To be argued by
DUSTIN J. BROCKNER
{10 minutes requested}

Supreme Court of the State of New York
Appellate Division – Third Department

No. 531110

STATE OF NEW YORK,

Plaintiff-Appellant,

v.

VAYU, INC.,

Defendant-Respondent.

BRIEF FOR APPELLANT

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PRELIMINARY STATEMENT

Defendant Vayu, Inc. is a company that designs and makes unmanned aerial vehicles ("UAVs" or "drones"). In 2016, it entered into an agreement with the State University of New York at Stony Brook ("Stony Brook") to sell and service two drones for use in Stony Brook's global health program. Stony Brook planned to use the drones to deliver medical supplies in Madagascar. After Vayu delivered defective drones, plaintiff the State of New York, acting on Stony Brook's behalf, sued Vayu in Supreme Court, Albany County (Walsh, J.), for breach of contract, among other claims. Vayu moved to dismiss for lack of personal jurisdiction. The court granted the motion and dismissed the complaint.

This Court should reverse. Making all inferences in favor of the State as the non-moving party, the State made a prima facie showing that Vayu's numerous activities in or directed at New York constituted the transaction of business here under New York's long-arm statute, C.P.L.R. 302(a)(1), thus giving the court personal jurisdiction over Vayu under that statute. Over a two-year period, Vayu, through its CEO, repeatedly projected itself into the State—via telephone calls and emails to Stony Brook employees—to create a continuous business relationship

with the university. In addition to agreeing to produce the two drones at issue, Vayu promised to provide training, technical support, and product upgrades. It also actively cultivated the parties' relationship in the hopes of selling Stony Brook more drones. And, when a dispute over the two drones arose, Vayu's CEO traveled to New York to resolve it. Further, there is a substantial relationship between the parties' dealings and the claims asserted; all claims arise directly from their agreement.

Given Vayu's New York contacts, the State also made a prima facie showing that exercising jurisdiction comports with due process.

QUESTIONS PRESENTED

Whether Supreme Court erred when it dismissed the complaint for lack of personal jurisdiction where Vayu, acting through its CEO, repeatedly projected itself into New York through telephone calls and emails that created an ongoing business relationship with a New York State agency and visited New York in furtherance of that agreement.

STATEMENT OF THE CASE

A. Factual Background

1. Vayu's Business Relationship with the State

Stony Brook is a public university located in Stony Brook, New York. From 2015 to 2018, Dr. Peter Small was a tenured professor at the university and resided in New York. Beginning in 2015, he ran Stony Brook's Global Health Institute ("GHI"), an interdisciplinary program that sought ways to improve access to health care in developing countries. (Record on Appeal ["R."] 50-51.) One project focused on using UAVs to deliver medical supplies to remote areas in such countries, including Madagascar. (R. 51.)

As part of that project, in 2015, Dr. Small contacted defendant Vayu, Inc., a company that designs and makes drones for medical purposes. (R. 32, 51.) Vayu is based in Michigan and incorporated under Delaware law. (R. 32.) Dr. Small was familiar with Vayu because its founder and CEO, Daniel Pepper, had contacted him in 2013 (i.e., before he began working at Stony Brook) about using drones to transport lab samples. (R. 51.)

Over the following months, Vayu—through its CEO, Pepper—repeatedly contacted Dr. Small and other Stony Brook employees to negotiate the possibility of Vayu producing drones for GHI's project. (R. 51.) As Dr. Small attests, these contacts—initiated by Vayu—entailed numerous phone calls made to New York telephone numbers and emails to Stony Brook addresses. (R. 51-52.)

The parties' negotiations contemplated creating an ongoing business relationship. In addition to making the drones, Vayu was expected to provide flight training and technical support for Stony Brook employees, as well as product upgrades. (R. 53.)

In mid-2016, as negotiations continued, Vayu conducted for Stony Brook a test flight of two drones in Madagascar. The drones performed poorly. One crashed and the other failed to perform as expected. (A. 52.) Over the following weeks, Vayu continued to negotiate with Stony Brook employees regarding Vayu producing and servicing drones for Stony Brook. Vayu promised that it could make drones that would meet Stony Brook's specifications. (R. 52-53.)

