. BARNETT: Well there are certain  
16 portions of the decision that talk about a  
17 plausibility requirement but when it turns to the  
18 specific area of a Section 1 complaint and a  
19 complaint alleged on parallel conduct, I agree with  
20 you, Justice Scalia, that that's the only  
21 interpretation I can draw from that passage. The  
22 Court held that if you allege parallel action unless  
23 there are no set of facts that can be proved, and  
24 it's always possible to hypothesize an agreement, you  
25 cannot dismiss that complaint.

1 JUSTICE SOUTER: Well, is that really what  
2 they -- I thought, and correct me if I'm wrong, but I  
3 thought that the, that the Court spoke of no set of  
4 facts, only on the assumption that there had been a  
5 pleading which did raise a plausible, possible  
6 inference of forbidden conduct, and I thought the  
7 Court was saying if the, if the plausibility  
8 criterion has been satisfied, then the only way that  
9 the defendant can get a dismissal is by showing that  
10 there is no set of facts which would actually support  
11 the action. And I'm not sure that that can be done  
12 at the, at the, at the stage of simply pleading a  
13 dismissal as opposed to summary judgment or something  
14 like that. But I thought the Court did not get to  
15 its no set of facts point until it had first assumed  
16 that there had been a, a pleading on the basis of  
17 which a plausible inference of forbidden conduct  
18 could be drawn. Am I about that?

19 MR. BARNETT: Well, Justice Souter, I read  
20 that passage of the Second Circuit decision as not  
21 expressly referencing the plausibility requirement.  
22 There is language saying that the allegation needs to  
23 be plausible but when you get to this specific  
24 passage it says that if you allege parallel conduct a  
25 court cannot dismiss the claim unless there could be

1 no set of facts that could be proved. But  
2 regardless, even if I am, your interpretation is  
3 potentially permissible interpretation, the  
4 fundamental concern of the United States is that this  
5 Court, having the case now, clarify that a Section 1  
6 Sherman Act complaint should not be able to survive a  
7 motion to dismiss unless it alleges some facts beyond  
8 mere generic parallel action.

9 JUSTICE SOUTER: So, so that if  
10 plausibility is the standard this does not meet the  
11 standard of plausibility, that's your argument?

12 MR. BARNETT: Well, we prefer the  
13 formulation that, from the Court's opinion in Dura  
14 that says that the facts need to demonstrate some  
15 reasonably founded expectation that there is an  
16 unlawful agreement within the meaning of Section 1 of  
17 the Sherman Act.

18 JUSTICE SCALIA: And some parallel action  
19 would indicate that wouldn't it? I mean, if for  
20 example they, you have nine companies that change  
21 their price at the same hour of the same day, 10  
22 months in a row.

23 MR. BARNETT: Absolutely, Justice Scalia.  
24 I agree.

25 JUSTICE SCALIA: So you're, you're not

1 saying that parallel action can never create this,  
2 this kind of --

3 MR. BARNETT: That is correct. If all you  
4 know is that there is parallel action or inaction,  
5 that in and of itself tells you nothing. Once you  
6 start to add the facts and circumstances surrounding  
7 it, particular parallel action can be suspicious  
8 enough, and the example you give is a good one, that  
9 demonstrates a reasonably founded expectation for  
10 believing that discovery may yield evidence showing  
11 that that parallel price increase at the same time by  
12 nine different companies was the result of an  
13 unlawful conspiracy.

14 If I can turn to, in -- in deciding  
15 whether or not there is such a reasonably founded  
16 expectation, you do need to look to the substantive  
17 law. Here the issue is the law on agreement under  
18 Section 1 of the Sherman Act. Some of the questions  
19 I think I've heard go to this issue. Section 1 law  
20 specifically limits the kinds of facts that can be  
21 used to establish an agreement that is cognizable  
22 under the Sherman Act. In particular, the Court's  
23 rulings made clear that conscious parallelism which  
24 some economists might argue is a form of an  
25 agreement, is not an agreement within the meaning of

1 Section 1.

2 JUSTICE STEVENS: It's clear it's not  
3 sufficient to prove it, but is it admissible  
4 evidence?

5 MR. BARNETT: It may be admissible  
6 evidence but depending on the facts and circumstances  
7 --

8 JUSTICE STEVENS: Should a plaintiffs's  
9 complaint fail because it includes unnecessary,  
10 verbose, admissible evidence?

11 MR. BARNETT: No. It should fail if it  
12 fail -- if it does not allege facts that indicate  
13 reasonable found --

14 JUSTICE STEVENS: Is not it an allegation  
15 that they've agreed not to compete with one another  
16 an allegation of fact?

17 MR. BARNETT: It is a combined question of  
18 law and fact in our view, because as I said the  
19 Section 1 law limits the kinds of facts that can be  
20 used to establish an agreement. If all they have  
21 alleged is parallel action without more --

22 JUSTICE STEVENS: But they have alleged  
23 more. They have alleged an actual agreement.

24 MR. BARNETT: But as paragraph 51 of the  
25 complaint is, as you were discussing, in some ways

1 even worse. Because it specifically relies upon  
2 parallel action and alleged parallel inaction.

3 JUSTICE SCALIA: But what if it didn't? I  
4 mean, I mean face the question that Justice Stevens  
5 puts. Suppose you have a complaint that says nothing  
6 else except that these defendants entered into an  
7 agreement in -- in restraint of trade.

8 MR. BARNETT: And that is not sufficient  
9 because in our view the complaint needs to allege  
10 some facts that demonstrate a basis for believing  
11 there was an unlawful agreement within --

12 JUSTICE STEVENS: What if the complaint in  
13 addition to that alleged that up to a certain date,  
14 it was unlawful for the companies to compete with one  
15 another but the law was changed and after that change  
16 took place they were advised by their lawyers they  
17 could compete, but they agreed not to. Would that be  
18 sufficient?

