No. _____

IN THE

Supreme Court of the United States

UPS SUPPLY CHAIN SOLUTIONS, INC.,
Petitioner

v.

EVA AIRWAYS CORPORATION,
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

A cargo interest plaintiff sought recovery against a contracting air carrier (petitioner UPS Supply Chain Solutions, Inc. ["UPS-SCS"]) for alleged damages to shipments from the United States to Korea pursuant to the Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999, S. Treaty Doc. No. 106-45 (2000) (the "Montreal Convention"). The contracting air carrier (petitioner UPS-SCS) brought a third-party complaint in the action against the acting carrier (respondent EVA Airways Corporation ["EVA"]) for indemnity and contribution pursuant to the Montreal Convention. The acting carrier (respondent EVA) challenged personal jurisdiction in the forum where the underlying cargo claim was brought.

Should the Fed. R. Civ. P. 12(b)(2) motion to dismiss for lack of personal jurisdiction have been granted?

Specifically, did the District Court and/or the Court of Appeals correctly interpret and apply the requirements of treaty law contained in the Montreal Convention to the personal jurisdiction analysis utilized to rule on and/or review the Rule 12(b)(2) motion to dismiss?

PARTIES TO THE PROCEEDING AND RELATED CASES

All parties appear on the caption of the case on the cover page.

The parent corporation of petitioner UPS-SCS is United Parcel Service, Inc., a publicly held company that holds 10% or more of the stock of UPS-SCS.

National Union Fire Insurance Company of Pittsburgh, PA v. UPS Supply Chain Solutions, Inc., No. 1-20-cv-02818, U.S. District Court for the Southern District of New York. Order entered Oct. 18, 2021.

National Union Fire Insurance Company of Pittsburgh, PA v. UPS Supply Chain Solutions, Inc., No. 21-2867, U.S. Court of Appeals for the Second Circuit. Judgment entered Jul. 19, 2023.

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Petitioner UPS-SCS respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (Pet. App. A1-A20) appears at Appendix A to the petition and is reported at 74 F.4th 66 (2d Cir. 2023).

The opinion and order of the United States District Court for the Southern District of New York (Pet. App. A21-A29) appears at Appendix B to the petition and is unpublished.

STATEMENT OF JURISDICTION

The date on which the United States Court of Appeals for the Second Circuit rendered its decision was July 19, 2023. Pet. App. A1-A20. No petition for rehearing was timely filed in the case. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT TREATY PROVISIONS

The Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999, S. Treaty Doc. No. 106-45 (2000) (the "Montreal Convention") provides in relevant part:

Chapter III

Liability of the Carrier and Extent of Compensation for Damage

* * *

Article 33 — Jurisdiction

1. An action for damages must be brought, at the option of the plaintiff, in the territory of one of the States Parties, either before the court of the domicile of the carrier or of its principal place of business, or where it has a place of business through which the contract has been made or before the court at the place of destination.

* * *

Chapter V

Carriage by Air Performed by a Person other than the Contracting Carrier

* * *

Article 45 — Addressee of Claims

In relation to the carriage performed by the actual carrier, an action for damages may be brought, at the option of the plaintiff, against that carrier or the

contracting carrier, or against both together or separately. If the action is brought against only one of those carriers, that carrier shall have the right to require the other carrier to be joined in the proceedings, the procedure and effects being governed by the law of the court seized of the case.

Article 46 — Additional Jurisdiction

Any action for damages contemplated in Article 45 must be brought, at the option of the plaintiff, in the territory of one of the States Parties, either before a court in which an action may be brought against the contracting carrier, as provided in Article 33, or before the court having jurisdiction at the place where the actual carrier has its domicile or its principal place of business.

INTRODUCTION

Each and every day thousands of international flights crisscross the globe bringing passengers and cargo to and from the signatory countries, including the United States, that participate in the Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999, S. Treaty Doc. No. 106-45 (2000) (the "Montreal Convention"). This important treaty balances the objectives of providing for equitable compensation for injury to passengers and damage to cargo that unfortunately occur in international air carriage while also facilitating the efficient operation of international carriage by air of passengers and cargo. The very existence of an international treaty on the subject matter underscores its importance to the global economy and the economies of the participating nations thereto.