As a result of the negotiations, around September 2016, Stony Brook agreed to pay $50,000 to Vayu for two drones that Vayu would

deliver to Madagascar. (R. 53.) Vayu's invoice to Stony Brook was billed to a New York address. (R. 53, 63-64.) Stony Brook wired payment in full to Vayu. (R. 53, 66.)

In November 2016, Vayu delivered the two drones. They were defective and inoperable. (R. 54-55; *see* R. 122-142 [photographs of defects].) Vayu thereafter communicated with Stony Brook by e-mail and telephone to discuss repairing or replacing the drones. (R. 55.)

Vayu sought not just to maintain its relationship with Stony Brook but also to grow it. In 2016, Stony Brook and Vayu partnered on a grant proposal that sought $900,000 from the U.S. Agency for International Development ("USAID") to fund the use of drones to deliver medical supplies in developing countries. (R. 53.) The proposal identified Stony Brook as one of Vayu's "[i]mplementing partners." (R. 84, 73.). The parties planned to use part of the grant for maintenance of the two drones at issue and to purchase additional drones for GHI's work in Madagascar. (R. 53.) While preparing the proposal, Vayu repeatedly communicated with Stony Brook employees by email and phone. (R. 53-54.) Although USAID approved the grant, Vayu unilaterally decided not to use any of the funds to support the parties' work together. (R. 54.)

After delivery of the defective drones, in December 2016, Vayu's CEO, Pepper, sent an email to Dr. Small expressing his hope that the parties could continue to "work collectively" in Madagascar and "plan future work" there. (R. 147.) Pepper also explained that Vayu valued Stony Brook's "expertise and perspective to define the next steps for the larger-scale implementation in Madagascar." He proposed setting up a call "to tackle the many hurdles we have to be successful in the next steps of this work." (R. 147.)

2. The Parties' Meeting in New York

The parties' dispute over the defective drones continued into 2017. Dr. Small called and emailed Pepper several times but got no response. (R. 56, 152.) When Pepper finally contacted Dr. Small, in September 2017, he asked to meet in New York to discuss the issues surrounding the drones and the Madagascar project. (R. 56.)

The two met in New York, where the parties agreed to terms to resolve their dispute. Stony Brook, at its own expense, would ship the defective drones to Vayu. In return, Vayu would send replacements to Madagascar that met Stony Brook's specifications and also train a Stony Brook employee on how to fly them. (R. 56.)

Afterwards, Dr. Small and Pepper exchanged emails that memorialized their discussion and confirmed their intent to continue their relationship. (R. 56-57.) As Pepper noted, "[o]ur shared vision" had "hit a wall in Madagascar, where we had high hopes for a large, extensive, and integrated [drone delivery] network." (R. 60.) Nonetheless, as Pepper explained, Vayu "want[s] to keep working with you." (R. 61.) Dr. Small similarly noted that "it was important to catch up and be reminded that this is a long and meaningful relationship in which shared passion and mutual trust has benefited both of us." (R. 156.)

In January 2018, Stony Brook shipped the drones back to Vayu. Yet Vayu refused to replace the drones as agreed. Nor has it refunded Stony Brook for the drones or paid for the cost of their return. (R. 57-58.)

B. Procedural History

In November 2018, the State of New York, acting on Stony Brook's behalf, sued Vayu in Supreme Court, Albany County. (R. 18-26.) The first claim—for breach of contract—alleges that Vayu breached its agreement with Stony Brook by providing defective drones and failing to replace those drones within a reasonable time. That claim seeks $51,065.46 in damages, plus interest, which equals the amount Stony Brook paid for

the drones plus the cost it incurred when returning them to Vayu. (R. 19-21.) The complaint also asserts claims for breach of warranty, conversion, unjust enrichment, and misappropriation of public property based on the parties' transaction relating to the two drones. (R. 23-25.)

Vayu moved to dismiss the complaint under C.P.L.R. 3211(a)(8) for lack of personal jurisdiction. (R. 28.) In opposing the motion, the State submitted an affidavit from Dr. Small that recounted Vayu's numerous New York contacts throughout the parties' dealings. (R. 50-58; *see* R. 59-174 [attachments to Small affidavit].) By decision and order, Supreme Court granted the motion and dismissed the complaint. The court reasoned that Vayu's activities in or directed at New York did not amount to "transact[ing] any business" within the State under the long-arm statute, C.P.L.R. 302(a)(1). (R. 14-15.) The State timely appealed. (R. 3.)

