STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

LETITIA JAMES
ATTORNEY GENERAL

BARBARA D. UNDERWOOD
SOLICITOR GENERAL

Telephone: (518) 776-2017

November 22, 2021

Honorable John P. Asiello
Clerk of the Court
New York State Court of Appeals
20 Eagle Street
Albany, New York 12207

Re: *State of New York v. Vayu*,
APL-2021-00148

Dear Mr. Asiello:

Please accept this letter as the submission of plaintiff-appellant, the State of New York, under Rule 500.11 in the above-captioned case.

The State appeals as of right from the decision of the Appellate Division, Third Department issued over a two-justice dissent. *See* C.P.L.R. 5601(a). The Third Department affirmed an order of Supreme Court, Albany County, granting defendant-respondent Vayu, Inc.'s motion to dismiss for lack of personal jurisdiction and dismissing the complaint. Vayu is a company that designs and makes unmanned aerial vehicles ("UAVs" or "drones"). In 2016, after months of negotiations, Vayu entered into an agreement with the State University of New York at Stony Brook ("SUNY Stony Brook" or "Stony Brook") to sell and service two drones for use in Stony Brook's global health program. After Vayu delivered defective drones, the State sued it for breach of contract, among other claims. In affirming Supreme Court's dismissal of the complaint, the Third Department held that personal jurisdiction was lacking under

THE CAPITOL, ALBANY, NEW YORK 12224-0341 • PHONE (518) 776-2050 • FAX (518) 915-7723 *NOT FOR SERVICE OF PAPERS
WWW.AG.NY.GOV

New York's long-arm statute, C.P.L.R. 302(a)(1), which creates jurisdiction over any non-domiciliary who, in person or through an agent, "transacts any business" within the State.

This Court should reverse. Making all inferences in favor of the State as the non-moving party, the activities of Vayu's employees in or directed at New York amounted to transacting business in New York under the long-arm statute. Over a two-year period, Vayu, through its employees, repeatedly projected itself into the State—via phone calls and emails—to create an ongoing business relationship with the university. In addition to selling the two drones to Stony Brook, Vayu agreed to provide training, product upgrades, and ongoing technical support; it also sought to sell Stony Brook more drones. When a dispute arose over the two drones, Vayu's CEO met with a Stony Brook employee in New York to shore up the parties' relationship. Further, there is a substantial connection between Vayu's New York contacts and this lawsuit: all claims arise from or directly relate to the parties' agreement.

Given these contacts, the State has also shown that exercising jurisdiction comports with federal due process.

STATEMENT OF THE CASE

A. Factual Background

1. Vayu's Business Relationship with the State

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

As part of that project, in 2015, Dr. Small contacted Vayu, a company that designs and makes drones that provide "medical aid to inaccessible areas." (R. 32, 51.) Vayu was based in Michigan and

incorporated under Delaware law. (R. 32.) Dr. Small was aware of Vayu because its founder and CEO, Daniel Pepper, had contacted him in 2013 (i.e., before Dr. Small began working at Stony Brook) about using drones to transport laboratory samples. (R. 51.)

Over the following months, Vayu—through its CEO, Pepper—repeatedly contacted Dr. Small and other Stony Brook employees to negotiate the terms of Vayu designing and producing drones for GHI. (R. 51.) These Vayu-initiated contacts entailed numerous phone calls made to New York phone numbers and emails sent to Stony Brook email addresses. (R. 51-52.)

The parties' negotiations contemplated not only the sale of the drones, but a continuous business relationship regarding their operation. (R. 52-53.) In addition to making and delivering the UAVs, Vayu was expected to train Stony Brook employees on how to operate them, as well as provide ongoing technical support and 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, the parties continued their negotiations. Vayu promised that it could make drones that would meet Stony Brook's specifications. (R. 52-53.)

Around September 2016, as a result of the negotiations, Stony Brook agreed to pay Vayu $50,000 for two drones that Vayu would deliver to Madagascar. (R. 53.) Vayu's invoice to Stony Brook billed a New York address. (R. 53, 63-64.) Stony Brook wired the payment to Vayu. (R. 53, 66.)

As Vayu made clear to Stony Brook, it aimed to sell many more drones to the university. At the same time it was negotiating the sale of the two drones, Vayu partnered with Stony Brook 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 touted Stony Brook as one of Vayu's "[i]mplementing partners." (R. 84, 73.). The proposal also explained that Vayu planned to use part of the grant money

to maintain the two drones at issue and pay for additional drones for GHI's work in Madagascar. (R. 53; *see* R. 73-74.) 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' joint work. (R. 54.)

In November 2016, Vayu delivered the two drones to Madagascar. They were defective and inoperable. (R. 54-55; *see* R. 122-142 [photographs of defects].) Vayu contacted Stony Brook by email and phone to discuss repairing or replacing the drones. (R. 55.) Among other things, Vayu reiterated that it wanted to expand the parties' business dealings. Its CEO, Pepper, wrote that he hoped that the parties could continue to "work collectively" and "plan future work" in Madagascar. (R. 146-47.) He explained that Vayu valued Stony Brook's "expertise and perspective to define the next steps for the larger-scale implementation in Madagascar." (R. 147.) Pepper proposed scheduling 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. In September 2017, Pepper proposed meeting Dr. Small that month in New York to discuss the issues surrounding the drones and the Madagascar project. (R. 56.)

