

United States District Court  
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

PIPE FITTERS LOCAL UNION NO. 120  
PENSION FUND, on behalf of itself  
and all others similarly  
situated,

Plaintiff,

v.

BARCLAYS CAPITAL INC.; THE  
GOLDMAN SACHS GROUP, INC.;  
KOHLBERG KRAVIS ROBERTS & CO.,  
LP; VESTAR CAPITAL PARTNERS INC.;  
CENTERVIEW PARTNERS LLC; and  
PETER J. MOSES,

Defendants.

\_\_\_\_\_ /

No. C 11-01064 CW

ORDER GRANTING  
DEFENDANTS' MOTION  
TO DISMISS AND  
GOLDMAN SACHS'  
MOTION TO DISMISS  
(Docket Nos. 66  
and 67)

Plaintiff Pipe Fitters Local Union No. 120 Pension Fund  
charges Defendants Barclays Capital Inc.; The Goldman Sachs Group,  
Inc.; Kohlberg Kravis Roberts & Co., L.P. (KKR); Vestar Capital  
Partners Inc.; Centerview Partners LLC; and Peter J. Moses with  
violating section 1 of the Sherman Act, 15 U.S.C. § 1. Defendants  
have filed a joint motion to dismiss. Goldman Sachs has filed a  
separate motion to dismiss. The motions were heard on August 25,  
2011. Having considered oral argument and the papers submitted by  
the parties, the Court GRANTS Defendants' joint motion and Goldman  
Sachs' motion.

1 BACKGROUND

2 The following allegations are taken from Plaintiff's first  
3 amended complaint (1AC).

4 Plaintiff, a public retirement trust fund, was a shareholder  
5 in Del Monte Foods. Defendants were involved in the leveraged  
6 buyout (LBO) of Del Monte, which was structured as a merger.

7 In the latter half of 2009, Barclays, one of Del Monte's  
8 investment banks, suggested to several private equity firms the  
9 idea of acquiring the company. Moses, a Barclays managing  
10 director, approached several firms, including KKR and Apollo  
11 Management. Del Monte was not aware of, nor did it prompt,  
12 Barclays' and Moses' overtures.

13 In early January 2010, Moses again met with KKR. He  
14 explained that bidding for Del Monte would occur through "a narrow  
15 private solicitation of interest to a small group of private  
16 equity firms and no strategic buyers, such as another food  
17 company." 1AC ¶ 41. Barclays would benefit at both ends of this  
18 arrangement, by advising Del Monte on the sell-side and providing  
19 financing to a private equity firm on the buy-side. KKR indicated  
20 that it was interested in bidding for Del Monte and would partner  
21 with Centerview to do so.

22 That same month, Apollo independently informed Del Monte that  
23 it was interested in purchasing the company for \$14 to \$15 per  
24 share. In response to Apollo's offer, Del Monte retained Barclays  
25 as its sell-side adviser. In this role, Barclays recommended that  
26 Del Monte consider only a select group of private equity firms.  
27 Del Monte adopted this recommendation. Barclays did not disclose  
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1 to Del Monte that it previously had recommended the company to  
2 private equity firms as an acquisition target.

3       Thereafter, Barclays invited KKR, Apollo, The Carlyle Group,  
4 The Blackstone Group and CVC Capital Partners to participate in  
5 the bidding process. Subsequently, Vestar and Campbell's Soup, a  
6 strategic buyer, asked Barclays to be included in the process.

7       In February 2010, the entities that expressed interest in Del  
8 Monte entered into a confidentiality agreement with the company,  
9 which contained a "No-Teaming" provision that "prohibited the  
10 bidders from entering into any 'agreement, arrangement or  
11 understanding, or any discussions which might lead to such  
12 agreement, arrangement or understanding, with any other  
13 person . . . including other potential bidders and equity or debt  
14 financing sources, regarding a possible transaction involving the  
15 Company.'" 1AC ¶ 48.

16       On March 11, 2010, Del Monte received written indications of  
17 interest from KKR, Apollo, Carlyle, CVC and Vestar. Vestar  
18 submitted the highest bid, pledging to buy the company for \$17.00  
19 to \$17.50 per share. Vestar, however, disclosed that it would  
20 need to partner with another private equity firm in order to  
21 fulfill its bid. KKR, along with its disclosed partner  
22 Centerview, tendered the second-highest bid, at \$17 per share.

23       On March 18, 2010, Del Monte rejected the bids. Del Monte  
24 instructed Barclays to "'shut [the] process down and let buyers  
25 know the company is not for sale.'" 1AC ¶ 53.