ARGUMENT

SUPREME COURT HAS PERSONAL JURISDICTION OVER VAYU

On a motion to dismiss for lack of personal jurisdiction, a court must accept as true the facts asserted in the complaint and the plaintiff's affidavits opposing the motion and accord the plaintiff "the benefit of every possible favorable inference." *Rushaid v. Pictet & Cie*, 28 N.Y.3d

316, 327 (2016) (internal quotation marks omitted); *Doller v. Prescott*, 167 A.D.3d 1298, 1302 (3d Dep't 2018). To defeat that motion, the plaintiff need only make "a prima facie showing" that Supreme Court had personal jurisdiction over the defendant. *Doller*, 167 A.D.3d at 1302.

As explained below, the State satisfied this burden to show that jurisdiction was proper under New York's long-arm statute and comported with due process.

A. Jurisdiction is proper under New York's long-arm statute.

New York's long-arm statute grants courts personal jurisdiction over any non-resident defendant who "through an agent . . . transacts any business within the state." C.P.L.R. 302(a)(1). This provision provides a "flexible" and "liberal" standard that even one transaction can satisfy. *Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc.*, 15 N.Y.2d 443, 456 (1965). Thus, jurisdiction is proper under C.P.L.R. 302(a)(1) if (i) the "defendant's activities here were purposeful" and (ii) "there is a substantial relationship between the transaction and the claim asserted." *Rushaid*, 28 N.Y.3d at 323 (internal quotation marks omitted). The State has made a prima facie showing that both prongs are satisfied.

1. Vayu engaged in numerous purposeful activities in or directed at New York.

Turning to the first prong, purposeful activities are those "with which a defendant, through volitional acts, avails itself of the privilege of conducting activities within [New York], thus invoking the benefits and protections of its laws." *Id.* (quoting *Fischbarg v. Doucet*, 9 N.Y.3d 375, 380 [2007]). This does not require a defendant to be physically present. *Deutsche Bank Sec., v. Montana Bd. of Investments*, 7 N.Y.3d 65, 71 (2006). Rather, a defendant can engage in sufficient purposeful activities simply by "using electronic and telephonic means to project [itself] into New York to conduct business transactions." *Id.* Further, where, as here, the dispute arises from the parties' contract, jurisdiction may be predicated on any purposeful act in this state that relates to or furthers that contract, even if performed *after* the contract's formation. *Longines*, 15 N.Y.2d at 457; *see also CutCo Indus., Inc. v. Naughton*, 806 F.2d 361, 367 (2d Cir. 1986) ("Acts performed by a defendant subsequent to the execution of a contract are ordinarily of jurisdictional consequence" under C.P.L.R. 302(a)(1)).

Ultimately, "although it is impossible to precisely fix those acts that constitute a transaction of business," the "primary consideration" is "the

quality of the defendants' New York contacts." *Fischbarg*, 9 N.Y.3d at 380.

The quality of Vayu's New York contacts, taken together, establish that Vayu transacted business here. Beginning in 2015, Vayu—through its CEO—repeatedly projected itself into New York over a two-year period by calling and emailing Dr. Small, who lived in New York, and other Stony Brook employees. Vayu initiated these contacts and did so by calling New York telephone numbers and emailing Stony Brook email addresses. (R. 51-52.) Making all inferences in favor of the State, the Stony Brook employees were in-state when they received these communications. *See Fischbarg*, 9 N.Y.3d at 381 (non-resident defendants engaged in purposeful activities where, during the parties' nine-month relationship, the "defendants communicated regularly with [the plaintiff] in this state" by phone and email).