19 MR. BARNETT: No. Every business, every  
20 day fails to enter some new line of business or take  
21 some potential competitive action. The mere --

22 CHIEF JUSTICE ROBERTS: But Justice  
23 Stevens's question was that the allegation was that  
24 after that date they agreed not to compete. That  
25 states -- that states a cause of action under the

1 Sherman Act, doesn't it?

2 MR. BARNETT: No. I would, with respect,  
3 Mr. Chief Justice, I would disagree with that. There  
4 still needs in our view to be some allegation that  
5 indicates -- a factual allegation that indicates a  
6 reason for believing there may have been unlawful  
7 agreement.

8 JUSTICE BREYER: Can they say on the 14th  
9 of January, 2004, we believe that in the city of New  
10 York, they agreed upon this course of action? That  
11 would surely be sufficient?

12 MR. BARNETT: That may be sufficient  
13 because it is providing enough facts to give you a  
14 reason to believe that the plaintiff has a basis for  
15 --

16 JUSTICE BREYER: Well, it's saying, all  
17 I've done is limited it in time and space. Just as  
18 you might say on October the 24th, 2004 at the corner  
19 of 14th and Third Avenue, defendant drove negligently  
20 and injured me. That's certainly a complaint, isn't  
21 it?

22 MR. BARNETT: Well, and it -- you -- you  
23 --

24 JUSTICE BREYER: Isn't it?

25 MR. BARNETT: It needs to allege enough



1 specifics --

2 JUSTICE BREYER: Well, look, the one I  
3 just alleged in the tort law is a complaint. I've  
4 just copied it out of the model complaints.

5 MR. BARNETT: I want to be clear --

6 JUSTICE BREYER: Am I right or not?

7 MR. BARNETT: The facts allege need to be  
8 specific enough to suggest --

9 JUSTICE BREYER: Well, I understand the  
10 standard.

11 MR. BARNETT: Yes.

12 JUSTICE BREYER: I want to know how to  
13 apply the standard and now I take my tort case --

14 MR. BARNETT: Yes.

15 JUSTICE BREYER: -- which is okay, and now  
16 I say sometime during the last 10 years he drove  
17 negligently and injured me. Is that no good?

18 MR. BARNETT: In my view that's probably  
19 insufficient --

20 JUSTICE BREYER: And so you're saying that  
21 this case is like that, when because they don't say  
22 when they met, they don't say what happened, they  
23 don't give a time or place.

24 If that's, leaving your side parallelism  
25 out of it, I'm past you on that, all right? I'll

1 accept for argument's sake all your point about that.  
2 Now if you're saying this is too vague, leaving that  
3 out of it, because it doesn't say time and place of  
4 the meetings or give any other clue for meetings  
5 etcetera, what's your best authority ?

6 This is an area of law I'm not familiar  
7 with. I'm looking for cases that will tell me how  
8 specific a complaint has to be to tie the events down  
9 to specific ones.

10 MR. BARNETT: I believe that this Court's  
11 decision in Dura Pharmaceutical --

12 JUSTICE BREYER: Dura is still the best.  
13 I think I, did I write that case?

14 (Laughter.)

15 MR. BARNETT: You did --

16 JUSTICE BREYER: I'm not drawing total  
17 comfort from it.

18 (Laughter.)

19 JUSTICE BREYER: In fact I'd like  
20 something in tort law or something that, you know,  
21 that I get a general idea of what the law is because  
22 I don't know that antitrust is --

23 JUSTICE SCALIA: Mr. Barnett, I thought --

24 MR. BARNETT: I thought our brief lists  
25 cases that go to that point.

1 JUSTICE SCALIA: Mr. Barnett I thought you  
2 had, you had said that you don't need to indicate the  
3 particular day of the agreement. That it would be  
4 enough if it was the kind of parallel action that  
5 suggested an agreement that over nine years they all  
6 raised the price at the same time. Now that doesn't  
7 really give the defendant notice of, you know, what  
8 individuals were responsible for this, when it  
9 occurred. But you say that would still be adequate?

10 MR. BARNETT: Well, it does provide notice  
11 that -- this is a fairly low threshold. It provides  
12 some indication. It can be an indication of direct  
13 evidence. It can be an indication of circumstantial  
14 evidence. It does focus the litigation, however, by  
15 providing a, a reason why the court and the defendant  
16 should be defending themselves against a section 1  
17 claim.

18 My time is up.

19 CHIEF JUSTICE ROBERTS: Thank you,  
20 Mr. Barnett.

21 Mr. Richards, we'll hear now from you.

22 ORAL ARGUMENT OF J. DOUGLAS RICHARDS

23 ON BEHALF OF RESPONDENTS

24 MR. RICHARDS: Mr. Chief Justice and may  
25 it please the Court:

1           There are four essential dimensions to the  
2 problem that's before the Court and on every one of  
3 those dimensions the guidance that the Solicitor  
4 General gave in its amicus brief in the Swierkiewicz  
5 case is 180 degrees opposite the guidance that the  
6 Solicitor General is providing in its amicus brief in  
7 this case. The first of those dimensions I'll begin  
8 with because it's where petitioners began. In their  
9 brief, the Solicitor General in the Swierkiewicz case  
10 very clearly said that evidentiary standards cannot  
11 be made into pleading standards. What they said on  
12 page 5 was that by requiring pleading of the  
13 McDonnell Douglas prima facie case from employment  
14 law the Second Circuit had erroneously conflated the  
15 fair notice owed the defendant at the outset of the  
16 litigation with the standards governing the  
17 plaintiff's present of proof in court. Later at page  
18 11, they said the court's test confuses pleading ---

