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COURT OF APPEALS

STATE OF NEW YORK

PEGASUS AVIATION I, INC.,

Appellant,

-against-

No. 153

VARIG LOGISTICA S.A.,

Respondent.

20 Eagle Street
Albany, New York 12207
October 13, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY

Appearances:

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Sara Winkeljohn
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 153, Pegasus
2 Aviation.

3 Counselor, proceed.

4 MR. PATCH: May it please the court, my
5 name is Richard Patch. I'm with the firm of Coblenz
6 Patch Duffy & Bass in San Francisco, California. I'm
7 appearing pro hoc before this court.

8 CHIEF JUDGE LIPPMAN: Welcome.

9 MR. PATCH: And I want to thank you for the
10 privilege.

11 CHIEF JUDGE LIPPMAN: You want some
12 rebuttal time, counsel?

13 MR. PATCH: Three minutes, please.

14 CHIEF JUDGE LIPPMAN: Three minutes, go
15 ahead.

16 MR. PATCH: This case presents a
17 fundamental issue for you to determine and that is
18 the question, in the State of New York, is there
19 going to be a different, unique, and far more
20 burdensome standard in spoliation cases, in sanctions
21 cases, when the underlying claim involves an alter
22 ego claim? Because that's what happened in this
23 case, and the - - - the majority is clear - - -

24 CHIEF JUDGE LIPPMAN: Talk about alter ego
25 first.

1 MR. PATCH: Sure.

2 CHIEF JUDGE LIPPMAN: Were there two
3 different organizations? Were they truly the alter
4 ego?

5 MR. PATCH: They are - - - we believe they
6 were truly the alter ego. They are - - -

7 CHIEF JUDGE LIPPMAN: But was - - - explain
8 why. Was the boards the same? Were there - - - how
9 was the control exercised?

10 MR. PATCH: They - - - they controlled the
11 board, they appointed the board, the - - - the
12 MatlinPatterson person in charge of the fund put his
13 sister on the board and made her president of the
14 company, they took a MatlinPatterson - - -

15 JUDGE ABDUS-SALAAM: Were they in control
16 of the board at the time that Pegasus first sued
17 VarigLog?

18 MR. PATCH: They were - - - no, we first
19 sued VarigLog in February of 2008 in Florida.

20 JUDGE ABDUS-SALAAM: And MatlinPatterson
21 was not in control at that time?

22 MR. PATCH: Well, they - - - they were - -
23 - they were not in charge at that time. There was a
24 - - - the sequence of events is they went down and
25 took over the company, and then for a period of time,

1 they were in dispute with the Brazilian shareholders
2 who they had set up as sort of puppets, because
3 Brazilian law doesn't allow foreigners to own air - -
4 - airlines. So they had these three people, and then
5 they got into a dispute. And from the time of July
6 of 2007 until April of 2008, they had to go into a
7 Brazilian court and say, give us control of the
8 company. This is very important because this is
9 highly un - - -

10 JUDGE RIVERA: When did these guys get
11 appointed?

12 MR. PATCH: Excuse me?

13 JUDGE RIVERA: When did the Brazilian
14 Fiscais guys, the committee, get appointed?

15 MR. PATCH: During that period of time.

16 JUDGE RIVERA: February, March, when?

17 MR. PATCH: They went from supervisors to
18 oversight. And the important thing is, look, this is
19 not a case where they sort of accidentally up - - -
20 overstepped the bounds with regard to alter ego.
21 This is a case where they went to a court and they
22 said, we want you to allow us to administer and
23 control and operate this company as the shareholder.
24 That - - - an enor - - - unique set of facts, and
25 they did it, they took them partner, and they took

1 one of their partners in Brazil and put him in charge
2 as the administrator.

3 CHIEF JUDGE LIPPMAN: No issue here of a
4 separate, independent board, as far as you're
5 concerned?

6 MR. PATCH: No. In fact, Judge Kapnick
7 says - - - almost tongue-in-cheek when she was ruling
8 on this motion, she says, quote - - - and this is at
9 page 20 - - - sorry.

