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COURT OF APPEALS

STATE OF NEW YORK

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STATE OF NEW YORK,

Appellant,

-against-

NO. 2

VAYU, INC.,

Respondent.

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20 Eagle Street  
Albany, New York  
January 3, 2023

Before:

ACTING CHIEF JUDGE ANTHONY CANNATARO  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE MADELINE SINGAS  
ASSOCIATE JUDGE SHIRLEY TROUTMAN

Appearances:

DUSTIN J. BROCKNER, ESQ.  
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Attorney for Appellant  
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Xavier Austin Reyna  
Official Court Transcriber



1           ACTING CHIEF JUDGE CANNATARO: Our next appeal is  
2           Number 2, State of New York v. Vayu.

3           Since I don't think there will be rebuttal time,  
4           Counsel, you can begin whenever you like.

5           MR. BROCKNER: I won't ask.

6           May it please the Court. Dustin Brockner on  
7           behalf of the State of New York.

8           Four facts taken together show that Vayu engaged  
9           in a New York business transaction under the Long-Arm  
10          Statute.

11          First - - -

12          JUDGE RIVERA: No. So Counsel, can you explain  
13          how its transaction of a business - - - or business within  
14          the state of New York, as opposed to transacting business  
15          with someone who happens to be a New York resident?  
16          Because I don't see how this is different from me standing  
17          in front - - - or sitting in front of my computer and  
18          ordering off a website a gift for someone out of New York  
19          State, something that never touches the ground in New York,  
20          that I mail; I pay for it; I say, this is what I want.

21          How is this different?

22          MR. BROCKNER: In the four ways I was just about  
23          to explain.

24          First, Vayu's CEO physically came to New York to  
25          attend a meeting in furtherance of the contract governing



1 the drones.

2 JUDGE RIVERA: I thought the contract had already  
3 been entered, and I thought this was a dispute over the  
4 breach of the contract that had already been entered?

5 MR. BROCKNER: Not precisely, Your Honor. This  
6 Court has repeatedly held that jurisdiction, the  
7 transaction of business, could be based on New York  
8 activities that occur after a contract has been performed.

9 D&R Global Selections is a 2017 case. There,  
10 it's a New York business transaction, and the jurisdiction  
11 is based solely on activities that occurred after the  
12 contract had formed.

13 JUDGE GARCIA: Is part of the lawsuit here and  
14 part of the basis for the contract claim, at least, related  
15 to the terms that were later negotiated at that meeting?

16 MR. BROCKNER: Exactly, Your Honor. That in-  
17 state meeting substantially furthered the contract. At  
18 that meeting, which was in New York, Vayu's CEO is  
19 physically here. The parties agreed to supplement the  
20 contract, Stony Brook would pay a thousand dollars to  
21 return the defective drones to Vayu, and in exchange, Vayu  
22 would send new - - - a new model of drones and provide  
23 flight training to a Stony Brook employee.

24 At least - - -

25 JUDGE SINGAS: And weren't they anticipating an



1 ongoing relationship?

2 MR. BROCKNER: Absolutely, Your Honor. And I'd  
3 say in two separate respects.

4 First, as to these drones in particular, there  
5 was going to be ongoing services, flight training, product  
6 upgrade, technical support. And that's for these drones -  
7 - -

8 JUDGE RIVERA: And did any of that occur in New  
9 York?

10 MR. BROCKNER: That would occur in Mada - - - in  
11 Madagascar, Your Honor.

12 JUDGE RIVERA: Oh.

13 MR. BROCKNER: And then - - -

14 JUDGE RIVERA: So - - - so again, they can  
15 anticipate future business, but again, all of this business  
16 is related to not even a venue in this country?

17 MR. BROCKNER: If I could take a step back, and  
18 we could look at 302(a)(1). That has two grounds for  
19 jurisdiction, Your Honor. Transac - - - it's two separate  
20 bases. It's - - - there's jurisdiction of the nonresident  
21 transacts any business within the state; or second,  
22 contracts to supply goods or services in the state.

23 And what Your Honor is getting at is why this is  
24 not a contracts to supply goods or services in the state  
25 case. Rather, we are turning to the transacting business



1 prong of it, and the fact that there's no goods or services  
2 can't do double duty where it pro - - - disproves both  
3 bases for jurisdiction. And this court has found that the  
4 defendant can transact business here, even if the contract  
5 doesn't require the defendant to provide any goods or  
6 services in New York.

7 JUDGE RIVERA: But I'm still on the prong thing.  
8 What's the transac - - - yes, I get your point. One could  
9 be transacting business within the state about services  
10 that are going to be delivered somewhere else. I get your  
11 point with that.

