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1 P R O C E E D I N G S

2 (10:03 a.m.)

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

6 ORAL ARGUMENT OF MICHAEL KELLOGG

7 ON BEHALF OF PETITIONERS

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

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

22 In that regard, I'd like to direct the
23 Court's attention to paragraph 51 of the plaintiff's
24 complaint in this case, which is at page 27 of the
25 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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