26       Despite Del Monte's directive, Barclays continued to pursue  
27 the sale of the company. Sometime between August and September  
28 2010, Moses suggested to KKR and Vestar that they "combine to

1 acquire Del Monte." 1AC ¶ 56. This suggestion and arrangement  
2 violated the No-Teaming Provision of the February 2010  
3 confidentiality agreement. Nonetheless, KKR and its partner  
4 Centerview agreed to join Vestar to attempt to purchase Del Monte.

5 On October 11, 2010, KKR and Centerview offered to acquire  
6 Del Monte for \$17.50 per share. KKR, Centerview, Vestar and  
7 Barclays concealed Vestar's involvement in the bid. On October  
8 25, 2010, Del Monte decided to negotiate solely with KKR and  
9 Centerview, without knowledge that Vestar was part of the venture.  
10 On October 27, 2010, Del Monte rejected the offer. "At Barclays'  
11 urging," Del Monte did not solicit additional offers. 1AC ¶ 60.

12 On November 8, 2010, a newspaper reported that KKR and  
13 Centerview intended to acquire Del Monte for \$18.50 per share.  
14 Thereafter, KKR and Centerview tendered an increased bid of \$18.50  
15 per share. However, they had authority to raise the bid to \$19  
16 per share.

17 While Del Monte was considering the \$18.50-per-share bid, KKR  
18 and Centerview finally sought permission from the company for  
19 Vestar to be a part of the bidding team. However, KKR and  
20 Centerview did not disclose to Del Monte that Vestar actually had  
21 been involved in the bidding process since September 2010. Del  
22 Monte granted KKR and Centerview's request.

23 On November 9, 2010, KKR agreed to obtain one-third of the  
24 financing for the proposed Del Monte LBO from Barclays.

25 On November 24, 2010, relying on Barclays' recommendation,  
26 Del Monte accepted the KKR-led team's \$19-per-share offer and  
27 approved of the team's decision to seek financing from Barclays.

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1 Del Monte retained Perella Weinberg Partners LP to evaluate the  
2 fairness of the transaction.

3 The Del Monte Merger Agreement, signed by the company and the  
4 KKR-led team, required a forty-five-day "go-shop" period, during  
5 which Del Monte could solicit additional offers. Goldman Sachs  
6 offered to administer the go-shop period on behalf of Del Monte.  
7 Barclays expressed to KKR its concern that Goldman Sachs was  
8 intending to "'scare up competition.'" 1AC ¶ 70. Thereafter, KKR  
9 offered Goldman Sachs five-percent participation in the  
10 syndication rights on the LBO financing. Goldman Sachs then  
11 discontinued its efforts to handle the go-shop period, which  
12 Barclays ultimately conducted.

13 On January 10, 2011, the go-shop period expired; no "pro-  
14 competitive superior offers" were made. 1AC ¶ 72. On February  
15 14, 2011, a Delaware Chancery Court enjoined the shareholder vote  
16 on the LBO to permit an additional twenty-day go-shop period,  
17 during which additional offers on Del Monte could be made. Again,  
18 no offers were made. The absence of offers was consistent with  
19 so-called "club rules" agreed to by members of a cartel of the  
20 largest private equity firms, which included KKR, Apollo, Carlyle  
21 and Blackstone. Goldman Sachs knew of these rules. These firms,  
22 among others, "agreed not to compete among themselves for" LBO  
23 transactions. 1AC ¶ 5.

24 On or about March 8, 2011, the Del Monte LBO merger took  
25 effect, and Del Monte shareholders were paid \$19 per share. In  
26 2010, various financial analysts believed stock in the company to  
27 be worth more than this amount.

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1 Plaintiff brings a claim under section 1 of the Sherman Act  
2 against all Defendants. Plaintiff contends that Defendants  
3 engaged in "a horizontal bid-rigging scheme." Pl.'s Corr. Mem. of  
4 P & A at 10:3. It intends to prosecute this case as a class  
5 action.

6 LEGAL STANDARD

7 A complaint must contain a "short and plain statement of the  
8 claim showing that the pleader is entitled to relief." Fed. R.  
9 Civ. P. 8(a). When considering a motion to dismiss under Rule  
10 12(b)(6) for failure to state a claim, dismissal is appropriate  
11 only when the complaint does not give the defendant fair notice of  
12 a legally cognizable claim and the grounds on which it rests.