These New York-directed communications were integral to the transaction at issue. Vayu used them to negotiate drone specifications and the ongoing services that Vayu would provide to Stony Brook. *See, e.g.*, *Deutsche Bank Sec.*, 7 N.Y.3d at 69, 71 (non-resident defendant transacted business here by using instant messenger service to negotiate

sale with New York plaintiff); *C. Mahendra (N.Y.), LLC v. Nat;l Gold & Diamond Ctr., Inc.,* 125 A.D.3d 454, 456 (1st Dep't 2015) (same based on negotiations by phone). Indeed, the design and sale of the drones "was a major aspect of [Vayu's] mission—'part of its principal reason for being.'" *Deutsche Bank Sec.*, 7 N.Y.3d at 72 (citation omitted).

Further, Vayu sent Stony Brook an invoice that billed a New York address and accepted a wire payment that originated from New York. (R. 53, 63-66.) *See Grimaldi v. Guinn*, 72 A.D.3d 37, 52 (2d Dep't 2010) (non-resident defendants' New York activities included a "facsimile transmission of an invoice" into New York and solicitation of payment from New York plaintiff). And, after delivering two defective drones, Vayu continued to project itself into New York to discuss with Stony Brook employees—via phone and email—how to remedy those defects.

Equally important, Vayu's CEO traveled to New York to meet with Dr. Small in an effort to cure Vayu's breach and repair the parties' business relationship. As this Court has explained, "a meeting of parties in New York, even for just one day, may be enough to subject defendants to New York jurisdiction." *Stardust Dance Prods., Ltd. v. Cruise Groups Int'l, Inc.*, 63 A.D.3d 1262, 1264 (3d Dep't 2009); *see Presidential Realty*

Corp. v. Michael Square W., Ltd., 44 N.Y.2d 672 (1978) ("solitary business meeting" in New York can satisfy C.P.L.R. 302(a)(1)). So too here. This meeting was instrumental to the transaction. The parties agreed to terms to resolve their dispute and allow their relationship to continue: Stony Brook would return the drones in exchange for replacements for which Vayu would provide flight training. (R. 56-57.)

These numerous activities in or directed at New York over a two-year period concerned more than a one-off sale of a consumer good. Rather, they resulted in the "purposeful creation of a continuing relationship with a New York [agency]." *D&R Global Selections, S.L. v Bodega Olegario Falcon Pineiro*, 29 N.Y.3d 292, 298 (2017) (internal quotation marks omitted). As part of the transaction, which concerned sophisticated machinery tailored to Stony Brook's needs, Vayu agreed to provide to Stony Brook flight training, ongoing technical support, and product upgrades. (R. 53; *see, e.g.*, R. 156 [Dr. Small describing the parties' relationship as "long and meaningful"].))

Indeed, through its New York contacts, Vayu sought to grow its relationship with Stony Brook to include "a large, extensive, and integrated [drone delivery] network." (R. 60.) To that end, Vayu and

Stony Brook employees worked closely on a grant proposal to USAID that sought funds that were intended to maintain the drones sold to Stony Brook and pay for additional ones. (R. 53-54.) While these efforts did not come to fruition, largely due to Vayu's conduct, including its failure to perform, they confirm that Vayu's contacts were purposefully designed to foster a continuing business relationship with a New York agency.

In sum, Vayu's purposefully availed itself of the privilege of conducting business here because—through numerous New York-directed phone calls and emails over the course of two years and an in-state meeting—Vayu cultivated a continuous business relationship with a New York State agency. *See, e.g.*, *Fischbarg*, 9 N.Y.3d at 381-82; *Grimaldi*, 72 A.D.3d at 52-52. Under the totality of the circumstances, Vayu conducted sufficient purposeful activities here under C.P.L.R. 302(a)(1).

In reaching a contrary conclusion, Supreme Court's misapplied governing law. The court reasoned that while a defendant transacts business in New York when it, on its own initiative, projects itself "into this state to engage in a sustained and substantial transaction," that principle did not apply because "it was [Dr.] Small who contacted Pepper"

in 2015 about having Vayu sell and service drones for Stony Brook. (R. 14-15.) But this ignores that "it is not necessarily who initiated contact that is determinative." *Grimaldi*, 72 A.D.3d at 51; *accord, e.g.*, *Roxx Allison Ltd. v. Jewelers Inc.*, 385 F. Supp. 3d 377, 382 (S.D.N.Y. 2019). Rather, as noted, the court's inquiry under C.P.L.R. 302(a)(1) focuses on "the nature and quality of the contacts and the relationship established as a result." *Grimaldi*, 72 A.D.3d at 51.