19           JUSTICE KENNEDY: Now you're reading from  
20 the Swierkiewicz brief?

21           MR. RICHARDS: From the Swierkiewicz  
22 Solicitor General brief.

23           They said that the court test in the  
24 Second Circuit that was reversed --

25           JUSTICE SCALIA: Well, i mean, you know,

1 that's shame on them. But we're trying to get this  
2 case right and, you know, I don't care what position  
3 they took before. I care about what the right answer  
4 is, and I find it difficult to believe that you can  
5 simply allege in a complaint, I was injured by the  
6 negligence of the defendant in driving an automobile,  
7 period. Does that satisfy the, the Federal Rules?

8 MR. RICHARDS: There's a big difference  
9 between -- the answer is I don't know, perhaps.

10 JUSTICE SCALIA: Perhaps?

11 MR. RICHARDS: Perhaps. But that's very  
12 different from this case and it's different in that  
13 an automobile accident is something that happens all  
14 in one moment in time. An antitrust conspiracy like  
15 the conspiracy alleged --

16 JUSTICE SCALIA: The agreement happens at  
17 one moment in time.

18 MR. RICHARDS: Oh, it could happen in many  
19 moments.

20 JUSTICE SCALIA: Meetings of the minds,  
21 meeting of the minds. I used to each Contracts.  
22 Meeting of the minds at one moment in time, okay.

23 MR. RICHARDS: But what the Second Circuit  
24 said on this point, and I submit that the Second  
25 Circuit was correct, was that the complaint does set

1    forth the temporal and geographic parameters of the  
2    alleged illegal activity and the identities of the  
3    alleged key participants, and I think that's correct.

4                   CHIEF JUSTICE ROBERTS:  But where does it  
5    set forth agreement?

6                   MR. RICHARDS:  It alleges --

7                   CHIEF JUSTICE ROBERTS:  Temporal,  
8    geographic, the identities, but where does it set  
9    forth anything evincing an agreement other than the  
10   allegation of parallel conduct?

11                   MR. RICHARDS:  It alleges that there was  
12   an agreement, but it doesn't prove that there was an  
13   agreement because proving the facts alleged is not a  
14   plaintiff's burden in the complaint.

15                   CHIEF JUSTICE ROBERTS:  Do you have any,  
16   is there an allegation of an agreement apart from the  
17   parallel conduct?

18                   MR. RICHARDS:  Yes.

19                   CHIEF JUSTICE ROBERTS:  And what does that  
20   consist of?

21                   MR. RICHARDS:  The leading plus factor  
22   that's generally used in, in the Matsushita context,  
23   in the Monsanto context, is action that would have  
24   been against the self-interest of the conspirators in  
25   the absence of a conspiracy, and this complaint

1 alleges very clearly that the conduct of not entering  
2 into one another's territories and competing among  
3 the ILECs as a CLEC was contrary to what would have  
4 been --

5 CHIEF JUSTICE ROBERTS: So it states --  
6 would it state an antitrust violation if had you a  
7 grocery store on one corner of the block and a pet  
8 store on the other corner of the block and you say,  
9 well, the grocery store is not selling pet supplies  
10 and they could make money if they did, therefore  
11 that's an antitrust violation?

12 MR. RICHARDS: If that conspiracy were  
13 implausible, if it made no sense.

14 CHIEF JUSTICE ROBERTS: That's all the  
15 facts that are alleged.

16 MR. RICHARDS: Right, but the Second  
17 Circuit standard and the standard we defend is that  
18 if someone alleges a conspiracy I that just makes no  
19 sense because it's obvious from the face of the  
20 complaint that the alleged conspirators aren't in the  
21 same product market, not in the same geographic  
22 market or something of that kind, there is no  
23 conceivable motive for them to enter into the kind of  
24 conspiracy at hand, the complaint can be dismissed.

25 JUSTICE BREYER: If my case, the gasoline,

1 oil prices fell, but I happen to know there were four  
2 gasoline shops near each other, gasoline stations,  
3 and they didn't cut their prices. Complaint?

4 MR. RICHARDS: Yes.

5 JUSTICE BREYER: Well, then that's the  
6 economy, and you can go sue half the firms in this  
7 economy. Every firm in a concentrated industry  
8 engages in -- I mean, normally conscious parallelism,  
9 and I know there are economists who think that that  
10 should be the case, but I thought the law to date was  
11 that the Department of Justice is not given by the  
12 Sherman Act the authority to remake the entire  
13 American economy. But if we accept your view I guess  
14 it is.

15 MR. RICHARDS: Well, Justice Breyer, in  
16 the NHL case, the National Hockey League case, which  
17 is one of the cases that the petitioners relied upon  
18 for a circuit conflict to get here, what the court  
19 said is that allegations that defendant's action  
20 taken independently would be contrary to their  
21 economic self-interest will ordinarily tend to  
22 exclude the likelihood --

23 JUSTICE BREYER: Ordinarily, if you take  
24 that sentence and read it for how you're reading, a  
25 consciously parallel action is a violation of Sherman



1 Act section 2, then we have that radical change that  
2 many have advocated for the last 40 or 50 years, that  
3 half the economy is in violation, because in any  
4 concentrated industry, after all, it is in the  
5 interest of a firm to cut prices and to make a large  
6 market unless he knows his three competitors will  
7 also keep prices up. Now, you have to know that or  
8 you'd cut them. And that's called conscious  
9 parallelism. And I had always thought that this  
10 Court had not said that that in and of itself is a  
11 violation of the Sherman Act.