Two days before the meeting, Pepper emailed Dr. Small to acknowledge that "[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. 154.) Nonetheless, Pepper explained, Vayu "want[s] to keep working with you." (R. 155.) Dr. Small likewise noted: "this is a long and meaningful relationship in which shared passion and mutual trust has benefited both of us." (R. 156.) He was therefore "hopeful" that the parties could "find a win win solution." (R. 156.)

At the meeting, held in Port Jefferson, New York, the parties agreed to terms to resolve their dispute. (R. 56.) Stony Brook, at its own expense, would ship the defective drones to Vayu. In return, Vayu would send

replacements to Madagascar and also train a Stony Brook employee on how to fly them. (R. 56.) At the meeting, Pepper also raised the possibility of the parties working together on additional projects. (R. 56; *see* R. 155-56.)

Afterwards Dr. Small and Pepper exchanged emails that memorialized the agreement that they had formed at the New York meeting and that addressed the "next steps" in their work together. (R. 56-57; *see* R. 159, 164-66, 171-74.) As Pepper explained, "we're now in a better position than ever before to realize our common goals. We want this to be successful for the long-term in Madagascar." (R. 159.)

Around January 2018, Stony Brook returned the two defective drones. Vayu refused to replace them as agreed, however. Nor did it refund Stony Brook for the drones or pay for the cost of their return. (R. 57-58.)

B. Proceedings Below

In November 2018, the State, 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 purchase price of the drones plus the cost Stony Brook incurred to return 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 detailing Vayu's numerous New York contacts. (R. 50-174.) Supreme Court granted the motion and dismissed the complaint. (R. 8-17.) The court held that the activities of Vayu's employees in or directed at New York did not amount to "transact[ing] any business" here under the long-arm statute, C.P.L.R. 302(a)(1). (R. 14-15.)

The State appealed. Vayu did not file a responding brief or appear in the Third Department.[1]

In a 3-2 decision, the Third Department affirmed Supreme Court's order. (Addendum ["Add."] 1-8.) The majority held that Vayu "did not purposefully avail itself of the privilege of conducting activities within New York by transacting business in New York," as required to establish personal jurisdiction under C.P.L.R. 302(a)(1). (Add. 4 [alterations and internal quotation marks omitted].) According to the majority, "the business transacted—specifically the sale of the UAVs to SUNY Stony Brook for use in Madagascar—was a one-time occurrence that resulted" after Dr. Small contacted Pepper in 2015. (Add. 4.) Regarding the parties' in-person meeting in New York, the majority observed that its purpose was "discussing issues regarding the *completed* purchase of the UAVS, rather than seeking additional business from SUNY Stony Brook or other entities in New York." (Add. 5.) Regarding Vayu's numerous New York-directed calls and emails, the majority observed that they "did not result in more sales in New York or seek to advance [Vayu's] business contacts within New York." (Add. 4.)

The two-justice dissent reasoned that, contrary to the majority's holding, Vayu had "purposefully availed itself of the privilege of conducting activities in New York." (Add. 6.) As the dissent explained, Vayu's New York contacts, including its CEO's in-state visit, demonstrated that the "sales transaction was not simply a 'one-time occurrence.'" (Add. 6.) Rather, it was "contemplated as part of an ongoing business relationship between SUNY Stony Brook and [Vayu] that was intended to blossom into further business relations involving, among other things, expanded UAV sales and applications, ongoing UAV technical support and flight training services." (Add. 6-7.)

The dissent further explained that the State had met the other two requirements for personal jurisdiction (Add. 7), which neither Supreme Court nor the Third Department majority had addressed (R. 13-16; Add. 4). First, there was a sufficient nexus under the long-arm statute between

[1] As of this letter's filing, the undersigned does not know if Vayu is represented by counsel in connection with this case. The counsel who represented Vayu in Supreme Court withdrew as counsel in that court.

Vayu's contacts and this lawsuit: Vayu's "contacts in this state were directly and substantially related to the sale of the two UAVs that are the subject of this litigation." (Add. 7.) Second, the exercise of jurisdiction comported with federal due process. The dissent explained that Vayu had "cultivated an ongoing business relationship with SUNY Stony Brook that was aimed at mutually raising the profile of both [GHI's] and [Vayu's] business portfolio under the auspices that it would transform into a 'large, extensive, and integrated [drone delivery] network.'" (Add. 7.) Thus, the dissent concluded, Vayu "cannot reasonably claim that, given the nature of its contacts and the resulting business relationship, it did not anticipate being haled into a New York court in the event disputes arose between the parties." (Add. 7.)

The State appealed as of right to this Court given the two-justice dissent. *See* C.P.L.R. 5601(a).

ARGUMENT

SUPREME COURT HAS PERSONAL JURISDICTION OVER VAYU

To defeat a defendant's motion to dismiss a complaint for lack of personal jurisdiction, a plaintiff "must come forward with sufficient evidence, through affidavits and relevant documents, to prove the existence of jurisdiction." *Fischbarg v. Doucet*, 9 N.Y.3d 375, 385 n.6 (2007) (internal quotation marks omitted). In reviewing that motion, a court must accept as true the facts asserted in the complaint and the plaintiff's affidavits opposing the motion; it must also 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). As explained below, the State carried its burden to show that exercise of jurisdiction is (i) proper under New York's long-arm statute and (ii) comports with federal due process.

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

New York's long-arm statute gives 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 sets forth a "liberal" standard that can be satisfied by a "single transaction in New

York." *Longines-Wittnauer Watch Co. v Barnes & Reinecke*, 15 N.Y.2d 443, 456 (1965); *see, e.g.*, *Parke-Bernet Galleries v. Franklyn*, 26 N.Y.2d 13, 16 (1970). Specifically, jurisdiction is proper so long as (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 (quoting *Fischbarg*, 9 N.Y.3d at 380). Making all inferences in its favor, the State has satisfied both prongs.