Courts have thus repeatedly held that a non-resident defendant transacts business here even if the plaintiff initiated the contact that results in the subject transaction. In *Grimaldi v. Guinn*, the Second Department found that an out-of-state car restoration expert transacted business in New York, even though it was the New York plaintiff who initially solicited the expert to install a car part and that expert never entered New York. 72 A.D.3d at 51-52. As the court explained, after plaintiff' had contacted the expert, that expert "by virtue of his telephone calls and e-mails" to the plaintiff over the course of a year, "purposefully created a continuing relationship with the plaintiff centered on the project at issue." *Id.*

The facts here are materially indistinguishable from *Grimaldi*. Even if Dr. Small is the one who made the first contact with Vayu, notwithstanding the fact that Vayu's CEO had first sought out Dr. Small in 2013 about using drones for medical purposes, Vayu thereafter made numerous phone calls and sent emails to Dr. Small and other Stony Brook employees. Through those contacts, Vayu purposefully created, and maintained, an ongoing business relationship with Stony Brook. In fact, Vayu's contacts are more significant than the defendant in *Grimaldi* given that Vayu's CEO personally met with Dr. Small in New York to further that relationship. *See, e.g.*, *Sterling Nat'l Bank & Trust Co. v. Fid. Mortg. Inv'rs*, 510 F.2d 870, 873-74 (2d Cir. 1975) (holding that although the plaintiff "first solicited" the non-resident defendant, it had engaged in a business transaction here given the "totality" of the defendant's contacts, including a single visit to New York).

Relatedly, in *Gary Null & Associates v. DNE Nutraceuticals Inc.*, a federal district court in New York held that out-of-state manufacturers had transacted business here, even though the plaintiff-buyer "initially reached out to defendants" about purchasing their products. No. 18-CV-7169 (JSR), 2018 WL 6991065, at *3 (S.D.N.Y. Dec. 20, 2018). The court

emphasized that the manufacturers "regularly contact[ed] plaintiff via phone and email" and physically visited the plaintiff in New York "to shore up their relationship," *id.*—as Vayu had done here.

Supreme Court also improperly discounted the jurisdictional significance of the parties' meeting in New York. The court found that the meeting did not support long-arm jurisdiction because it "did not culminate in additional business activities, but instead focused on addressing the existing dispute between the parties regarding the UAVs in Madagascar." (R. 15-16.)

This reasoning is flawed. A defendant's in-state activity that furthers an already-formed contract—such as repairing a breach—constitutes transacting business here under C.P.L.R. 302(a)(1). *See Longines*, 15 N.Y.2d at 457; *D&R Global Selections, S.L. v. Bodega Olegario Falcon Pineiro*, 29 N.Y.3d 292, 298 (2017) (non-resident defendant went to New York "in furtherance of" the parties' existing oral agreement); *Gary Null*, 2018 WL 6991065, at *3. And the purpose of Vayu CEO's meeting with Small in New York was to further that agreement. During the meeting, the parties agreed to terms that would cure Vayu's breach and restore the parties' relationship.

Lastly, Supreme Court's reliance on *Paterno v. Laser Spine Institute*, 24 N.Y.3d 370 (2014), is misplaced. (R. 15.) That case—which involved a medical malpractice action based on a back surgery that a Florida-based medical provider performed in Florida—is readily distinguishable. *Id.* at 372, 375. The defendants in *Paterno*, unlike Vayu here, never physically entered New York in connection with the transaction. *Id.* Nor did they contemplate or seek to create an ongoing relationship with the plaintiff, a New York resident. Rather, the surgery was supposed to be a one-time procedure that cured the plaintiff's back pain. *Id.* at 372-73. Further, the *Paterno* defendants' only New York-specific contacts—calls and emails directed here—concerned primarily "administrative matters" regarding plaintiff's arrival in Florida. *Id.* at 373. Thus, those contacts merely "served the convenience of plaintiff." I*d.* at 378-79 (noting that if jurisdiction can be based on such contacts, it would "set a precedent for almost limitless jurisdiction over out-of-state medical providers").