12 MR. RICHARDS: Well, Justice Breyer, we  
13 don't just allege conscious parallelism. We  
14 allege --

15 JUSTICE BREYER: I know that, but if in  
16 fact all you have to do in order to bring a  
17 price-fixing case and get into discovery is to allege  
18 conscious parallelism and then add without further  
19 foundation, and we think there was a real agreement  
20 too, but there's nothing other than the conscious  
21 parallelism to back it up, now we've got just what I  
22 said, with the exception you might not win at the end  
23 of the day. What have you is a ticket to conduct  
24 discovery. Now, that's what's bothering the  
25 Department of Justice and so I'd like to know the

1 answer to that problem.

2 MR. RICHARDS: Well, Justice Breyer, the  
3 difference between that, a critical difference  
4 between that scenario and what we have alleged in  
5 this complaint is that we do allege in great detail  
6 that not entering into one another's territories  
7 would have been contrary to the interests of --

8 JUSTICE SOUTER: But that does not help  
9 you with respect to the other claim, the claim that  
10 there was a conspiracy to prevent upstart competitors  
11 from coming in. There's no plus factor as I  
12 understand it alleged there, and I also understand  
13 that it would have been entirely in the interest of  
14 each of your defendants to keep the upstarts out and  
15 that there is no need for them to agree to do that.  
16 It would be the most natural thing in the world to do  
17 it. What do you say about that part of your case?

18 MR. RICHARDS: As to that aspect of the  
19 case, paragraph 50 does allege two plus factors, but  
20 they are essentially allegations of common motive,  
21 which is a less strong, I'll grant you --

22 JUSTICE SOUTER: Yes, but a common, isn't  
23 the common motive consistent, just as consistent with  
24 no agreement as with agreement? In other words, they  
25 didn't have to agree; their common motive was

1 operative agreement or not?

2 MR. RICHARDS: The important thing as to  
3 that aspect of the conspiracy is the Continental case  
4 in this Court, which said that you're not supposed to  
5 dismember -- it's an inappropriate way to approach a  
6 conspiracy to dismember it, look at one piece of it  
7 in isolation, evaluate it as though it's by itself  
8 and then wipe the slate clean at the end of that  
9 analysis, and that's essentially what the other side  
10 is trying to do repeatedly.

11 JUSTICE SOUTER: No, what the other side  
12 is saying is that simply by alleging parallelism when  
13 it would be in the interest of each of the alleged  
14 conspirators to do just as you claim they are doing  
15 in the absence of an agreement, you have not alleged  
16 something that gets to the threshold of plausibility.  
17 That's their argument and I, I --

18 JUSTICE SCALIA: I think, by the way, that  
19 that argument applies not just to the keeping out the  
20 upstart claim, but also to the not entering the other  
21 alleged conspirator s' fields of monopoly, if you  
22 want to put it that way, because if I, if I enter  
23 your field I know that you're going to enter mine.  
24 It just doesn't pay for me to do it. Yeah, I can  
25 make money, but I'll lose money. It seems to me

1 perfectly natural for companies that have a certain  
2 geographic area in which they are the, the principal,  
3 the selected instrument and although they technically  
4 can enter somebody else's geographic area, they know  
5 that if they do it they will be subjected to the same  
6 thing. That is nothing more than conscious  
7 parallelism.

8 JUSTICE SOUTER: You may reply to us  
9 jointly or severally, however you may want.

10 (Laughter.)

11 MR. RICHARDS: If I may, I'll try to pose  
12 a hypothetical that I think addresses Justice  
13 Souter's question and then, Justice Scalia, I'll try  
14 to address your question. Justice Souter, a good  
15 example would be suppose one alleges a conspiracy to  
16 rob a bank and to steal a number of getaway cars at  
17 the same time and one comes -- in order to get away,  
18 so that the conspirators couldn't be found at the  
19 site of robbing the bank. One could say, well,  
20 there's a reason to rob the getaway cars totally  
21 independent of the bank and without a conspiracy.  
22 Why do they need a conspiracy to steal a car? Why  
23 isn't that something that they wouldn't individually  
24 do?

25 JUSTICE SOUTER: But the difference

1 between that case and this is that the allegation  
2 with respect to the agreement to procure the getaway  
3 cars gets to a kind of specificity that is not  
4 present here. Here the allegation simply is parallel  
5 conduct to make it hard for the upstarts to get in.  
6 And at that general level the answer is, of course  
7 anyone in his right mind would want to make it  
8 difficult to let the upstarts in. There's no need to  
9 assume that they might have agreed on some matter of  
10 detail which is not essential to the scheme. This is  
11 a general characteristic of competition and  
12 resistance of competition.

13 MR. RICHARDS: I understand, but the point  
14 I'm trying to make with the hypothetical is that what  
15 one does if one is just looking at the conspiracy to  
16 keep CLECs out by itself first, taking the secondary  
17 aspect of the conspiracy, putting it first and  
18 analyzing it in isolation, is like taking the getaway  
19 car theft, analyzing it in isolation, saying, well,  
20 they have a reason individually to steal the cars, so  
21 I guess that couldn't --

22 JUSTICE STEVENS: Mr. Richards, can I ask  
23 you this question. Supposing that you were allowed  
24 to have discovery and each chief executive of the  
25 defendant companies got on the stand and said: I

1 never talked to my, my competitors at all, I never  
2 seriously considered competing in the other, other  
3 company's territory for the reasons set forth in the,  
4 in your opponent's brief on the merits here. We  
5 never did agree. And you're able to prove the things  
6 you've alleged in the agreement. Would the, would it  
7 be appropriate to enter summary judgment against you  
8 on that testimony if you had no evidence of a  
9 specific agreement?