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." *Rushaid*, 28 N.Y.3d at 323 (quoting *Fischbarg*, 9 N.Y.3d at 380). A defendant may "engage in extensive purposeful activity here without ever actually setting foot in the State." *Parke-Bernet Galleries*, 26 N.Y.2d at 17. Thus, this Court has repeatedly recognized long-arm jurisdiction over commercial actors "using electronic and telephonic means to project themselves into New York to conduct business transactions." *Deutsche Bank Sec., Inc. v. Montana Bd. of Invs.*, 7 N.Y.3d 65, 71 (2006) (citing cases); *see also, e.g.*, *Fischbarg*, 9 N.Y.3d at 380.

Further, as this Court explained in its seminal decision in *Longines*, where the dispute arises from a contract, jurisdiction may be predicated on any purposeful acts "performed by the [defendant] in this State in relation to the contract, albeit preliminary or *subsequent* to its execution" or formation. 15 N.Y.2d at 457 & n.5 (emphasis added); *see, e.g.*, *D&R Global Selections, S.L. v Bodega Olegario Falcon Pineiro*, 9 N.Y.3d 292, 298 (2017). Ultimately, "although it is impossible to precisely fix those acts that constitute a transaction of business," the "primary consideration" is "the quality of the defendant['s] New York contacts." *Fischbarg*, 9 N.Y.3d at 380.

The quality of Vayu's New York contacts, taken together, establish that it purposely availed itself of the privilege of conducting business in the State. Indeed, Vayu transacted not just with not just any party, but

with an arm of the State itself. 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 New York, and other Stony Brook employees. Vayu initiated these contacts by calling New York phone numbers and emailing Stony Brook addresses. (R. 51-52.) Making all inferences in the State's favor, the Stony Brook employees were in New York when they received these communications.

These New York-directed contacts were integral to the transaction at issue. Vayu used them to negotiate the drone specifications and the ongoing services that it would provide to Stony Brook. *See 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. National Gold & Diamond Ctr., Inc.,* 125 A.D.3d 454, 456 (1st Dep't 2015) (same based on negotiations by phone). Indeed, negotiating a transaction for drones that can deliver medical supplies "was a major aspect of [Vayu's] mission—'part of its principal reason for being.'" *See Deutsche Bank Sec.*, 7 N.Y.3d at 72 (citation omitted). (R. 32, 51.)

Vayu also sent Stony Brook an invoice to its New York address and accepted a wire payment that originated from New York. (R. 53, 63-66.) *See, e.g.*, *Grimaldi v. Guinn*, 72 A.D.3d 37, 52 (2d Dep't 2010) (non-resident defendants' New York activities included faxing an invoice into New York and soliciting payment from New York plaintiff); *Druck Corp. v. Macro Fund (U.S.) Ltd.*, 102 F. App'x 192, 194 (2d Cir. 2004) (same based on defendant's acceptance of funds wired from New York). Further, after the parties' contract was formed, Vayu continued to project itself into New York—by phone and email—to discuss how to resolve the dispute that had arisen from Vayu's delivery of defective drones and continue with the next steps of the transaction. (*See* R. 147-48.) *See Fischbarg*, 9 N.Y.3d at 383 (noting that "regularly communicat[ing]" with a New York plaintiff during the course of the contractual relationship is a "proper predicate[]" for long-arm jurisdiction).

Equally important, Vayu's CEO traveled to New York to meet with Dr. Small to address the transaction. The "nature and quality" of the parties' New York meeting support long-arm jurisdiction. *George Reiner & Co. v. Schwartz*, 41 N.Y.2d 648, 653 (1977). As this Court has

explained, "a solitary business meeting conducted for a single day in New York" can satisfy C.P.L.R. 302(a)(1). *Presidential Realty Corp. v. Michael Sq. W.*, 44 N.Y.2d 672, 672 (1978). This is so even if the meeting relates to a contract that a non-resident defendant performs entirely out-of-state. *See George Reiner & Co.*, 41 N.Y.3d at 653. And the meeting here was instrumental to the parties' transaction. As the dissent noted, the parties settled on terms "that would not only resolve their present sales dispute, but further sought to repair and secure their continuing business relationship." (Add. 6.) In particular, Stony Brook agreed to pay for the return of the drones in exchange for Vayu providing replacements and flight training. (R. 56-57.)

Further, Vayu's numerous activities in or directed at New York over a two-year period went beyond a one-off sale of a consumer good. Rather, they were directed toward, and resulted in, the "purposeful creation of a continuing relationship with a New York [entity]." *D&R Global Selections, S.L.*, 29 N.Y.3d at 298 (quoting *Fischbarg*, 9 N.Y.3d at 381). As part of the transaction, which concerned sophisticated machinery tailored to Stony Brook's needs, Vayu agreed to provide Stony Brook flight training, product upgrades, and ongoing technical support. (R. 53; *see, e.g.*, R. 156 [Dr. Small describing the parties' relationship as "long and meaningful"].) Indeed, Vayu intended for this sale to be the first of many to Stony Brook. As Vayu CEO's explained, its goal was to develop "a large, extensive, and integrated [drone delivery] network." (R. 154.) To that end, Vayu and Stony Brook employees worked closely on a grant proposal that sought funds that were intended to maintain the drones sold to Stony Brook and to pay for additional ones. (R. 53-54.) While these efforts did not come to fruition, largely due to Vayu's conduct, including its breach of the parties' agreement, they confirm that Vayu's contacts were purposefully designed to foster a continuing business relationship.