13 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). In  
14 considering whether the complaint is sufficient to state a claim,  
15 the court will take all material allegations as true and construe  
16 them in the light most favorable to the plaintiff. NL Indus.,  
17 Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). However, this  
18 principle is inapplicable to legal conclusions; "threadbare  
19 recitals of the elements of a cause of action, supported by mere  
20 conclusory statements," are not taken as true. Ashcroft v. Iqbal,  
21 129 S. Ct. 1937, 1949-50 (2009) (citing Twombly, 550 U.S. at 555).

22 When granting a motion to dismiss, the court is generally  
23 required to grant the plaintiff leave to amend, even if no request  
24 to amend the pleading was made, unless amendment would be futile.  
25 Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911  
26 F.2d 242, 246-47 (9th Cir. 1990). In determining whether  
27 amendment would be futile, the court examines whether the  
28 complaint could be amended to cure the defect requiring dismissal

1 "without contradicting any of the allegations of [the] original  
2 complaint." Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th  
3 Cir. 1990).

#### 4 DISCUSSION

5 To state a claim under section 1 of the Sherman Act, a  
6 plaintiff "must demonstrate: '(1) that there was a contract,  
7 combination, or conspiracy; (2) that the agreement unreasonably  
8 restrained trade under either a per se rule of illegality or a  
9 rule of reason analysis; and (3) that the restraint affected  
10 interstate commerce.'" Tanaka v. Univ. of S. Cal., 252 F.3d 1059,  
11 1062 (9th Cir. 2001) (quoting Hairston v. Pac. 10 Conference, 101  
12 F.3d 1315, 1318 (9th Cir. 1996)).

13 As explained below, Plaintiff fails to plead the first and  
14 second elements of its section 1 claim. Because Plaintiff does  
15 not sufficiently state a section 1 claim, the Court does not  
16 address Defendants' argument that Plaintiff fails to allege  
17 antitrust injury or that its antitrust claim is impliedly  
18 precluded by federal securities laws.

#### 19 I. Unreasonable Restraint of Trade

20 The Sherman Act does not condemn every restraint of trade;  
21 instead, the law "was intended to prohibit only unreasonable  
22 restraints of trade." NCAA v. Bd. of Regents of Univ. of Okla.,  
23 468 U.S. 85, 98 (1984) (emphasis added).

24 To determine whether an alleged restraint is unreasonable, a  
25 court may employ a rule of reason analysis or a per se rule of  
26 illegality. Under the rule of reason analysis, which "is the  
27 presumptive or default standard," a plaintiff must "'demonstrate  
28 that a particular contract or combination is in fact unreasonable

1 and anticompetitive.'" California ex rel. Harris v. Safeway, \_\_\_  
2 F.3d \_\_\_, 2011 WL 2684942, at \*11 (9th Cir.) (quoting Texaco Inc.  
3 v. Dagher, 547 U.S. 1, 5 (2006)). Making this showing "entails  
4 significant costs" because litigation "of the effect or purpose of  
5 a practice often is extensive and complex." Arizona v. Maricopa  
6 Cnty. Med. Soc., 457 U.S. 332, 343 (1982) (citation omitted).

7 The per se rule of illegality obviates the need for the  
8 resource-intensive inquiry into reasonableness. "The per se rule,  
9 treating categories of restraints as necessarily illegal,  
10 eliminates the need to study the reasonableness of an individual  
11 restraint in light of the real market forces at work . . . ."  
12 Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877,  
13 886 (2007). "Resort to per se rules is confined to  
14 restraints . . . that would always or almost always tend to  
15 restrict competition and decrease output." Id. A "per se rule is  
16 appropriate only after courts have had considerable experience  
17 with the type of restraint at issue and only if courts can predict  
18 with confidence that it would be invalidated in all or almost all  
19 instances under the rule of reason." Id. at 886-87 (citations  
20 omitted). Courts should be reticent to adopt a per se rule "where  
21 the economic impact of certain practices is not immediately  
22 obvious." Id. at 887.

23 As noted above, Plaintiff labels Defendants' challenged  
24 conduct as a horizontal bid-rigging arrangement, which is per se  
25 illegal under the Sherman Act. United States v. Green, 592 F.3d  
26 1057, 1068 (9th Cir. 2010). To support its assertion that  
27 Defendants rigged bidding for Del Monte, Plaintiff points to the  
28 alleged violation of the No-Teaming Provision of the February 2008

1 confidentiality agreement. It is not apparent, however, how the  
2 breach of this provision constituted an unreasonable restraint of  
3 trade, let alone per se illegal bid rigging.

