NOTE

In *Todd*, the court blurred the line between proof of agreement and proof of anticompetitive effects. In effect, most "factors" that the court considered can be used as plus factors.

Todd v. Exxon Corp.

275 F.3d 191 (2d Cir. 2001)

SOTOMAYOR, Circuit Judge.

Plaintiff-appellant Roberta Todd appeals from an order of the United States District Court for the Southern District of New York granting defendants-appellees' motion to dismiss the complaint for failure to state a claim pursuant to Fed.R.Civ.P. 12(b)(6). We hold that plaintiff adequately alleges a § 1 Sherman Act violation for an unlawful information exchange. Plaintiff's complaint alleges a plausible product market, a market structure that is susceptible to collusive activity, a data exchange with anticompetitive potential, and antitrust injury. We therefore vacate and remand.

BACKGROUND

Plaintiff brought this action against fourteen major companies in the integrated oil and petrochemical industry, collectively accounting for 80–90% of the industry's revenues and employing approximately the same percentage of the industry's workforce. On behalf of herself and all other similarly situated current and former Exxon employees (the putative class), plaintiff alleges that defendants violated § 1 of the Sherman Act by regularly sharing detailed information regarding compensation paid to nonunion managerial, professional, and technical ("MPT") employees and using this information in setting the salaries of these employees at artificially low levels. Plaintiff seeks money damages and equitable relief pursuant to § 1 of the Sherman Act.

Accepting the allegations in the complaint as true, as we must on this motion to dismiss, the facts of this case are as follows.

Defendants instituted a system whereby they periodically conducted surveys comparing past and current MPT salary information and participated in regular meetings at which current and future salary budgets were discussed. The data exchanges were also accompanied by assurances that the information would be used in setting the salaries of MPT employees. Defendants' "Job Match Survey" created a common denominator to facilitate the comparison of MPT salaries. The survey used certain jobs at defendant Chevron as benchmarks. The other defendants would submit detailed information regarding the jobs at their companies that were most comparable to the Chevron benchmark jobs so that they could be matched. The survey compared the responsibilities and compensation packages offered by defendants for certain jobs and job types against those of the benchmark positions at Chevron. This survey was coordinated by defendants Unocal and Chevron. Chevron and Unocal each would meet with half of the other companies involved to develop matches to the benchmarks, and then would gather the information before submitting it to a third-party consultant, Towers Perrin. Towers Perrin compiled the information, then analyzed, refined, and distributed it to the defendants on diskettes and in the form of hard copies. Since not all jobs could be matched precisely, defendants agreed upon certain percentage "offsets" to facilitate the comparison. The Job Match Survey was performed every two years and was supplemented in the "off years" by the "Grade Average Update,"

which would calculate the change in grade average salaries since the last Job Match Survey and then adjust the salary level from the previous year's survey by the amount of the change. Id.

Defendants' "Job Family Survey" provided the most current account of the compensation being paid in the industry. . . . Plaintiff alleges that Exxon used these subsets to compare its own salaries with those of six particular competitors, referred to as the "Six Majors." . . .

Plaintiff contends that defendants' arrangement violated § 1 of the Sherman Act. According to the complaint, these violations had the purpose and effect of depressing MPT salaries paid by defendants. The arrangement reduced the incentive for defendants to bid up salaries in order to attract experienced MPT employees or to retain employees who might be lured to other firms. As a result, the plaintiffs in the putative class received compensation that was materially lower than what they would have received but for defendants' anticompetitive practices. . . .

DISCUSSION

I. Standard of Review

We review de novo the district court's grant of defendants' motion to dismiss pursuant to Rule 12(b)(6). . . . On a motion to dismiss for failure to state a claim, we construe the complaint in the light most favorable to the plaintiff, accepting the complaint's allegations as true. . . . A complaint should not be dismissed for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957).[*] Thus, the issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. . . .