In sum, Vayu's purposefully availed itself of the privilege of conducting business here because—through numerous New York-directed contacts over the course of two years, including an in-state meeting—it cultivated a continuous business relationship with an arm of the State. Under the totality of the circumstances, Vayu conducted sufficient purposeful activities in New York to confer personal jurisdiction over Vayu under C.P.L.R. 302(a)(1).

In reaching a contrary conclusion, the Third Department majority misapplied this Court's precedent. To begin, it erred by discounting the jurisdictional significance of the parties' New York meeting. The majority found that the meeting did not support long-arm jurisdiction because "the purpose" of the meeting was to "discuss[] issues regarding the *completed* purchase of the UAVS, rather than seek[] additional business from SUNY Stony Brook." (Add. 5.)

This reasoning is flawed. It is well-settled that a defendant's in-state activity that is "in furtherance of" an already-formed contract can sustain the exercise of jurisdiction under C.P.L.R. 302(a)(1). *D&R Global Selections, S.L.*, 29 N.Y.3d at 298; *see, e.g.*, *Longines*, 15 N.Y.2d at 457 & n.5; *Paradigm Mktg. Consortium, Inc. v. Yale New Haven Hosp., Inc.*, 124 A.D.3d 736, 737 (2d Dep't 2015). Thus, contrary to the majority's reasoning, the fact that the purchase of the drones was complete at the time of the parties' meeting is not determinative where, as here, the *performance* of the underlying contract was not.

Here, the New York meeting materially furthered the parties' contract. Vayu and Stony Brook, as noted, agreed to terms that supplemented that contract and would allow the parties' relationship to continue and, as Vayu hoped, grow. Courts have repeatedly found that C.P.L.R. 302(a)(1) jurisdiction can be based on in-state meetings that are intended to shore up or expand existing contractual relations. For instance, in *Longines*, this Court found that non-resident defendants had transacted business in New York where, among other things, their representatives—similar to Vayu's CEO—visited plaintiff "on Long Island to discuss certain problems in connection with the performance of the contract" and entered into "a supplementary contract" that was formed in New York. 15 N.Y.2d at 456-57; *see also*, *e.g., Atlantic Metal Prods. v Blake Constr. Co.*, 40 A.D.2d 966, 966 (1st Dep't 1972) (non-resident defendant attended New York meeting at which the parties' resolved their differences over existing contract); *CutCo Indus.*, *Inc. v. Naughton*, 806 F.2d 361, 367 (2d Cir. 1986); *Gary Null & Assocs. Inc. v. DNE Nutraceuticals Inc.*, No. 18 Civ. 7169, 2018 WL 6991065, at *3 (S.D.N.Y. Dec. 20, 2018).

The Third Department majority further erred when analyzing Vayu's phone calls and emails to Stony Brook employees over a two-year

period. The majority did not contest that (i) Vayu initiated many of these communications; (ii) they were made to and received by individuals in New York; and (iii) the parties engaged in substantive negotiations through these communications. Nonetheless, the majority held that these contacts cannot support the exercise of jurisdiction because they led to a "one-time" transaction and "did not result in more sales in New York or seek to advance [Vayu's] business contacts within New York." (Add. 4.)

This conclusion misapprehends the inquiry under C.P.L.R. 302(a)(1). For one thing, "proof of one transaction in New York is sufficient to invoke jurisdiction" under the statute. *Deutsche Bank Sec.*, 7 N.Y.3d at 71 (internal quotation marks omitted). For another, the inquiry focuses on whether a defendant's contacts "were purposeful," *Rushaid*, 28 N.Y.3d at 323, not whether they were successful—i.e., resulted in more sales. Drawing all inferences in the State's favor, these New York-directed contacts were purposeful. Through them, Vayu cultivated an ongoing business relationship that, as the dissent noted, Vayu expected would "blossom into further business relations involving, among other things, expanded UAV sales and applications, ongoing UAV technical support and flight training services." (Add. 6.) Indeed, even after the parties' dispute arose, Vayu made clear that it "want[ed] to keep working" with Stony Brook and discussed the possibility of the parties working on additional projects. (R. 154.)

That Dr. Small may have made the first contact with Vayu does not compel a contrary conclusion. As this Court's decision in *Parke-Bernet Galleries* makes clear, long-arm jurisdiction over a defendant based on the transaction of business may be proper even if the plaintiff made the initial contact. In that case, the plaintiff, an art auctioneer, contacted an out-of-state defendant about an auction that plaintiff was holding in New York the following month. 26 N.Y.2d at 15. Although the defendant never entered New York, he "projected himself" into the State by participating in the auction via phone and successfully bidding on two paintings, which totaled $96,000. *Id.* at 16, 18. After the defendant allegedly failed to pay, the auctioneer filed suit, and this Court held that personal jurisdiction over the defendant existed under C.P.L.R. 302(a)(1). *Id.* at 16-17. As it explained, the defendant's "active participation in the bidding" amounted to "the sustained and substantial transaction of business here." *Id.* at 18.