The unique aspects of American federalism serve to complicate the theories of jurisdiction inherited from the common law and the result is a highly complex body of law respecting personal jurisdiction. This case, and the voluminous other ones like it that have the potential to arise from the thousands of crisscrossing international air shipments in and out of the United States, exist at the intersection between the liability mechanism established by the Montreal Convention and the uniquely complicated application of American personal jurisdiction jurisprudence.

In a case of first impression, the Court has the opportunity to provide sage and necessary guidance

on how courts should interpret and enforce the treaty law at issue here when personal jurisdiction challenges arise. Under circumstances presented by a common dual cargo carrier situation faced here, does a proper reading of the Montreal Convention provide support for the rightful assertion of personal jurisdiction against one carrier when another carrier seeks to join the former in an active underlying cargo damage action? UPS-SCS maintains that it does.

STATEMENT OF THE CASE

A. Factual Background

The underlying plaintiff in the District Court action, National Union Fire Insurance Company of Pittsburgh, PA ("Plaintiff"), sought recovery in the U.S. District Court for the Southern District of New York against UPS-SCS for alleged damages to shipments of vitamins transported by air from Chicago, Illinois in the United States to South Korea under the Montreal Convention. Pet. App. A3. As the contracting carrier, UPS-SCS brought a third-party complaint against the acting carrier EVA for indemnity and contribution pursuant to the Montreal Convention. Pet. App. A3. The reason for EVA's inclusion was that it contracted with UPS-SCS to carry the shipments of vitamins from the United States to South Korea via air. *Id.* Although headquartered in Taiwan, EVA admitted that it conducts business operations in New York and operates flights to and from JFK International Airport. Pet. App. A22. However, the cargo at issue did not travel through New York. *Id.*

B. Procedural History

EVA brought a motion to dismiss under Rule 12(b)(2) of the Federal Rules of Civil Procedure asserting lack of personal jurisdiction over it in the Southern District of New York. Pet. App. A3. The District Court below granted the Rule 12(b)(2) motion of EVA and dismissed the third-party complaint brought against EVA by UPS-SCS. Pet. App. A4.

The District Court held that there was no jurisdiction under N.Y. C.P.L.R. § 302(a)(3) ruling that UPS-SCS failed to allege an injury to a person or property within New York. Pet. App. A26. The District Court rejected the use by UPS-SCS of *Chubb Ins. Co. v. Menlo Worldwide Forwarding, Inc.*, 634 F.3d 1023 (9th Cir. 2011) to support its argument. Pet. App. A26. In addition, the District Court rejected the argument by UPS-SCS that the Montreal Convention and consent could support personal jurisdiction over EVA; the District Court concluded that the Montreal Convention does not afford or confer personal jurisdiction. Pet. App. A29.

An appeal to the Court of Appeals followed. While the appeal was pending, UPS-SCS and Plaintiff entered into a settlement agreement on the underlying action. Pet. App. A4. Thereafter, the Court of Appeals affirmed the District Court's dismissal of EVA for lack of personal jurisdiction. Pet. App. A1. Like the District Court, the Court of Appeals held that UPS-SCS failed to allege an in-state injury required for specific jurisdiction under New York's long arm statute. Pet. App. A9. The Court of Appeals

also held that neither the Montreal Convention nor consent could support personal jurisdiction over EVA. Pet. App. A12-A19. The Court of Appeals recognized that the appeal presented a question of first impression: whether the Montreal Convention confers personal jurisdiction. Pet. App. A2. In addition to a textual analysis of the treaty, the Court of Appeals also considered its precedent interpreting the provisions of the Warsaw Convention—the predecessor treaty which the Montreal Convention replaced—as non-binding persuasive authority for its conclusions regarding the Montreal Convention. Pet. App. A15-A18.