10 MR. RICHARDS: In the context of summary  
11 judgment or at trial, we would be required to prove  
12 what we have now alleged.

13 JUSTICE STEVENS: But my question is you  
14 can prove what you've now alleged factually, but they  
15 deny the existence of any agreement and they  
16 explained the reasons for it exactly as the lawyers  
17 did in this brief. Would you not lose on summary  
18 judgment?

19 MR. RICHARDS: If we don't have proof at  
20 that point of what we've alleged here, we'd lose --

21 JUSTICE SCALIA: After several years --

22 JUSTICE STEVENS: Prove what you have  
23 alleged, in effect, except for the key allegation of  
24 agreement among the competitors. If you had no other  
25 evidence of that agreement, would you win.

1           MR. RICHARDS:  If we had proof that they  
2 actually acted against what would have been their  
3 self-interest in the absence of a conspiracy, we  
4 would satisfy then the Matsushita standard for  
5 summary judgment.

6           JUSTICE GINSBURG:  I don't understand  
7 acting in self interest.  I mean, they might just  
8 decide apart from, you know, if they go into their  
9 territory they'll come into mine, that investing in  
10 this wired business isn't the best, the best bet for  
11 them.  Maybe they want to get into the wireless  
12 business and think that's a better way to spend their  
13 money.

14           MR. BARNETT:  Surely it is possible to  
15 conceive of facts under which they would not have not  
16 conspired and they would have had a different motive,  
17 but that's not the legal standard under Conley versus  
18 Gibson.

19           JUSTICE GINSBURG:  But I'm questioning  
20 you.  You say you meet the plus factor because they  
21 were acting against their self- interest, that a  
22 self-interested player in this league would have gone  
23 into the other's territory, and I'm questioning that  
24 by saying that they might have seen this whole area  
25 as not the best place to invest their money.

1           MR. RICHARDS: I understand that. But we  
2 have alleged that as fact, Justice Ginsburg, and that  
3 fact and that allegation has to be treated as true  
4 under conventional pleading standards for purposes of  
5 a motion to dismiss. If we are unable to prove that  
6 fact when we get to summary judgment --

7           JUSTICE STEVENS: You mean the mere fact  
8 that you have alleged something is against their  
9 self-interest is enough to make an issue of fact on  
10 whether it's against their self-interest?

11          MR. RICHARDS: Yes, yes.

12          JUSTICE STEVENS: They could have gone on  
13 the stand, they gave all the reasons in the red  
14 briefs -- or the blue briefs in this case, that say  
15 it's not against their self-interest; you'd say that  
16 would be a jury question?

17          MR. RICHARDS: No, not at summary  
18 judgment. What I'm saying is that at the pleading  
19 stage to allege that, which is an allegation of fact,  
20 satisfies pleading standards. Just to allege it with  
21 testimony on the other side and no evidence to prove  
22 that allegation on summary judgment --

23          JUSTICE STEVENS: Are you suggesting that  
24 you don't have to prove an actual agreement? You can  
25 merely prove conduct contrary to self-interest is



1 sufficient?

2 MR. RICHARDS: Conduct contrary to  
3 self-interest is a way of inferring actual agreement  
4 in the absence of direct evidence.

5 JUDGE STEVENS: Do you agree you must --  
6 do you agree that you must prove an actual agreement  
7 among the defendants?

8 MR. RICHARDS: There must be an inference  
9 of actual agreement, but the inference can be drawn  
10 from circumstantial evidence, and that's what  
11 Matsushita is all about.

12 CHIEF JUSTICE ROBERTS: So then when we  
13 get back to the paragraph 51, let me start with your  
14 statement at the bottom half of that paragraph, that  
15 plaintiffs allege upon information and belief that  
16 they have entered into a contract, is a conclusion  
17 based upon your prior allegations, it's not an  
18 independent allegation of an agreement. It's saying  
19 because of this parallel conduct, because we think  
20 it's contrary to their self interest, therefore, they  
21 have agreed.

22 MR. RICHARDS: Counsel presented it as  
23 though it's a complete summary of everything, but  
24 what it says is, and the other facts and market  
25 circumstances alleged above, and it's preceded by --

1 CHIEF JUSTICE ROBERTS: But it's a  
2 statement of a conclusion based upon your allegations  
3 that precede it.

4 MR. RICHARDS: Correct.

5 CHIEF JUSTICE ROBERTS: It's not a  
6 statement that independently there apart from all of  
7 this, there's an agreement.

8 MR. RICHARDS: Well, it's also an  
9 independent statement and allegation on information  
10 and belief, which is permitted under Rule 8, that  
11 there is agreement.

12 JUSTICE ALITO: I guess if you had just  
13 alleged the last part of paragraph 51, plaintiffs  
14 have alleged, plaintiffs allege upon information and  
15 belief, et cetera, without the detail that you  
16 provided, would that have been sufficient?

17 MR. RICHARDS: If you gave no context of  
18 what kind of a conspiracy you were alleging and what  
19 kind of scope it had, so that a court could balance  
20 --

21 JUSTICE ALITO: But you omit all the  
22 allegations about parallel conduct and the other  
23 allegations that you think provide a basis for  
24 inferring a conspiracy from the parallel conduct, if  
25 you omit all that but you just include the last part

1 of 51, would that be enough?