Indeed, courts have repeatedly held that jurisdiction exists under C.P.L.R. 302(a)(1) even if, as in *Parke-Bernet Galleries*, the plaintiff initiated the contact that resulted in the subject transaction. *See, e.g.*, *Grimaldi*, 72 A.D.3d at 51; *Stardust Dance Prods., Ltd. v Cruise Groups Intl., Inc.*, 63 A.D.3d 1262, 1262-63 (3d Dep't 2009); *Sterling Natl. Bank & Trust Co. of New York v. Fid. Mtge. Inv.*, 510 F.2d 870, 874 (2d Cir. 1975) (holding that although the plaintiff "first solicited" the non-resident defendant, that defendant had transacted business here given the "totality" of its contacts, including a single New York visit).

The same reasoning applies here. Even if it can be said that Dr. Small, after assuming his position with Stony Brook, first contacted Vayu (notwithstanding the fact that Vayu's CEO had earlier sought out Dr. Small), Vayu thereafter "projected [itself]" in New York through numerous phone calls and emails, as well as by having its CEO physically come here. *Parke-Bernet Galleries*, 26 N.Y.2d at 18. Through its New York contacts, Vayu solicited a substantial business transaction that was more "sustained" than in *Parke-Bernet Galleries*: Vayu's contacts took place over many months, and the resulting agreement required Vayu to provide continuing services to SUNY Stony Brook. *See supra* at 2-5.

Finally, the Third Department majority's reliance on this Court's decision in *Paterno v. Laser Spine Institute*, 24 N.Y.3d 370 (2014), is misplaced. (Add. 4.) That case involved a New York resident who brought a medical malpractice action against Florida-based medical providers based on a back surgery they performed in Florida. 24 N.3d at 372, 375. It is distinguishable for three reasons.

First, the defendants in *Paterno* never physically entered New York in connection with the transaction. *Id.* Second, those defendants did not contemplate or seek to create a continuous relationship with the plaintiff. Rather, the one-time surgery was supposed to cure the plaintiff's back pain. *Id.* at 372-73. Third, 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. Those communications merely "served the convenience of plaintiff," and, thus, a finding of jurisdiction based on such limited contacts would "set a precedent for almost limitless jurisdiction over out-of-state medical providers." *Id.* at 378-79. By contrast, Vayu's New York-directed contacts

are far more substantial. During the parties' 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—before and after *Paterno*—have held that such substantive telephonic and electronic contacts can satisfy C.P.L.R. 302(a)(1). *See, e.g.*, *Fischbarg*, 9 N.Y.3d at 381-83; *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.

For these reasons, the State has demonstrated that Vayu's purposeful activities occurring in or directed to New York were sufficient to satisfy the first prong of C.P.L.R. 302(a)(1)'s two-part test for jurisdiction.

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

Neither Supreme Court nor the Third Department addressed C.P.L.R. 302(a)(1)'s second prong, which requires that there be "a substantial relationship" between the transaction and the claims asserted. *Rushaid*, 28 N.Y.3d at 329. This standard 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).

As the dissent below explained, this requirement is readily satisfied here. (Add. 7.) The State's claims are directly connected to the parties' transaction involving the two drones: the claims were caused by or relate to 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. The parties also met in New York to resolve a dispute over those drones. *See D&R Global Selections, S.L*, 29 N.Y.3d at 299 (substantial relationship established where the defendant "engaged in activities in New York in furtherance of their agreement"). Indeed, the State's alleged damages include the costs to return the defective drones to Vayu—costs that Vayu induced Stony Brook to incur during the in-person meeting in New York. (*See* R. 20-21, 56.)

Thus, the State has established that there is a "substantial relationship" between Vayu's New York activities, the parties' agreement, Vayu's alleged breach or disregard thereof, and potential damages. *See D&R Global Selections, S.L.*, 29 N.Y.3d at 299.

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

The exercise of personal jurisdiction must also comport with federal due process. *See Rushaid*, 28 N.Y.3d at 330. 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." *Id.* (internal quotation marks omitted). This is not one of those rare cases.

Federal 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]).

Vayu had the requisite minimum contacts for the same reasons it has transacted business here under C.P.L.R. 302(a)(1). *See supra* at 8-14. Vayu "purposefully availed itself of the privilege of conducting activities within New York." *Rushaid*, 28 N.Y.3d at 330 (internal alterations and citations omitted). And this suit "arises out of or relates" to Vayu's contacts with New York. *Aybar v. Aybar*, __ N.E.3d __, 2021 NY Slip. Op. 05393, *6 (2021); *see Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1026-27 (2021). Further, the fact that the party with whom Vayu transacted was an arm of the State defeats any assertion that Vayu should not have "reasonably foresee[n] having to defend a lawsuit in New York." *D&R Global Selections, S.L.*, 29 N.Y.3d at 300.

Nor would allowing this suit to proceed offend "traditional notions of fair play and substantial justice." *Id.* Where, as here, minimum contacts exist, the defendant must "present a compelling case" that the exercise of personal jurisdiction is "unreasonable." *Id.*; *see Rushaid*, 28 N.Y.3d at 331 (listing five reasonableness factors). Vayu failed to present any compelling case in Supreme Court as to why the exercise of personal

jurisdiction would be unreasonable here. 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 in which an arm of the State is a party. *Rushaid*, 28 N.Y.3d at 331.

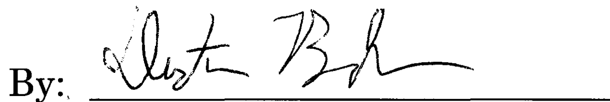
The State has therefore demonstrated that the exercise of jurisdiction comports with federal due process.

CONCLUSION

The Appellate Division's order should be reversed and Vayu's motion to dismiss the complaint pursuant to C.P.L.R. 3211(a)(8) should be denied.