REASONS FOR GRANTING THE WRIT

I. The Case Presents a Question of First Impression Involving the Interpretation and Application of a Treaty

Before the Court of Appeals issued its opinion below, there was a dearth of any published, binding precedent directly addressing the interplay of the Montreal Convention, the existence and treatment of dual international air carriers, and the personal jurisdiction doctrines applied in the federal courts. The Court of Appeals itself acknowledged that the appeal before it presented a question of first impression: whether the Montreal Convention confers personal jurisdiction. Pet. App. A2. Moreover, when the Court of Appeals performed its textual analysis of the Montreal Convention, it was informed not by any prior precedent interpreting the current language of the treaty but rather by prior precedent interpreting the provisions of the Warsaw Convention—the predecessor treaty which the Montreal Convention replaced—as admittedly non-binding persuasive authority for its conclusions. Pet. App. A15-A18.

Likewise, the District Court below cited to an unpublished, non-binding district court decisions when holding that that the Montreal Convention does not afford or confer personal jurisdiction; the cases cited did not fully address the issue or the UPS-SCS argument of consent as it relates to the application of the Montreal Convention to the personal jurisdiction analysis. In briefing before the District Court, EVA

cited no binding, published precedent that has fully addressed the argument made by UPS-SCS that the Montreal Convention can be interpreted to establish personal jurisdiction over EVA based upon a reading of Articles 33, 45, and 46 in and of itself. None of the authorities cited by EVA directly and fully addressed the interplay of the Montreal Convention, the existence and treatment of dual international air carriers (and their own claims against each other pursuant to Art. 45), and the personal jurisdiction doctrines applied in the federal courts.

The opinion of the Court of Appeals below will be the highest level of precedential authority tackling the intersection between the liability mechanism for dual air carriers established by the Montreal Convention and the uniquely complicated application of American personal jurisdiction jurisprudence and ultimately governing cases like this one that have the potential to arise from the thousands of crisscrossing international air shipments in and out of the United States each and every day. Given the importance to and impact on daily international commerce, it is imperative that the rule of law established in these circumstances be the correct one.

While the Court of Appeal's analysis of the issues was backwards looking (to prior precedent involving the predecessor treaty which the Montreal Convention replaced), the Court's review of this case will allow for a more forward looking analysis taking into consideration a plain and reasonable interpretation of the newer language and scheme provided in the Montreal Convention and its

provisions. The fact remains that the prior treaty was replaced and a newer treaty deserve a fresh interpretation that fits the language and scheme contained therein.

II. The Court is Uniquely Qualified to Make a Correct and Plain Reading of the Montreal Convention to Govern All Such Similar Cases in the United States

Given a treaty's place in the hierarchy of laws recognized by the language of the U.S. Constitution itself (*see* Art. III, Sec. 2), the Court is the appropriate and experienced body to interpret and harmonize a treaty such as the Montreal Convention with other jurisprudence governing the situation presented, *i.e.*, the law of personal jurisdiction in the United States.

UPS-SCS maintains that a plain reading of the Montreal Convention's provisions and the process they describe for handling instances of dual carriers of the nature described herein suggests that the Montreal Convention itself confers personal jurisdiction when one of the dual carriers reins the other into existing litigation brought by the underlying cargo interest. Montreal Convention, Arts. 33, 45, and 46; *see Medellin v. Texas*, 552 U.S. 491, 506 (2008) ("The interpretation of a treaty, like the interpretation of a statute, begins with its text."); *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 134 (1989) (Where the text of a treaty is clear, a court has "no power to insert an amendment" based on consideration of other sources.").

In addition to the Montreal Convention directly conferring personal jurisdiction by its terms, UPS-SCS asserts that consent to general personal jurisdiction is a possibility under the existing jurisprudence. *See Chen v. Dunkin' Brands, Inc.*, 954 F.3d 492, 499 (2d Cir. 2020) (foreign corporation does not consent to general personal jurisdiction by merely registering to do business in N.Y. and designating state agent for service of process); s*ee also Diab v. British Airways, PLC*, 2020 U.S. Dist. LEXIS 218765, at *11, 2020 WL 6870607 (E.D. Pa. Nov. 12, 2020) ("'Consent is a traditional basis for assertion of jurisdiction long upheld as constitutional.'") (citing *Bane v. Netlink, Inc.*, 925 F.2d 637, 641 (3d Cir. 1991)).