II. The Rule of Reason

Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." Traditional "hard-core" price fixing remains per se unlawful under the seminal case *United States v. Socony–Vacuum Oil Co.*, 310 U.S. 150 (1940), and its progeny. If the plaintiff in this case could allege that defendants actually formed an agreement to fix MPT salaries, this per se rule would likely apply. Furthermore, even in the absence of direct "smoking gun" evidence, a horizontal price-fixing agreement may be inferred on the basis of conscious parallelism, when such interdependent conduct is accompanied by circumstantial evidence and plus factors such as defendants' use of facilitating practices. *See*, *e.g.*, *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939). Information exchange is an example of a facilitating practice that can help support an inference of a price-fixing agreement.

There is a closely related but analytically distinct type of claim, also based on § 1 of the Sherman Act, where the violation lies in the information exchange itself—as opposed to merely using the information exchange as evidence upon which to infer a price-fixing agreement. This exchange of information is not illegal *per se*, but can be found unlawful under a rule of reason analysis. *See Battipaglia v. N.Y. State Liquor Auth.*, 745 F.2d 166, 174–75 (2d Cir.1984) (Friendly, J.). The state of the law on this issue was not always so clear. . . .

In *United States v. Container Corp. of America*, the Supreme Court held that information exchange itself could constitute a § 1 violation, upholding the sufficiency of a complaint charging "an exchange of price information but no agreement to adhere to a price schedule." The Court found that under the market conditions present in that case, and in light of the nature of the information disseminated,

[*] [Note: In *Twombly* (2007), the Supreme Court narrowed the standard].

the data exchange caused a stabilization of prices and thus had an anticompetitive effect on the market for corrugated containers. Unclear in the wake of *Container Corp.* was whether such exchanges were per se unlawful or subject to a rule of reason. The Court used some of the language of the Court's per se jurisprudence, yet conducted a market analysis that suggested a rule of reason. In a well-known concurrence, Justice Fortas urged that a per se rule was not appropriate.

The Supreme Court resolved the confusion in *United States v. Citizens & Southern National Bank*, clarifying that "the dissemination of price information is not itself a per se violation of the Sherman Act." 422 U.S. 86, 113 (1975). In *United States v. United States Gypsum Co.*, the Court explained its reasoning: "The exchange of price data and other information among competitors does not invariably have anticompetitive effects; indeed such practices can in certain circumstances increase economic efficiency and render markets more, rather than less, competitive." 438 U.S. 422, 441 n. 16 (1978). The Court then set out the basic framework for the rule of reason inquiry in this context: "A number of factors including most prominently the structure of the industry involved and the nature of the information exchanged are generally considered in divining the procompetitive or anticompetitive effects of this type of inter-seller communication."

As plaintiff does not allege an actual agreement among defendants to fix salaries, we analyze plaintiff's complaint solely as to whether it alleges unlawful information exchange pursuant to this rule of reason.

III. Market Power

A. The Relevant Market

An important factor to analyze in a *Gypsum* data exchange case is the market power of the defendants. One traditional way to demonstrate market power is by defining the relevant product market and showing defendants' percentage share of that market. Plaintiff argues that the relevant market in this case is the market for "the services of experienced, salaried, non-union, managerial, professional and technical (MPT) employees in the oil and petrochemical industry, in the continental United States and various submarkets thereof." If the market is defined in this way, defendants would have a substantial market share of 80–90%. If the market cannot be limited in this way, defendants' percentage market share would drop substantially. . . .

Because market definition is a deeply fact-intensive inquiry, courts hesitate to grant motions to dismiss for failure to plead a relevant product market. . . . It frequently has been observed that "a pronouncement as to market definition is not one of law, but of fact." There is, however, no absolute rule against the dismissal of antitrust claims for failure to allege a relevant product market. . . .

To survive a Rule 12(b)(6) motion to dismiss, an alleged product market must bear a rational relation to the methodology courts prescribe to define a market for antitrust purposes—analysis of the interchangeability of use or the cross-elasticity of demand, . . . and it must be "plausible." Hack v. President & Fellows of Yale Coll., 237 F.3d 81, 86 (2d Cir.2000). . . .

In the instant case, the district court held that "the relevant market proposed by plaintiff does not rise to the level of plausibility required in an antitrust action." . . .

1. Whether Plaintiff's Alleged Market Is Over Inclusive

The district court held that the proposed product market was over-inclusive because the plaintiff "failed to explain how it is that accountants, lawyers, chemical engineers and other MPT employees in the oil and petrochemical industry are interchangeable with one another when the jobs

they perform are so different. . . . We agree with plaintiff that the interchangeability of these employees is not part of defining the relevant market.