Respectfully submitted,

LETITIA JAMES
Attorney General
State of New York
Attorney for Appellant

By: 

DUSTIN J. BROCKNER
Assistant Solicitor General
Office of the Attorney General
The Capitol
Albany, New York 12224
(518) 776-2017
dustin.brockner@ag.ny.gov

BARBARA D. UNDERWOOD
Solicitor General
JEFFREY W. LANG
Deputy Solicitor General
DUSTIN J. BROCKNER
Assistant Solicitor General
of Counsel

cc (via First-Class Mail and Email [[redacted]@vayu.us]):

Vayu, Inc.
Attn: Daniel Pepper
847 Willow Run Airport
Ypsilanti, MI 48198

Vayu, Inc.
Attn: Daniel Pepper
206 E. Huron Street
Ann Arbor, MI 48104

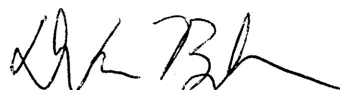
Vayu, Inc.
Attn: Daniel Pepper
1250 N. Main Street,
Ann Arbor, Michigan, 48104

WORD COUNT CERTIFICATION

Pursuant to 22 N.Y.C.R.R. § 500.11(m), I, Dustin J. Brockner, certify that, according to the word-count feature of the word-processing program used to prepare this letter, the body of this letter contains 5,214 words.

November 22, 2021

Respectfully submitted,



DUSTIN J. BROCKNER
Assistant Solicitor General

Addendum

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: June 24, 2021 531110

STATE OF NEW YORK,
Appellant,
v MEMORANDUM AND ORDER

VAYU, INC.,
Defendant.

Calendar Date: April 20, 2021

Before: Garry, P.J., Egan Jr., Aarons, Pritzker and Reynolds Fitzgerald, JJ.

Letitia James, Attorney General, Albany (Dustin J. Brockner of counsel), for appellant.

Garry, P.J.

Appeal from an order of the Supreme Court (Walsh, J.), entered January 23, 2020 in Albany County, which granted defendant's motion to dismiss the complaint.

In September 2016, the State University of New York at Stony Brook (hereinafter SUNY Stony Brook) entered into an agreement to purchase two unmanned aerial vehicles (hereinafter UAVs) from defendant, a corporation based in Michigan and incorporated in Delaware that designs and manufactures UAVs. The agreement provided for the UAVs to be delivered to SUNY Stony Brook's Global Health Institute in Madagascar, and to be used for delivery of medical supplies to remote areas of that

country.[1] Following the delivery of the UAVs to Madagascar, SUNY Stony Brook alleged that the UAVs were defective and returned them to defendant in Michigan. When defendant thereafter failed to replace them or provide a refund, plaintiff commenced this action on behalf of SUNY Stony Brook asserting breach of contract, among other claims. Defendant moved to dismiss the complaint due to lack of personal jurisdiction (see CPLR 3211 [a] [8]). Supreme Court granted defendant's motion, finding that it could not exercise jurisdiction pursuant to the long-arm statute (see CPLR 302). Plaintiff appeals.

Specific or long-arm jurisdiction allows a court to, as pertinent here, "exercise personal jurisdiction over any non-domiciliary . . . who in person, or through an agent . . . transacts any business within the state" (CPLR 302 [a] [1]).[2] "The CPLR 302 (a) (1) jurisdictional inquiry is twofold: under the first prong the defendant must have conducted sufficient activities to have transacted business in the state, and under the second prong, the claims must arise from the transactions" (Rushaid v Pictet & Cie, 28 NY3d 316, 323 [2016]; see D&R Global Selections, S.L. v Bodega Olegario Falcon Pineiro, 29 NY3d 292,

---

[1] The agreement between the parties does not appear to have been reached through plaintiff's bidding and contractual process (see generally State Finance Law § 163).

[2] Supreme Court's order also found that it could not exercise general jurisdiction over defendant (see CPLR 301). Although plaintiff does not appear to challenge that part of Supreme Court's order, it bears noting that the court correctly found that defendant is not subject to general jurisdiction in New York, as "the paradigm bases for general jurisdiction" – the principal place of business and state of incorporation – lay in Michigan and Delaware, respectively (Daimler AG v Bauman, 571 US 117, 137 [2014] [internal quotation marks, brackets, ellipsis and citation omitted]; see Aybar v Aybar, 169 AD3d 137, 144 [2019], lv granted 34 NY3d 905 [2019]). Nor are defendant's contacts with New York "so substantial and of such a nature as to render it at home" in New York (Daimler AG v Bauman, 571 US at 139 n 19; see David D. Siegel & Patrick M. Connors, NY Prac § 82 at 168 [6th ed 2018]).

297 [2017]). "Inasmuch as CPLR 302 (a) (1) is a single act statute[,] proof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted (Gottlieb v Merrigan, 119 AD3d 1054, 1056 [2014] [internal quotation marks, ellipsis and citations omitted]; see Fischbarg v Doucet, 9 NY3d 375, 380 [2007]). "Exercise of personal jurisdiction under CPLR 302 (a) (1) must also comport with federal due process" (D&R Global Selections, S.L. v Bodega Olegario Falcon Pineiro, 29 NY3d at 299; see Rushaid v Pictet & Cie, 28 NY3d at 330). "As the party seeking to assert personal jurisdiction, [the] plaintiff [bears] the burden of proof on this issue. Such burden, however, does not entail making a prima facie showing of personal jurisdiction; rather, [the] plaintiff need only demonstrate that it made a sufficient start to warrant further discovery" (Bunkoff Gen. Contrs. v State Auto. Mut. Ins. Co., 296 AD2d 699, 700 [2002] [internal quotation marks and citations omitted]; see Archer-Vail v LHV Precast Inc., 168 AD3d 1257, 1260-1261 [2019]).