2 MR. RICHARDS: If there isn't enough in  
3 the way of facts alleged to permit a court to  
4 understand what it is you're claiming in general  
5 terms happening, then you haven't satisfied Rule 8.  
6 I mean --

7 JUSTICE SOUTER: What's the answer to  
8 Justice Alito's question in this case?

9 MR. RICHARDS: Well, in this case we have  
10 provided, as the Second Circuit --

11 JUSTICE KENNEDY: No. His hypothetical is  
12 all you've done is to allege the final sentence  
13 without the preceding clause, the five or six lines  
14 before there's a comma. That's out. All there is is  
15 the allegation of the conspiracy. Is that enough in  
16 this case?

17 MR. RICHARDS: In this case with the  
18 allegations of the nature of the conspiracy that  
19 precede that sentence, it's enough.

20 JUSTICE KENNEDY: No. The hypothetical is  
21 without the preceding clause. Is that enough --

22 MR. RICHARDS: That sentence by itself --

23 JUSTICE KENNEDY: Is that enough in this  
24 case for what Justice Alito asked, and I think we are  
25 interested in the answer that you make given this

1 complaint in this case that we are faced with.

2 MR. RICHARDS: I think that that would  
3 satisfy conventional pleading standards under Rule  
4 8(a). On the other hand, I don't think it would  
5 satisfy the Second Circuit's standard below, because  
6 the Second Circuit required enough facts to enable a  
7 court to wrap its mind around a complainant,  
8 understanding what it is you claimed happened. You  
9 don't have to prove your case as a complainant, you  
10 just have to --

11 JUSTICE BREYER: I'd also like a clear  
12 answer, and I would like to go back to Justice  
13 Stevens' question because I'm not sure what you're  
14 thinking there. We have three steel sheet companies  
15 in the United States, no more. They sell at \$10 a  
16 sheet. One day we have action in the case, a memo to  
17 the president of the company. He says Mr. President,  
18 if you cut your prices to \$7 you will make even more  
19 money unless the others go along. And if they get  
20 there first, you will lose money. So whether they  
21 cut or not, you'd better cut your prices. Reply from  
22 the president: But if I don't cut my prices, they  
23 won't cut theirs, and we are all better off. That's  
24 your evidence. Do you win?

25 MR. RICHARDS: That would depend on the

1 vehicle --

2 JUSTICE BREYER: There is no depend.

3 That's the evidence. Do you win?

4 MR. RICHARDS: If that's the evidence, I  
5 think I win.

6 JUSTICE BREYER: All right. And you cite  
7 Matsushita for that?

8 MR. RICHARDS: No. For that I would cite  
9 Judge Posner's decision.

10 JUSTICE BREYER: If you're right, then I  
11 guess we could engage in this major restructuring of  
12 the economy, and if that's the law, I'm surprised  
13 they haven't done it, but maybe they have just been  
14 recalcitrant.

15 MR. RICHARDS: Well, there's no major  
16 restructuring of the --

17 JUSTICE BREYER: Well, because we have  
18 concentrated industries throughout the economy, I  
19 guess, or at least we used to, and I suppose that  
20 that's a perfectly valid way of reasoning for an  
21 executive in such a company, at least they teach that  
22 at the schools of government, and people who aren't  
23 really experienced in these things, but --

24 MR. RICHARDS: Well, the way Judge Posner  
25 explains it in High Fructose is to say that it is

1 possible to have an agreement without a moment where  
2 there's a statement of agreement. The participants  
3 in a conspiracy can possibly treat what one of them  
4 does as an offer, which another one can accept by  
5 following it, to satisfy that way of showing a  
6 conspiracy.

7 JUSTICE BREYER: Okay, fine. Now, let's  
8 forget my immediate disagreement or not. Let's say I  
9 agree with you on this. Now we have our example  
10 right in mind. What other than the parallel to my  
11 example could one reading this complaint think you  
12 intend to prove?

13 MR. RICHARDS: Well, Your Honor, the  
14 strongest -- plus factors that, in the absence of  
15 direct evidence of conspiracy at the outset of a  
16 case, which private plaintiffs will almost never have  
17 because people don't conspire in public parks. All a  
18 plaintiff can have is what are called plus factors  
19 under Matsushita, and the strongest of those plus  
20 factors is what has been alleged in great detail in  
21 this complaint of action against self interest. The  
22 case law recognizes that --

23 CHIEF JUSTICE ROBERTS: But how do you  
24 tell? I mean, companies get proposals all the time.  
25 Here's a way you could make more money. You could

1 all enter the market in some foreign country. The  
2 people decide, I mean, life is short and they've got  
3 certain objectives, and they don't have to do  
4 everything that an economist might think is in their  
5 economic self interest. I mean, what is the limiting  
6 self interest to that?

7 MR. RICHARDS: This is different from that  
8 because this is a situation where when the  
9 Telecommunications Act was passed in 1996, Congress  
10 expected that the ILECs would compete in one  
11 another's territories as CLECs. The defendants  
12 pledged that they would compete in one another's  
13 territories at ILECs. They then for years in  
14 Congress complained that the CLECs who were trying to  
15 compete with them were given an unfair advantage in  
16 the terms and conditions on which they were permitted  
17 to --

18 CHIEF JUSTICE ROBERTS: Is it an adequate  
19 response for the executive to say, I'm a little risk  
20 averse, I want to see how things work out over the  
21 next five years. They keep changing the laws, the  
22 regulatory environment. That's why I didn't jump in  
23 and compete?

24 MR. RICHARDS: If they can prove that  
25 that's the reason why they didn't jump in and

1 compete, then they have a nonconspiratorial reason  
2 for what they did.

3 JUSTICE SOUTER: But if they don't do  
4 that, is it your argument that simply by behaving  
5 differently from the way Congress assumed when it  
6 passed the statute, that raises the plausible  
7 inference of violation?