EVA cannot dispute that it agreed to carry the cargo at issue from Chicago to South Korea. As an international air carrier, EVA was well aware of the application and import of the Montreal Convention. In fact, EVA asserted in one of its affirmative defenses that the transportation at issue was "international carriage" within the meaning of the Montreal Convention and that the rights of the parties are governed exclusively by the provisions of the Montreal Convention. Moreover, EVA asserted various affirmative defenses pursuant to the provisions of the Montreal Convention.

EVA simply chose to ignore the import of the Montreal Convention when it suited it. The Montreal Convention gives the claiming party (Plaintiff) the option of bringing an action for damages against the actual carrier or the contracting carrier, or both: "In relation to the carriage performed by the actual

carrier, an action for damages may be brought at the option of the plaintiff, against the carrier or the contracting carrier, or against both together or separately." Montreal Convention, Art. 45. The proper forum is dependent on locations related to the carrier(s) being sued; accordingly, when this duality of carriers exists, the locations may be entirely divergent. *See* Montreal Convention, Arts. 33 and 46. If a claiming party pursues only one of the carriers, the Montreal Convention provides a mechanism for that carrier to rein in the other: "If the action is brought against only one of the carriers, that carrier shall have the right to require the other carrier to be joined in the proceedings, the procedure and effects being governed by the law of the court seized of the case." (Montreal Convention, Art. 45.) Given this scheme created by the Montreal Convention, it can hardly be said that EVA was surprised by the third-party action against it or that it was unaware of the possibility of potential jurisdiction over or liability against it. When EVA freely chose to do business with contracting carrier UPS-SCS to serve as the actual international air carrier, it consented to the Court's personal jurisdiction over it in the event that UPS-SCS found that it needed to avail itself of the procedure provided in Article 45 of the Montreal Convention. Whereas in *Chen* (cited above) a company does not consent to NY jurisdiction by registering to do business in NY and designating a state agent for service of process, the result should be different when an air carrier willingly participates and engages in business activity subject to an international treaty and its procedure. UPS-SCS continues to assert that consent to personal

jurisdiction in a court where the treaty procedure allows an action to exist is a viable argument.

UPS-SCS implores the Court to engage a fresh interpretation of the Montreal Convention so as to appropriately consider the viable arguments it has with regard to the assertion of personal jurisdiction[1] over EVA based upon the language from and the scheme created by the treaty at issue.

III. Due Consideration Should Be Given to a Unique Commercial Situation Which Warranted Treatment by International Treaty

Given the inherent difficulty in negotiating and ratifying an international treaty adopted by multiple countries around the world, the importance of the commercial situation at issue here becomes clear evident. Instances of dual carriers providing international air cargo transportation of the nature described took up space in the Montreal Convention. The treaty includes valuable language that specifically addresses when one of the dual carriers reins the other into existing litigation brought by the underlying cargo interest.

Specific treatment of this situation in a treaty distinguishes it from other commercial situations that

[1] Review of dismissal for lack of personal jurisdiction is de novo. *Porina v. Marward Shipping Co.*, 521 F.3d 122, 126 (2d Cir. 2008); *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, 171 F.3d 779, 784 (2d Cir. 1999).

may have given rise to seemingly analogous authorities drawn upon by EVA or the courts below. More importantly, the courts below rejected the use by UPS-SCS of *Chubb Ins. Co. v. Menlo Worldwide Forwarding, Inc.*, 634 F.3d 1023 (9th Cir. 2011) to support its argument that there was personal jurisdiction under N.Y. C.P.L.R. § 302(a)(3).

The failure to consider other precedents regarding the interpretation of the Montreal Convention and its scheme as they may have related to the personal jurisdiction question gives credence to the position of UPS-SCS that due consideration was not given to an instance of a commercial situation expressly addressed and governed by an international treaty.

Given the focus that diplomats and foreign leaders have given to the commercial situation presented by this case through its inclusion in an international treaty, this case should appropriately be in the hands of the highest court in the land so that it can provide sage and necessary guidance on how courts should interpret and enforce the treaty law at issue here when personal jurisdiction challenges arise when one carrier in common dual cargo carrier situation seeks to join another one in an active underlying cargo damage action.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

Dated:
October 17, 2023

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