

15-1161

Planetarium Travel, Inc. v. Altour International Inc. et al.

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

1 At a stated term of the United States Court of Appeals
2 for the Second Circuit, held at the Thurgood Marshall United
3 States Courthouse, 40 Foley Square, in the City of New York,
4 on the 19th day of November, two thousand fifteen.

5
6 **PRESENT: DENNIS JACOBS,**
7 **DEBRA ANN LIVINGSTON,**
8 **CHRISTOPHER F. DRONEY,**
9 **Circuit Judges.**

10
11 - - - - -X
12 **PLANETARIUM TRAVEL, INC.**
13 **Plaintiff-Appellant,**

14
15 **-v.-**

15-1161

16
17 **ALTOUR INTERNATIONAL INC.,**
18 **Defendant-Appellee.**

19 - - - - -X
20
21 **FOR APPELLANT:** DAVID DETOFFOL, DETOFFOL &
22 ASSOCIATES, New York, New York.

23
24 **FOR APPELLEE:** EVAN SHAPIRO, SKARZYNSKI BLACK
25 LLC, New York, New York.

26
27 Appeal from a judgment of the United States District
28 Court for the Southern District of New York (Torres, J.).

1
2 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED**
3 **AND DECREED** that the judgment of the district court be
4 **AFFIRMED.**

5
6 Planetarium Travel, Inc. ("Planetarium") appeals from
7 the judgment of the United States District Court for the
8 Southern District of New York (Torres, J.), granting Altour
9 International Inc's ("Altour") motion to dismiss this
10 antitrust case. We assume the parties' familiarity with the
11 underlying facts, the procedural history, and the issues
12 presented for review.

13
14 Planetarium's complaint alleges that Altour, another
15 supplier, induced American Express Travel Related Services
16 Company, Inc. ("Amex"), a distributor, not to renew
17 Planetarium's franchise agreement with Amex. Planetarium's
18 antitrust claim is thus based on a vertical restraint. See
19 Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 730
20 (1988) ("Restrains . . . imposed by agreement between firms
21 at different levels of distribution [are] vertical
22 restraints."). "[V]ertical restraints are generally subject
23 to 'rule of reason' analysis." Elecs. Commc'ns Corp. v.
24 Toshiba Am. Consumer Prods., Inc., 129 F.3d 240, 243 (2d
25 Cir. 1997); see also Leegin Creative Leather Prods., Inc. v.
26 PSKS, Inc., 551 U.S. 877, 907 (2007).

27
28 To establish an antitrust violation under the rule of
29 reason: (1) plaintiff "'bears the initial burden of showing
30 that the challenged action has had an *actual* adverse effect
31 on competition as a whole in the relevant market"; (2) if
32 the plaintiff carries this burden, "the burden shifts to the
33 defendant to establish the 'pro-competitive redeeming
34 virtues' of the action"; (3) should the defendant make this
35 showing, "the plaintiff must then show that the same pro-
36 competitive effect could be achieved through an alternative
37 means that is less restrictive of competition." K.M.B.
38 Warehouse Distribs., Inc. v. Walker Mfg. Co., 61 F.3d 123,
39 127 (2d Cir. 1995) (quoting Capital Imaging Assocs., P.C. v.
40 Mohawk Valley Med. Assocs., Inc., 966 F.2d 537, 543 (2d Cir.
41 1993)). Planetarium's initial burden in this analysis can
42 be discharged in two different ways: alleging an "actual
43 adverse effect on competition, such as reduced output," or
44 "indirectly by establishing that [the competitor] had
45 sufficient market power to cause an adverse effect on
46 competition." Tops Mkts., Inc. v. Quality Mkts., Inc., 142
47 F.3d 90, 96 (2d Cir. 1998). Importantly, "[b]ecause the

1 antitrust laws protect competition as a whole, evidence that
2 plaintiffs have been harmed as individual competitors will
3 not suffice." Geneva Pharm. Tech. Corp. v. Barr Labs.,
4 Inc., 386 F.3d 485, 507 (2d Cir. 2004).

5
6 Planetarium has failed to allege an actual adverse
7 effect on competition. "[E]xclusive distributorship
8 arrangements are presumptively legal," and Planetarium has
9 failed to explain how this arrangement would impair
10 competition in the sales of first class and business class
11 airline tickets. Elecs. Commc'ns Corp., 129 F.3d at 245.
12 Nor has Planetarium alleged that Altour has sufficient
13 market power to adversely affect competition. At most, an
14 examination of the complaint and its attached documents
15 reveals that Altour is the 13th largest travel agency in the
16 United States and that Amex was only recouping 9 % of travel
17 spending from its card members. These factual allegations
18 provide no indication that such market share gives rise to
19 market power, i.e., the ability "to raise price
20 significantly above the competitive level without losing all
21 of [its] business." K.M.B. Warehouse Distributions, Inc. v. ITEK Corp.,
22 129 F.3d at 1560, 1570 (11th Cir. 1983)). The district court
23 correctly ruled that Planetarium did not plausibly allege a
24 violation of the antitrust laws.
25

26
27 For the foregoing reasons, and finding no merit in
28 Planetarium's other arguments, we hereby **AFFIRM** the judgment
29 of the district court.
30

31 FOR THE COURT:
32 CATHERINE O'HAGAN WOLFE, CLERK
33