In opposition to defendant's motion to dismiss, plaintiff submitted the affidavit of a visiting research professor with SUNY Stony Brook and the founding director of the Global Health Institute in Madagascar (hereinafter the professor). The professor averred that, in 2013, defendant's chief executive officer (hereinafter the CEO) contacted him with the idea to use UAVs to transport medical supplies and specimens. Upon the commencement of the professor's employment with SUNY Stony Brook in 2015, he contacted the CEO "with the purpose of creating a business relationship between [defendant] and [SUNY] Stony Brook" to develop use of UAVs for delivery of medical supplies. The professor asserted that, thereafter, the CEO sought to develop the UAVs that could be sold to SUNY Stony Brook, through telephonic and email conversations with him and other SUNY Stony Brook employees. It was also alleged that the parties knew that the contacts between SUNY Stony Brook and defendant would be "continuous for some time in the future," and included training and technical support for operation of the UAVs and submission of grant applications for funding for future UAV development.

To that end, SUNY Stony Brook and defendant jointly submitted a grant proposal for funding to cover the manufacture, use and maintenance of the UAVs for delivery of medical supplies in other countries.

Following test flights in Madagascar, where the UAVs allegedly did not perform well, the professor and the CEO engaged in conversations to improve the UAVs. Ultimately, in September 2016, SUNY Stony Brook agreed to purchase the UAVs, with SUNY Stony Brook receiving an invoice from defendant and remitting payment to defendant's bank account in Michigan. The UAVs were delivered to Madagascar in November 2016. After the issues with the UAVs surfaced, the professor and the CEO met in New York in September 2017 to discuss the problems and the Madagascar project. Upon defendant's alleged agreement to replace the UAVs, SUNY Stony Book subsequently shipped the UAVs back to defendant in Michigan.

It is undisputed that the parties formed a relationship. Nonetheless, in reviewing the parties' interactions as summarized above, we agree with Supreme Court that defendant did not "purposefully avail[] itself of 'the privilege of conducting activities within [New York],' by . . . transacting business in New York," thus invoking the benefits and protections of New York's laws (D&R Global Selections, S.L. v Bodega Olegario Falcon Pineiro, 29 NY3d at 297, quoting Rushaid v Pictet & Cie, 28 NY3d at 323). The various communications between the parties were twofold: first, to discuss the ongoing issues with the UAVs that SUNY Stony Brook purchased and, second, to create a relationship and to submit grants for projects that would take place entirely and solely outside of New York. Regardless of the quantity of defendant's communications with SUNY Stony Brook, these communications did not result in more sales in New York or seek to advance defendant's business contacts within New York (see Paterno v Laser Spine Inst., 24 NY3d 370, 378 [2014]). Rather, the business transacted – specifically the sale of the UAVs to SUNY Stony Brook for use in Madagascar – was a one-time occurrence that resulted after the professor commenced employment with SUNY Stony Brook in 2015 and then contacted the CEO (compare D&R Global Selections, S.L. v Bodega Olegario

Falcon Pineiro, 29 NY3d at 298; Deutsche Bank Sec., Inc. v Montana Bd. of Invs., 7 NY3d 65, 71-72 [2006], cert denied 549 US 1095 [2006]). The visit by the CEO to New York in 2017 was for the purpose of discussing issues regarding the completed purchase of the UAVs, rather than seeking additional business from SUNY Stony Brook or other entities in New York (compare D&R Global Selections, S.L. v Bodega Olegario Falcon Pineiro, 29 NY3d at 298; Stardust Dance Prods., Ltd. v Cruise Groups Intl., Inc., 63 AD3d 1262, 1264-1265 [2009]). The UAVs were shipped to Madagascar and subsequently returned to defendant in Michigan. The grant that SUNY Stony Brook and defendant applied for was not intended to benefit New York, but rather other countries. Given these facts, we find that defendant could not reasonably have expected to defend this action in New York and, thus, Supreme Court properly dismissed the complaint for lack of personal jurisdiction.

Aarons and Reynolds Fitzgerald, JJ., concur.

Egan Jr., J. (dissenting).

Because we believe that defendant's business activities both within and directed at this state bring it within the reach of New York's long-arm statute (see CPLR 302 [a] [1]), we respectfully dissent.

"A New York court may exercise personal jurisdiction over a nondomiciliary who, either in person or through his or her agent, 'transacts any business within the state or contracts anywhere to supply goods or services in the state'" (Urfirer v SB Bldrs., LLC, 95 AD3d 1616, 1617 [2012], quoting CPLR 302 [a] [1]). In determining whether long-arm jurisdiction has been acquired over a nondomiciliary, the court must undertake a two-part inquiry: "[f]irst, the defendant must have purposefully availed itself of the privilege of conducting activities within the forum [s]tate by either transacting business in New York or contracting to supply goods or services in New York. Second, the claim must arise from that business transaction or from the contract to supply goods or services" (D&R Global Selections,

S.L. v Bodega Olegario Falcon Pineiro, 29 NY3d 292, 297 [2017] [internal quotation marks and citations omitted]). Ultimately, as the party seeking to assert jurisdiction, it is the plaintiff's burden to demonstrate a proper basis for long-arm jurisdiction (see Gottlieb v Merrigan, 170 AD3d 1316, 1317 [2019], lv denied 33 NY3d 908 [2019]; Andrew Greenberg, Inc. v Sirtech Can., Ltd., 79 AD3d 1419, 1420 [2010]).