12 But I still don't see that. I'm having  
13 difficulty seeing that, and I'm - - - if - - - are you  
14 saying this turns on the one trip - - -

15 MR. BROCKNER: No. Your - - -

16 JUDGE RIVERA: - - - taken into New York?

17 MR. BROCKNER: No, Your Honor.

18 JUDGE RIVERA: Okay.

19 MR. BROCKNER: Well, I mean, just to, again, look  
20 at that one trip, Vayu CEO is look - - - is at that meeting  
21 in New York saying he's - - -

22 JUDGE RIVERA: Well, if he didn't do that?

23 MR. BROCKNER: If he didn't do that, that would  
24 be - - -

25 JUDGE RIVERA: It's in jurisdiction?



1 MR. BROCKNER: That would be a closer question,  
2 Your Honor. That would be a def - - - and if I can just go  
3 - - -

4 JUDGE RIVERA: And where would it fall on the  
5 line of that close question?

6 MR. BROCKNER: Your Honor, this Court, in prior  
7 jurisdictional cases, doesn't say, we're going to define  
8 precisely what contexts are sufficient and what contexts  
9 are necessary. I don't think the court needs to do that  
10 here.

11 JUDGE RIVERA: Well, I'm giving you the  
12 hypothetical. Everything but that visit, is that  
13 transacting business within New York State?

14 MR. BROCKNER: If it's - - - there's no  
15 negotiation, I - - -

16 JUDGE RIVERA: Everything else is the same,  
17 except the visit to New York State.

18 MR. BROCKNER: And there - - - and they never  
19 renegotiated and supplemented the contract and it was just  
20 the initial contacts, I think that might not get us - - -  
21 get us there.

22 But if I can just go through the rest of those  
23 factors. You know, it was not just the in-state meeting  
24 and furtherance of the contract, in which Vayu - - - the  
25 State's damages include the thousand dollars in shipping



1 costs that Vayu CEO induced Stony Brook to incur while Vayu  
2 CEO was in New York. That is transacting business,  
3 supplementing a contract, getting the State - - - or Stony  
4 Brook to pay additional costs. That is business.

5 And then on top of that, if I can turn to the  
6 other factors, because this is a totality of the  
7 circumstances inquiry, Vayu repeatedly projected itself  
8 into New York through calls and emails over many months to  
9 negotiate drone specifications. And the purpose of these  
10 activities, in New York and directed to New York, was to  
11 create a continuing business relationship with - - -

12 JUDGE RIVERA: Well, so again, let's take the  
13 hypothetical where they never come into New York State.  
14 Someone contacts them and says, I want to purchase your  
15 drones; do they deliver to Madagascar? I'll send you the  
16 specs; I want it sent to Madagascar. Any training, any  
17 follow-up, you'll do in Madagascar. And I'm going this for  
18 the next five years. I want to have a contract like that  
19 with you for five years.

20 MR. BROCKNER: Well, I - - -

21 JUDGE RIVERA: And - - - and so the person who's  
22 gotten that outreach from New York State resident is  
23 responding to that. Are they transacting business within  
24 New York State?

25 MR. BROCKNER: In that case, Your Honor, that's



1 different than this case because you're assuming - - - in -  
2 - - in this case, the evidence is that Vayu initiated many  
3 of these contacts.

4 So in your hypothetical, the key difference, if I  
5 may, is that there, the plaintiff has a fully formed ide -  
6 - -

7 JUDGE RIVERA: I thought there was disputed about  
8 who initiated it. I thought there wasn't - - - I thought  
9 that was the finding below, that there's no evidence to  
10 establish that Vayu initiated - - - I may have misread the  
11 record. You can tell me otherwise.

12 MR. BROCKNER: Well, two things, Your Honor.  
13 It's a motion to dismiss. There's no - - - there is no  
14 factual findings, and all - - - inferences has to be made  
15 in the State's favors, a nonmoving party.

16 Second, I think Your Honor is talking about that  
17 very first contact, which again, is there even a dispute  
18 there? Because Vayu CEO first contacted the professor in  
19 2013, and then this is to 2015 is the first contact. But  
20 this Court's never said that first contact is somehow  
21 dispositive or determinative, and that approach would be  
22 inconsistent with how this court's generally approached  
23 jurisdiction, which is you look to not any single factor,  
24 but the in totality of the circumstances. And this court  
25 has, time and again, found jurisdiction.





1 Even if plaintiff made that first contact - - -

2 JUDGE RIVERA: So then does it turn on that?

3 Does it turn on Vayu, perhaps, having made the first  
4 contact?

5 I'm not going to dispute with you as a motion to  
6 dismiss. Of course it is, but nevertheless, we have a  
7 particular record in front of us.