. . . Plaintiff is correct to point out that a horizontal conspiracy among buyers to stifle competition is as unlawful as one among sellers. . . . The fact that this case involves a buyer-side conspiracy affects how the market is defined. Normally, the market is composed of products that have reasonable interchangeability for the purposes for which they are produced—price, use and qualities considered. In economists' terms, two products or services are reasonably interchangeable where there is sufficient cross-elasticity of demand. Cross-elasticity of demand exists if consumers would respond to a slight increase in the price of one product by switching to another product. Thus, the inquiry is whether a "hypothetical cartel" would be "substantially constrain[ed]" from increasing prices by the ability of customers to switch to other producers.

There is a danger in applying these factors mechanically in the context of monopsony or oligopsony. These factors are reversed in the context of a buyer-side conspiracy. . . . In such a case,"the market is not the market of competing sellers but of competing buyers. This market is comprised of buyers who are seen by sellers as being reasonably good substitutes. A greater availability of substitute buyers indicates a smaller quantum of market power on the part of the buyers in question. . . .

The district court's analysis reflects a failure to reverse all of the factors involved in light of the buyer-side nature of the alleged activity. . . . The question is not the interchangeability of, for example, lawyers with engineers. At issue is the interchangeability, from the perspective of an MPT employee, of a job opportunity in the oil industry with, for example, one in the pharmaceutical industry.

2. Whether Plaintiff's Alleged Market is Under Inclusive

. . . The district court found that "plaintiff fails to adequately explain why an antitrust lawyer employed by an oil company does not compete in the same market as an antitrust lawyer at a commercial bank or in a private law firm." Defendants make the same argument on appeal. By "underinclusive," the district court appears to mean that the market should not be limited to employers in the oil and petrochemical industry. There may be merit to the district court's argument as it relates to less specialized job categories, but this fact-specific question cannot be resolved on the pleadings. At this stage, it is sufficient that plaintiff has alleged specific facts that support a narrow product market in a way that is plausible and bears a rational relation to the methodology courts prescribe to define a market for antitrust purposes.

Plaintiff claims that MPT employees accumulate industry-specific knowledge that renders them more valuable to employers in the oil and petrochemical industry than to employers in other industries. . . . While the complaint could perhaps be more specific about the experience that renders these employees more valuable within the oil industry, plaintiff's point is hardly counter-intuitive. It is consistent with common sense and empirical research that employees' industry-specific experience may cause them to suffer a pay cut if forced to switch industries. . . .

This is not to say, however, that less technical jobs require no industry-specific experience, and the extent to which they do involves a question of fact not resolvable on a Rule 12(b)(6) motion. It is not implausible that less technical MPT employees develop industry-specific expertise that affects their value in the labor market. . . .

B. Anticompetitive Effect As an Indication of Market Power

Plaintiff's alleged product market would support the 80-90% market share figure for defendants. Market power defined as a percentage market share, however, is not the only way to

demonstrate defendants' ability to depress salaries. If a plaintiff can show that a defendant's conduct exerted an actual adverse effect on competition, this is a strong indicator of market power. In fact, this arguably is more direct evidence of market power than calculations of elusive market share figures. . . .

IV. Susceptibility of the Market

The Supreme Court in *Gypsum* explained that one of the two most prominent factors in the rule of reason analysis of a data exchange is "the structure of the industry involved." Therefore, once the relevant market is defined, a court must analyze the structure of that market to determine whether it is "susceptible to the exercise of market power through tacit coordination. . . .

A. Concentration

Generally speaking, the possibility of anticompetitive collusive practices is most realistic in concentrated industries. If the relevant market in this case is defined as the plaintiff contends, the defendants would control collectively a 80–90% market share. While this is an extremely high market share by any measure, the district court contends that the alleged market "is not, as plaintiff contends, so clearly oligopolistic." The district court points out that there are fourteen defendants in this case. . . . That the market would not be deemed highly concentrated by this measure, however, does not preclude the possibility of collusive activity. . . .