Here, we do not dispute the majority's recitation of facts. Rather, with respect to the first prong of the jurisdictional analysis, contrary to the majority's holding, we find that defendant's contacts adequately demonstrated that it purposefully availed itself of the privilege of conducting activities in New York by transacting business here. Although the two unmanned aerial vehicles (hereinafter UAVs) that were purchased by the State University of New York at Stony Brook (hereinafter SUNY Stony Brook) were shipped to Madagascar, SUNY Stony Brook was in New York, the purchase price was billed to New York and the payment was made from New York. In addition, numerous email and telephone communications between a professor at SUNY Stony Brook (hereinafter the professor) and defendant's chief executive officer (hereinafter the CEO) – which grew to include communications between other staff members of SUNY Stony Brook and defendant – evolved between 2015 and 2016 to include negotiations regarding, among other things, SUNY Stony Brook's UAV specifications and culminated in SUNY Stone Brook's purchase of two UAVs from defendant in September 2016 (see C. Mahendra [NY], LLC v National Gold & Diamond Ctr., Inc., 125 AD3d 454, 456 [2015]). After the two UAVs proved unsatisfactory, the CEO visited New York in September 2017 and met with the professor during which meeting the CEO agreed to terms with the professor that would not only resolve their present sales dispute, but further sought to repair and secure their continuing business relationship (see Stardust Dance Prods., Ltd. v Cruise Groups Intl., Inc., 63 AD3d 1262, 1264 [2009]). The emails between the professor and the CEO both leading up to and following this in-person meeting demonstrate that the initial September 2016 sales transaction was not simply a "one-time occurrence" but was contemplated as part of an ongoing business relationship between SUNY Stony Brook and defendant that was intended to blossom into

further business relations involving, among other things, expanded UAV sales and applications, ongoing UAV technical support and flight training services. Although the relationship between SUNY Stony Brook and defendant ended without the execution of any additional contracts, in our opinion, defendant's contacts in New York were nevertheless purposefully intended to create a continuing business relationship and, therefore, the first prong of obtaining long-arm jurisdiction was established (see Fischbarg v Doucet, 9 NY3d 375, 380 [2007]; Deutsche Bank Sec., Inc. v Montana Bd. of Invs., 7 NY3d 65, 71-72 [2006], cert denied 549 US 1095 [2006]; C. Mahendra [NY], LLC v National Gold & Diamond Ctr., Inc., 125 AD3d at 457; Grimaldi v Guinn, 72 AD3d 37, 51-52 [2010]; Stardust Dance Prods., Ltd. v Cruise Groups Intl., Inc., 63 AD3d at 1264).

With regard to the second prong, given that defendant's contacts in this state were directly and substantially related to the sale of the two UAVs that are the subject of this litigation, coupled with defendant's additional efforts to resolve its sales dispute with SUNY Stony Brook and continue their ongoing business relationship, plaintiff adequately demonstrated that there was a substantial relationship between defendant's New York activities and the subject business transaction to satisfy this prong (see generally D&R Global Selections, S.L. v Bodega Olegario Falcon Pineiro, 29 NY3d at 298; Rushaid v Pictet & Cie, 28 NY3d 316, 329 [2016]). Finally, having cultivated an ongoing business relationship with SUNY Stony Brook that was aimed at mutually raising the profile of both SUNY Stony Brook's Global Health Institute and defendant's business portfolio under the auspices that it would transform into a "large, extensive, and integrated [drone delivery] network," defendant cannot reasonably claim that, given the nature of its contacts and the resulting business relationship, it did not anticipate being haled into a New York court in the event disputes arose between the parties such that the exercise of jurisdiction comports with federal due process and does not "offend traditional notions of fair play and substantial justice" (International Shoe Co. v Washington, 326 US 310, 316 [1945] [internal quotation marks and citations omitted]).

Accordingly, we would reverse the order of Supreme Court and deny the motion.

Pritzker, J., concurs.

ORDERED that the order is affirmed, without costs.

ENTER:

Robert D. Mayberger
Clerk of the Court

<u>AFFIDAVIT OF SERVICE</u>

STATE OF NEW YORK)
) ss:
COUNTY OF ALBANY)

William Sportman, being duly sworn, deposes and says:

I am over eighteen years of age and an employee in the office of LETITIA JAMES, Attorney General of the State of New York, attorney for Respondent(s) herein.

On the 22nd day of November, 2021, I served a copy of the annexed **Letter with Addendum** upon the individuals named below by depositing a true copy thereof, properly enclosed in a sealed, postpaid wrapper, in a letter box of the Capitol Station Post Office in the City of Albany, New York, a depository under the exclusive care and custody of the United States Post Office Department, directed to the said individuals at the address within the State and respectively designated by them for that purpose as follows:

Vayu, Inc.
Attn: Daniel Pepper
1250 N. Main Street,
Ann Arbor, Michigan, 48104

Vayu, Inc.
Attn: Daniel Pepper
847 Willow Run Airport
Ypsilanti, MI 48198

Vayu, Inc.
Attn: Daniel Pepper
206 E. Huron Street
Ann Arbor, MI 48104

Sworn to before me this
22nd day of November, 2021.

Cristal R. Gazelone
NOTARY PUBLIC

CRISTAL R. GAZELONE
Notary Public, State of New York
Reg. No. 01GA6[illegible]
Qualified in Rensselaer County
Commission Expires April 2, 2024