8 MR. BROCKNER: Your Honor, no single fact is  
9 dispositive. It is presence in New York. It is numerous  
10 phone calls and emails projected into New York to negotiate  
11 the drone specification. That's why this is very different  
12 than your hypothetical about the plaintiff somehow  
13 providing all the details to the defendant, and the  
14 defendant doing it.

15 In this case, the discussions were over the  
16 specifications for the drone. Can - - -

17 JUDGE RIVERA: But if the plaintiff calls and  
18 says, I want to buy the drones. They go into Madagascar.  
19 Let's work out the specs. And the person who was making  
20 the drones and providing this service, as well as the - - -  
21 the item itself, don't they have to be able to communicate  
22 with them?

23 MR. BROCKNER: Certainly, Your Hon - - - of  
24 course, they would be able to communicate about that, but  
25 when Vayu - - - when the - - -



1           JUDGE RIVERA: I guess, I'm trying to get to the  
2 difference between a New York resident searching out a  
3 business to provide something to them, which may not come  
4 into New York, right, and - - - and the business itself  
5 reaching into New York.

6           Or do you think that not - - - that doesn't  
7 matter? It doesn't matter in that way. It can be a  
8 factor, but it doesn't really matter. What matters is the  
9 nature of this relationship.

10          MR. BROCKNER: The latter, Your Honor. I think  
11 if the defendant is reaching out, that this Court has said  
12 that it's maybe even determinative, that's how the case  
13 law, but it's certainly not sufficient.

14          And I - - - and - - - and so all these contexts,  
15 where it's coming to New York, projecting yourself into New  
16 York, again, things that this Court has recognized can be  
17 sufficient to create a continuous business relationship,  
18 not just for these drones, but Vayu wanted to sell a lot  
19 more drones. You look at page 117 and 118 of the record,  
20 ten drones over two years, plus charging stations.

21          And on top of this - - - and the last factor I'd  
22 like to highlight, it's just not just a entity that happens  
23 to be in New York; it is an arm of the State itself. And I  
24 think that's relevant in two regards - - -

25          JUDGE RIVERA: Yes. And could not the State have



1 negotiated in its contract? I know the problem here is you  
2 have the individual doing this, as opposed to whatever  
3 might be an appropriate office of the State negotiating the  
4 contract. But any disputes would be resolved in your  
5 courts, and there would be personal jurisdiction for Vayu?

6 MR. BROCKNER: Yes. And Vayu could've said the  
7 opposite. I mean, the parties are always free to negotiate  
8 a form of selection clause, that is not - - - the absence  
9 of one isn't a ding against the plaintiff, especially when  
10 - - -

11 JUDGE RIVERA: No, I'm just saying it - - -  
12 should the Court not agree with you? It's not as if the  
13 State doesn't have another way to deal with this problem.

14 MR. BROCKNER: And similarly, Vayu would have  
15 another way to deal with this problem if they were the ones  
16 to insist on a forum - - - decide to contract with the  
17 State of New - - - an arm of the State of New York and  
18 wants to put in a forum selection clause that says, despite  
19 the fact that we are contracting with an arm of the State  
20 of New York, and we can reasonably anticipate to be held  
21 into a state court given who you're cont - - - contracting  
22 with, all that they - - - and then given all that, they  
23 could certainly try to put in a forum selection clause in  
24 that circumstances. But the fact that this is a  
25 substantial business relationship with an arm of the State



1 of New York is all the more reason why this is a  
2 transacting business here.

3 And if I may, I think, the third department went  
4 - - - went astray in saying this contract didn't benefit  
5 New York at all. This was a contract to provide goods to  
6 GHI, Stony Brook's - - - a program in - - - in Stony Brook.  
7 It's part of the educational mission, and they were trying  
8 to - - - they were trying to provide a promise to enhance  
9 Stony Brook's programing educational mission, and - - - and  
10 that is itself a benefit to New York, and it's contrary to  
11 what - - - what the Third Department held.

12 So if I - - - in conclusion, when there's an in-  
13 state meeting in furtherance to the contract, many caught  
14 phone calls over many months into New York to create a  
15 continuous business relationship with a arm of the State of  
16 New York. That is enough to at least get passed the motion  
17 to dismiss under 302(a)(1).

18 ACTING CHIEF JUDGE CANNATARO: Thank you,  
19 Counsel.

20 MR. BROCKNER: All right.

21 Thank you, Your Honors.

22 (Court is adjourned)

23

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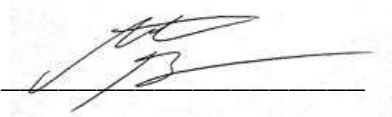
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C E R T I F I C A T I O N

I, Xavier Austin Reyna, certify that the foregoing transcript of proceedings in the Court of Appeals of State of New York v. Vayu, Inc., No. 2 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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