8 MR. RICHARDS: Within the other facts that  
9 I was identifying, there is a strong suggestion here  
10 that competition as a CLEC would have been, in the  
11 absence of the pattern of conduct that we allege  
12 here, would have been a profitable endeavor.

13 JUSTICE SOUTER: Okay. But is part of the  
14 plausibility of that inference the fact, in your  
15 argument, the fact that Congress assumed that would  
16 happen?

17 MR. RICHARDS: That's one factor that I  
18 point to among several to --

19 JUSTICE SOUTER: But I mean, the  
20 congressional assumption is part of your case, in  
21 other words?

22 MR. RICHARDS: It is.

23 JUSTICE SOUTER: Yes.

24 MR. RICHARDS: I believe that along with  
25 other factors such as the constant complaints to



1 Congress about how CLECs had the better side of the  
2 deal than the ILECs, along with the pledges of the  
3 defendants that they would do, and that they didn't  
4 do.

5 JUSTICE SCALIA: I used to work in the  
6 field of telecommunications and if the criterion is  
7 that happens which Congress expected to happen when  
8 it passed its law, your case is very weak.

9 MR. RICHARDS: Well, Your Honor, that -- I  
10 certainly don't expect that that is the evidence that  
11 we would be relying on at trial or at summary  
12 judgment to support our case, but in our motion to  
13 dismiss we don't have to have the evidence to support  
14 our case.

15 JUSTICE SCALIA: Well, you need what is  
16 called the plus factor, and I gather that you  
17 acknowledge that if I disagree with you that this,  
18 this parallel action seemed to be against the self  
19 interest of the companies, you no longer have a plus  
20 factor and you would lose.

21 MR. RICHARDS: I don't think that the  
22 Court, if the Court comes to a conclusion on its own  
23 that the facts that we have alleged, which is that it  
24 would have been in their interest to do this in the  
25 absence of conspiracy, is wrong, then the Court is

1 not following conventional pleading standards.

2 JUSTICE SCALIA: So all you have to do to  
3 prove, to establish a plus factor is to say in your  
4 pleading, and there is a plus factor?

5 MR. RICHARDS: Well, you have to say what  
6 it is.

7 JUSTICE SCALIA: You have to say what it  
8 is, that's all, and even if it's implausible?

9 MR. RICHARDS: Well, if it's implausible,  
10 that might be a different consideration.

11 JUSTICE GINSBURG: Mr. Richards, didn't  
12 the Second Circuit say you don't need a plus factor?  
13 They said if you did, we think that the plaintiffs  
14 could show it, but the second sentence is you don't  
15 need a plus factor.

16 MR. RICHARDS: That's correct.

17 JUSTICE GINSBURG: And that can be wrong  
18 or right, but the Second Circuit was very clear that  
19 Rule 8 wants a plain statement of the claim and no  
20 plus factor.

21 MR. RICHARDS: I agree with that, Your  
22 Honor, and my contention as to what the law is is  
23 that we are not required to plead plus factors. But  
24 the fact remains that we have, and that our factual  
25 pleading of plus factors has to be treated as true

1 for purposes of a --

2 JUSTICE ALITO: What if you pled more than  
3 you had to, and it's clear from what you pled that  
4 you were drawing an implausible inference? Can't the  
5 complaint then be dismissed for failure to state a  
6 claim?

7 MR. RICHARDS: No, I don't believe that it  
8 can be if -- because the Court is not, the correct  
9 function of the Court under a Rule 12(b)(6) motion is  
10 not to be decided by whether it believes or is  
11 persuaded by the allegations in the complaint.

12 JUSTICE ALITO: Well, let's take the Form  
13 9 where you take the form complaint for an automobile  
14 accident, and suppose what it says is, I was injured  
15 in an automobile accident at a particular place in  
16 time. I was hit by a compact car with Massachusetts  
17 plates. The defendant owns the compact car with  
18 Massachusetts plates. That's the complaint. The  
19 Court can't dismiss that for failure to state a claim  
20 when it's apparent from the face of the claim that  
21 you're, that the basis for suing the defendant is a  
22 totally implausible inference?

23 MR. RICHARDS: Well, if the allegation is  
24 also made that the defendant was negligent, then I  
25 think it clearly satisfies the pleading standard

1 under Form 9. I think it would be a more detailed  
2 complaint than the sample that comprises Form 9 of  
3 the rules.

4 JUSTICE ALITO: Even if it reveals that  
5 the only basis for identifying this person as the  
6 defendant is the fact that the person has a  
7 Massachusetts license plate and a compact car?

8 MR. RICHARDS: Yes, because that's more  
9 than nothing, and the rule in Form 9 contains  
10 nothing.

11 JUSTICE GINSBURG: Well, it contains a  
12 time and a place. It's quite specific that there was  
13 an accident and that defendant, defendant of a  
14 certain name at a certain time and place negligently  
15 drove. What it doesn't tell you is the details of  
16 the, of what was negligent, but it certainly is  
17 specific in time and place and person, which is one  
18 of the -- one of the concerns, I mean, if you strip  
19 away everything, it seems that you have a suspicion  
20 that there may have been a conspiracy and you want to  
21 use a discovery process to find out whether or not  
22 that's true. Isn't that essentially what this  
23 complaint is?

24 MR. RICHARDS: That is the situation that  
25 any plaintiff is going to be in in a horizontal

1 conspiracy case in the sense that we don't know for  
2 certain that there was a conspiracy. We have  
3 observed market facts which are suggestive of a  
4 conspiracy and we allege that there was a conspiracy.  
5 Now under conventional standards, all we would have  
6 to do is allege that there was a conspiracy and say  
7 what it was. We wouldn't have to plead a basis to  
8 infer that we are correct or incorrect because that's  
9 not the analysis that Rule 12(b)(6) --

10 CHIEF JUSTICE ROBERTS: But you don't  
11 think you have to prove that either? I mean, you  
12 don't think you have to prove anything more than what  
13 you've alleged in the complaint about the background  
14 context, the parallel conduct?