4 Plaintiff cites Green, which does not support its position.  
5 In that case, Green had near absolute control over the bidding  
6 process, in which contractors fashioned their bids "without regard  
7 to the competition." 592 F.3d at 1068-69. Here, Plaintiff's  
8 allegations do not imply that Barclays, or any other entity or  
9 combination of entities, had the same control over the process as  
10 Green. While Barclays allegedly steered Del Monte to consider  
11 only the KKR-led team's bid, there are no allegations that  
12 Barclays required KKR and Centerview to join Vestar in order to  
13 bid, that Barclays influenced the team's bid or that Barclays  
14 prevented other entities from making offers before or during the  
15 go-shop periods. There are no allegations suggesting that the  
16 KKR-led team made its bid "without regard to the competition;" the  
17 bid was made before the go-shop periods, during which other bids  
18 could have been made. Plaintiff alleges that no bids were made  
19 during the go-shop periods because members of a private equity  
20 firm cartel "do not compete against each other during" such  
21 periods. 1AC ¶ 74. However, this allegation does not address the  
22 potential for bids from entities not part of the cartel, such as  
23 CVC, which placed a bid during the first round and was not  
24 allegedly a cartel member. Nor does it address Campbell's Soup,  
25 which had expressed interest in acquiring Del Monte in the first  
26 round of bidding and was a "strategic buyer," not a private equity  
27 firm. Without any party holding absolute control over the bidding  
28 process, it is not apparent that Defendants undertook any conduct

1 that had "'manifestly anticompetitive' effects and lack[ed] 'any  
2 redeeming virtue.'" Safeway, 2011 WL 2684942, at \*11 (quoting  
3 Leegin, 551 U.S. at 886). Thus, Plaintiff has not alleged a  
4 restraint of trade that is per se illegal.

5 Nor does Plaintiff allege an unreasonable restraint of trade  
6 under a "quick look" antitrust analysis. This "truncated rule of  
7 reason . . . analysis may be appropriately used where 'an observer  
8 with even a rudimentary understanding of economics could conclude  
9 that the arrangements in question would have an anticompetitive  
10 effect on customers and markets.'" Safeway, 2011 WL 2684942, at  
11 \*11 (quoting Cal. Dental Ass'n v. FTC, 526 U.S. 756, 770 (1999)).  
12 To support use of a quick-look analysis, Plaintiff repeats only  
13 its flawed argument that Defendants engaged in horizontal bid  
14 rigging. As explained above, although the No-Teaming Provision  
15 may have been violated, it is not apparent that its breach  
16 necessarily had an anticompetitive effect.

17 Finally, because it has not alleged a relevant market,  
18 Plaintiff does not satisfy its pleading burden to sustain a  
19 section 1 claim under a rule of reason analysis. Tanaka, 252 F.3d  
20 at 1063 (stating that, under a rule-of-reason analysis, the  
21 failure "to identify a relevant market is a proper ground for  
22 dismissing a Sherman Act claim") (citing Big Bear Lodging Ass'n v.  
23 Snow Summit, Inc., 182 F.3d 1096, 1105 (9th Cir. 1999)). Citing  
24 Forsyth v. Humana, Inc., 114 F.3d 1467 (9th Cir. 1997), Plaintiff  
25 maintains that a relevant market need not be plead because it has  
26 alleged direct anticompetitive effects. However, Forsyth was a  
27 monopolization case under section 2 of the Sherman Act, which  
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1 addressed the evidence necessary to show a defendant's market  
2 power. See id. at 1475-76.

3 Accordingly, Plaintiff fails to state its section 1 claim  
4 against Defendants. The claim is dismissed with leave to amend to  
5 plead an unreasonable restraint of trade.

## 6 II. Antitrust Conspiracy

7 Defendants contend that, even if Plaintiff were to plead an  
8 unreasonable restraint of trade, it fails to allege an antitrust  
9 conspiracy.

10 As an initial matter, Barclays', Moses' and Goldman Sachs'  
11 participation in the purported conspiracy is not inconsistent with  
12 a theory that Defendants engaged in an alleged horizontal  
13 restraint of trade, even though these Defendants were not KKR,  
14 Centerview and Vestar's competitors. See Bus. Elecs. Corp. v.  
15 Sharp Elecs. Corp., 485 U.S. 717, 730 (1988) ("Restraints imposed  
16 by agreement between competitors have traditionally been  
17 denominated as horizontal restraints."). Non-competitors can  
18 agree to participate in a horizontal conspiracy. See, e.g., In re  
19 Ins. Brokerage Antitrust Litig., 618 F.3d 300, 337 (3d Cir. 2010)  
20 ("The fact that Marsh, an entity vertically oriented to the  
21 insurers, appears to be a sine qua non of the alleged horizontal  
22 agreement is not necessarily an obstacle to plaintiffs' claim.");  
23 United States v. MMR Corp. (LA), 907 F.2d 489, 498 (5th Cir. 1990)  
24 ("[A] noncompetitor can join a Sherman Act bid-rigging conspiracy  
25 among competitors."). Indeed, in Green, the defendant was a  
26 consultant who did not compete with the contractors in the case;  
27 nevertheless, the Ninth Circuit found sufficient evidence to  
28 sustain her conviction for participating in a horizontal bid

1 rigging scheme. Thus, that Barclays, Moses and Goldman Sachs were  
2 not KKR, Centerview and Vestar's competitors does not require  
3 dismissal of Plaintiff's conspiracy claim.