By contrast, Vayu's New York-directed communications are far more substantial. During their phone calls and emails, initiated by Vayu's CEO, the parties discussed (i) the product and services that Vayu

would provide, (ii) growing their relationship to include additional drones, and (iii) resolving a dispute over Vayu's performance. (R. 53-56.) Indeed, courts—both before and after *Paterno*—have held such substantive telephonic and electronic contacts can satisfy C.P.L.R. 302(a)(1). *See, e.g.*, *Deutsche Bank Sec.*, 7 N.Y.3d at 69, *Grimaldi*, 72 A.D.3d at 51-52; *C. Mahendra (N.Y.)*, 125 A.D.3d at 456 (phone calls conferred personal jurisdiction over a non-resident defendant where "during [those] telephone discussions, the parties negotiated the essential terms required for contract formation").

Therefore, accepting the State's submissions as true and making all inferences in its favor, the State made a prima facie showing that Vayu's activities that occurred in or were directed at New York, taken together, constitute sufficient purposeful activities to establish long-arm jurisdiction. *See Doller*, 167 A.D. at 1302.

2. The State's claims arise from Vayu's New York contacts.

The second prong of C.P.L.R. 302(a)(1) requires that there must be "a substantial relationship" between the transaction and the claim asserted. *Rushaid*, 28 N.Y.3d at 329. This inquiry is "relatively permissive" and "does not require causation." *Id.* Rather, a plaintiff's

claims need only be "in some way arguably connected to the transaction." *Id.* (internal quotation marks omitted)

This requirement is easily satisfied. Plaintiff's claims are connected to the parties' transaction concerning the two drones, as they were directly caused by or flow from Vayu's New York contacts. Through numerous emails and phone calls directed at New York, Vayu induced Stony Brook to enter into an agreement to purchase drones and sought to continue and expand the parties' relationship. Further, the parties met in New York to resolve a dispute over the drones that Stony Brook had purchased. *D&R Global*, 29 N.Y.3d at 299 (substantial relationship established where the defendant "engaged in activities in New York in furtherance of their agreement"). Thus, the State has made a prima facie showing that there is a "substantial relationship" between Vayu's New York activities and the parties' agreement, Vayu's alleged breach or disregard thereof, and potential damages. *See id.*

B. The exercise of personal jurisdiction comports with due process.

To support the exercise of jurisdiction, the State must also make a prima facie showing that the exercise of personal jurisdiction comports

with federal due process. *Id.* Although the long-arm statute and due process are "not coextensive," a case in which personal jurisdiction is statutorily permitted but barred by due process would be "rare." *Rushaid*, 28 N.Y.3d at 330. This is not one of those rare cases.

Due process requires that the defendant have "certain minimum contacts with the forum such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Id.* at 331 (alteration omitted) (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 [1945]).

Here, Vayu established minimum contacts with New York because, as explained *supra* at 10-19, it has "purposefully avail[ed] itself of the privilege of conducting activities within [New York]." *Id.* (internal quotation marks omitted). Further, the fact that the party with whom Vayu transacted was an arm of the State of New York further defeats any assertion that Vayu should not have "reasonably foresee[n] having to defend a lawsuit in New York." *D&R Global*, 29 N.Y.3d at 300.

Nor would maintaining this suit offend "traditional notions of fair play and substantial justice." *Id.* Where, as here, minimum contacts exist, the defendant bears the burden to "present a compelling case" that

the exercise of personal jurisdiction would be "unreasonable." *Id.*; *see Rushaid*, 28 N.Y.3d at 331 (listing five reasonableness factors). Vayu did not offer any compelling reason in Supreme Court. Nor could it. "[M]odern communication and transportation" minimize any burden on Vayu of defending the suit here, and the forum state, New York, has a strong interest in adjudicating a dispute where the State itself is a party. *Rushaid*, 28 N.Y. 3d at 331.

Accordingly, the State made a prima facie showing that the exercise of jurisdiction under C.P.L.R. 302(a)(1) comports with federal due process.

CONCLUSION

This Court should reverse Supreme Court's order that granted Vayu's motion to dismiss for lack of personal jurisdiction and remand this case to Supreme Court for further proceedings.

Dated: Albany, New York
October 22, 2020

Respectfully submitted,

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