15 MR. RICHARDS: If the Court -- if we were  
16 to prove to the satisfaction of the finder of fact  
17 that the conduct we have pointed to here was or would  
18 have been contrary to the interests of the defendants  
19 in the absence of a conspiracy, we were to prove that  
20 as distinguished from pleading, we would satisfy  
21 Matsushita. Now at that stage in the case, it's  
22 inconceivable that there won't be all kinds of other  
23 memos and, you know, real world things that will shed  
24 light on why the defendants internally think they did  
25 this.

1 JUSTICE SCALIA: How much money do you  
2 think it would have cost the defendants by then to  
3 assemble all of the documents that you're going to be  
4 interested in looking at? How many buildings will  
5 have to be rented to store those documents and how  
6 many years will be expended in, in gathering all the  
7 materials?

8 MR. RICHARDS: Well, to address that  
9 concern, which we share, because we don't gain  
10 anything with Matsushita. At the end of the road in  
11 the case, we don't gain anything by pursuing a case  
12 for years in an unnecessarily burdensome way if we  
13 are not sure that it's going to prevail. So we  
14 proposed in this case a phased discovery process,  
15 pursuant to which you would first have discovery into  
16 conspiracy, and then the Court would have an early  
17 opportunity for a Matsushita motion and we either  
18 carry the day at that point or we don't. That's  
19 discovery.

20 JUSTICE GINSBURG: At what point does it  
21 get characterized as a class action, before this  
22 discovery or after?

23 MR. RICHARDS: It's at the Court's  
24 discretion when to entertain the motion for class  
25 certification. In this particular case the

1 defendants, a couple of the defendants proposed that  
2 we include in that phased discovery proposal class  
3 certification as an additional subject of that first  
4 phase of discovery, and we would be amenable to that  
5 as a compromise. But the point, getting back to  
6 Justice Scalia's point, that discovery as to whether  
7 there was a conspiracy in this case in order to  
8 satisfy that first phased analysis, would not need to  
9 be terribly burdensome and wouldn't necessarily be  
10 more burdensome than all kinds of other cases. It's  
11 really a very targeted issue. I think it's actually  
12 an appropriate way to deal with cases of this kind  
13 and it's actually a way that the Court has proposed  
14 dealing with similar issues in the past in the  
15 Anderson versus Creighton case.

16 CHIEF JUSTICE ROBERTS: Well, how would it  
17 be focused if you're talking about whether it's in  
18 their economic interest? You would have to say why,  
19 why didn't you enter into this particular realm of  
20 competition and they would say, well because we were  
21 doing other things. We had other areas that we were  
22 focusing on. And they would have to document all  
23 that to your satisfaction.

24 MR. RICHARDS: We'd -- we would ask for  
25 production of documents reflecting their thinking

1 process about entering into one another's  
2 territories. And that would be very enlightening.  
3 And after we get those documents we would have a much  
4 clearer idea and be able to share with the Court a  
5 much clearer idea of the entire picture of a kind  
6 that we can't have at the 12(b)(6) stage.

7 Thank you.

8 CHIEF JUSTICE ROBERTS: Thank you  
9 Mr. Richard, Mr. Kellogg, you have four minutes  
10 remaining.

11 REBUTTAL ARGUMENT BY MICHAEL KELLOGG,  
12 ON BEHALF OF PETITIONERS

13 MR. KELLOGG: Thank you. Your Honor.

14 I have three quick points that I would  
15 like to make. First following up on Justice  
16 Ginsburg's point, the private plaintiffs do not have  
17 an authority to issue purely investigative  
18 complaints. The Department of Justice of course can  
19 issue civil investigative demands, but for private  
20 plaintiffs the price of admission even to discovery,  
21 particularly to the sort of massive discovery at  
22 issue here, is to establish some basis for thinking  
23 the plaintiff -- the defendants have done something  
24 wrong. In that regard, in the Trinko case, the  
25 plaintiffs there specifically alleged that the



1 defendants were engaged in actions against self  
2 interest by not cooperating with new entrants. And  
3 what the Court did is it went behind that mere  
4 allegation, looked at the complaint, looked at facts  
5 concerning the industry, looked at the statute,  
6 regulatory rulings and said that's ridiculous. Of  
7 course it is in the self interest of the incumbents  
8 to not go out of their way to cooperate with new  
9 entrants to allow them to take business away.

10 Now the flip side, the second half of the  
11 conspiracy that the plaintiffs alleged here is our  
12 failure to enter new markets. And it's important to  
13 recognize that they are suggesting we should have  
14 relied upon a regulatory regime that we were  
15 successfully challenging in the courts. We got it  
16 struck down three separate times, and it was simply  
17 not a viable business opportunity in light of those  
18 facts and there is no reason to suggest that it was  
19 anything but in the self interest of the defendants  
20 to decline to enter these markets. Even conscious  
21 parallelism is not sufficient to state a claim under  
22 the antitrust laws. And at best, that is what we  
23 have here, and as a consequence they failed to state  
24 a claim.

25 If the Court has further questions? I

1 have nothing further.

2 CHIEF JUSTICE ROBERTS: Thank you,  
3 Mr. Kellogg. The case is submitted.

4 (Whereupon, at 11:02, the case in the  
5 above-titled matter was submitted.)

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