4 Nevertheless, Plaintiff does not allege facts that imply that  
5 all the parties agreed to the purported antitrust conspiracy. To  
6 state a claim under section 1, a plaintiff must plead "enough  
7 factual matter (taken as true) to suggest that an agreement was  
8 made." Twombly, 550 U.S. at 556. "A statement of parallel  
9 conduct, even conduct consciously undertaken, needs some setting  
10 suggesting the agreement necessary to make out a § 1 claim;  
11 without that further circumstance pointing toward a meeting of the  
12 minds, an account of a defendant's commercial efforts stays in  
13 neutral territory." Id. at 557.

14 Here, Plaintiff pleads reasons as to why each of the parties  
15 was interested in having the KKR-led team prevail in bidding for  
16 Del Monte. Barclays and Moses wanted to benefit from both sides  
17 of the deal. KKR, Centerview and Vestar wanted to prevail at the  
18 lowest possible price. Goldman Sachs wanted to obtain five-  
19 percent of the financing syndication rights, as promised by KKR.  
20 Plaintiff also alleges roles for Defendants in a conspiracy.  
21 This, on its own, is not sufficient; "plaintiffs must allege  
22 additional facts that tend to exclude independent self-interested  
23 conduct as an explanation for defendants' parallel behavior."  
24 Twombly, 550 U.S. at 552 (citation and internal quotation and  
25 editing marks omitted).

26 Additionally, Plaintiff's allegations do not suggest that  
27 Goldman Sachs was aware of what had occurred in the bidding  
28 process prior to it receiving the offer of a percentage of the

1 syndication rights from KKR. Plaintiff pleads only that Goldman  
2 Sachs dropped its efforts to run the go-shop period after KKR  
3 offered it five percent of the syndication rights. This does not  
4 imply that Goldman Sachs had any knowledge of any arrangement  
5 between Barclays, Moses, KKR, Centerview and Vestar.

6 Plaintiff's reliance on the alleged "club rules" complicates  
7 its antitrust theory. Plaintiff does not allege that Barclays,  
8 Moses, or Vestar were aware of the alleged private equity firm  
9 cartel or that its rules could preclude bids by some firms during  
10 a go-shop period. Without such an allegation, there can be no  
11 meeting of the minds that Defendants' alleged antitrust conspiracy  
12 would depend on the operation of the "club rules."

13 Accordingly, Plaintiff's claim is dismissed for the  
14 additional reason that Plaintiff does not allege an antitrust  
15 conspiracy.

#### 16 CONCLUSION

17 For the foregoing reasons, the Court GRANTS Defendants' joint  
18 motion to dismiss (Docket No. 67) and Goldman Sachs' motion to  
19 dismiss (Docket No. 66). Plaintiff fails to plead an unreasonable  
20 restraint of trade and a cognizable an antitrust conspiracy.

21 Plaintiff may file an amended complaint by September 15,  
22 2011. Defendants shall answer or move to dismiss any amended  
23 complaint within twenty-one days of the date it is filed. If  
24 Defendants move to dismiss Plaintiff's amended pleading, they  
25 shall submit a consolidated brief, not to exceed thirty-five  
26 pages. If some Defendants desire to file separate memoranda of  
27 points and authorities, they may do so, so long as Defendants'  
28 briefing collectively does not exceed the thirty-five-page limit.

1 Plaintiff shall respond in a brief not to exceed thirty-five  
2 pages. Defendants' reply, if necessary, shall not exceed twenty  
3 pages. Any motion to dismiss will be heard on November 17, 2011  
4 at 2:00 p.m.

5 Unless the parties stipulate to the contrary, Plaintiff's  
6 motion for class certification is due November 17, 2011,  
7 Defendants' opposition is due January 12, 2012, and Plaintiff's  
8 reply is due January 26, 2012. The motion will be heard on  
9 February 16, 2012 at 2:00 p.m.

10 IT IS SO ORDERED.

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Dated: 8/30/2011

  
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CLAUDIA WILKEN  
United States District Judge