The Supreme Court has found that data exchange can be unlawful despite a relatively large number of sellers. In *Container Corp.*, the Court used the oft-cited language that the industry was "dominated by relatively few sellers." But in fact, the defendants in *Container Corp.* were eighteen firms controlling 90% of the market, defined as the sale of cardboard cartons in the Southeast. The Court nonetheless found the market sufficiently concentrated to support the finding of a violation.

[W]e do not think that fourteen companies sharing an 80–90% market share is so unconcentrated as to warrant a Rule 12(b)(6) dismissal where the nature of the exchanges appears anticompetitive. . . .

B. Fungibility

The district court also asserted that "even if the proposed market were oligopolistic, plaintiff still could not establish its susceptibility to the exercise of market power through tacit coordination. The 'products' in her proposed market are, as discussed above, far from fungible." . . .

It is important to bear in mind the context in which the fungibility question arises. The inquiry is one part of the question of whether the market is susceptible to the exercise of market power though tacit coordination. Fungibility is relevant on this point because it is less realistic for a cartel to establish and police a price conspiracy where it is difficult to compare the products being sold. . . . Therefore, fungibility plays a significant role in evaluating the anticompetitive potential of an information exchange.

The question in this case is whether jobs at the various oil and petrochemical companies were comparable, or fungible enough so that the defendants could have used the exchanged information as part of a tacit conspiracy to depress salaries. . . .

Plaintiff's complaint alleges in detail the sophisticated techniques defendants used to "achieve a common denominator" with respect to the compensation paid to their MPT employees. . . . Plaintiff is thus on solid ground when she argues that defendants "made their own employees' positions 'fungible' for comparison purposes with those of their competitors." . . .

V. The Nature of the Information Exchanged

Alongside the structure of the industry involved," the other major factor for courts to consider in a data exchange case is the "nature of the information exchanged. There are certain well-established criteria used to help ascertain the anticompetitive potential of information exchanges. . . .

The first factor to consider is the time frame of the data. The Supreme Court has made clear that exchanges of current price information, of course, have the greatest potential for generating anti-competitive effects and although not per se unlawful have consistently been held to violate the Sherman Act. . . . [Here, the defendants allegedly exchanged past and current salary information, as well as future salary budget information]. . . .

[A]nother factor courts look to is the specificity of the information. Price exchanges that identify particular parties, transactions, and prices are seen as potentially anticompetitive because they may be used to police a secret or tacit conspiracy to stabilize prices. [Here, the defendants developed and used standards for detailed and specific information].

Another important factor to consider in evaluating an information exchange is whether the data are made publicly available. Public dissemination is a primary way for data exchange to realize its procompetitive potential. . . . In the instant case, dissemination of the information to the employees could have helped mitigate any anticompetitive effects of the exchange and possibly enhanced market efficiency by making employees more sensitive to salary increases. No such dissemination occurred, however. . . .

A final troubling aspect of the arrangement at issue is the fact that the defendants allegedly participated in frequent meetings to discuss the salary information, accompanied by assurances that the participants would primarily use the exchanged data in setting their MPT salaries. Meetings, of course, are not inherently unlawful but in this context they have the potential to enhance the anticompetitive effects. Meanwhile, the frequency of the meetings is itself problematic for the same reason that the exchange of current price data is suspect: It tends to facilitate the policing of price conspiracies.

In sum, the "nature of the information exchanged" weighs against the motion to dismiss. The characteristics of the data exchange in this case are precisely those that arouse suspicion of anticompetitive activity under the rule of reason.

VI. Effect on Competition and Antitrust Injury

An antitrust plaintiff must allege not only cognizable harm to herself, but an adverse effect on competition market-wide. . . . In the traditional oligopoly case, horizontal coordination may inflate prices to supracompetitive levels. In an oligopsony, the risk is that buyers will collude to depress prices, causing harm to sellers. Plaintiff . . . alleges that salary levels across the integrated oil and petrochemical industry have been artificially depressed because the information exchange has reduced competitive incentives.

CONCLUSION

For the reasons stated, we vacate the district court's grant of defendants' Rule 12(b)(6) motion to dismiss and remand for proceedings consistent with this opinion.