10 CHIEF JUDGE LIPPMAN: That's okay.

11 MR. PATCH: This is at page 30 line 25, she
12 says, quote, "It's not like they had an independent
13 board", end quote. Because after they took over in
14 April, and they said we have control, we're taking
15 over the company, they - - -

16 JUDGE RIVERA: They control day-to-day
17 operations?

18 MR. PATCH: Day-to-day operations.

19 JUDGE RIVERA: They control negotiations
20 over the three or four planes and the rent arrears?

21 MR. PATCH: Absolutely. They said, we are
22 the people you have to negotiate with.

23 JUDGE ABDUS-SALAAM: So you - - -

24 MR. PATCH: And they appointed the board.

25 JUDGE ABDUS-SALAAM: - - - you - - - you

1 say, counsel - - - you say in your briefs that we
2 understand that our burden on the alter ego theory is
3 different than control of the documents, and I know
4 we're backing into the sanctions again and the
5 spoliation, but - - - but you seem to be arguing now
6 that by virtue of their control of the company, if
7 there is a spoliation sanction, you've - - - you've
8 essentially won the alter ego theory as well.

9 MR. PATCH: No, in fact, that's the mistake
10 I'm trying to suggest to you that the majority made.
11 They said it would be tantamount to granting a
12 summary judgment. That's just plain wrong. That
13 concern - - -

14 JUDGE FAHEY: Well, the charge - - - the
15 charge is permissive, isn't it? The trial charge is
16 permissive.

17 MR. PATCH: There - - - there's - - -

18 JUDGE FAHEY: It uses language "may",
19 that's your point.

20 MR. PATCH: There's - - -

21 JUDGE FAHEY: It doesn't say shall.

22 MR. PATCH: I think there's three things,
23 actually. One is that there's nothing about the
24 charge that has to mention control whatsoever. The
25 jury doesn't need to understand that. What the

1 charge should say is, you're instructed that VarigLog
2 and the MatlinPatterson defendants allowed documents
3 to be destroyed and therefore you are allowed - - -
4 you may infer - - - that there was material in there
5 adverse to their interests.

6 JUDGE RIVERA: But - - - but at the core of
7 that - - - I mean, essentially, isn't that that - - -
8 that they have control over these documents,
9 therefore they have control over the way the company
10 functions?

11 MR. PATCH: Well, they - - - they have
12 control - - -

13 JUDGE RIVERA: How can you separate that?

14 MR. PATCH: Because one test is control
15 over the events which give rise to the litigation.

16 JUDGE RIVERA: Um-hum.

17 MR. PATCH: Namely, did they control the
18 airplanes, did they make the decisions to convert
19 them, did they refuse to give them back, did they
20 refuse to execute the documents that would allow us
21 to remove them from their jurisdiction?

22 CHIEF JUDGE LIPPMAN: Well, what about the
23 Appellate Division's findings that - - - that this
24 would really severely prejudice them and that you're
25 not prejudiced?

1 MR. PATCH: Well, first - - -

2 CHIEF JUDGE LIPPMAN: What's wrong with
3 what the Appellate Division's view that they have a
4 right to substitute their judgment for the judgment
5 of the Supreme Court, don't they?

6 MR. PATCH: They made three mistakes.

7 CHIEF JUDGE LIPPMAN: Go ahead.

8 MR. PATCH: They made a determination that
9 their documents weren't relevant, and in making that
10 determination, they made three mistakes. First, they
11 refused to follow all the other Appellate Division
12 cases with respect to what constitutes gross
13 negligence. We gave you a litany from Voom to - - -
14 to Sage. The - - - the - - - these cases show three
15 different things. One, no hold was issued, right?
16 And we have three cases, Hawley, Voom - - -

17 CHIEF JUDGE LIPPMAN: They gave you their -
18 - - their documents, right?

19 MR. PATCH: They did, but they didn't issue
20 - - -

21 CHIEF JUDGE LIPPMAN: Isn't that important
22 at all?

23 MR. PATCH: I don't believe it is. Now,
24 the Appellate Division did mention that and in GenOn
25 case, they mentioned that as well. But to me it's

1 just the opposite. Look, if you did your own
2 documents correctly, you know what your duty is. You
3 know what you're supposed to do.

4 JUDGE ABDUS-SALAAM: According - - - und -
5 - - under your theory that MatlinPatterson controlled
6 the company, one of the catalogs or categories of
7 documents that you say are relevant and that were not
8 turned over are internal e-mails in VarigLog, so
9 wouldn't those have been turned over to you by
10 MatlinPatterson if - - - if your theory is correct
11 that they controlled the company? Wouldn't you have
12 gotten those already?

13 MR. PATCH: Well, their - - - their e-mail
14 system at MatlinPatterson in New York is different
15 than the e-mail system in VarigLog in Brazil. So,
16 you know, look, we have three categories of
17 documents, just so we're clear. Bank records, which
18 they refused to produce; internal e-mail, which they
19 refused to produce - - -

20 JUDGE RIVERA: Well, why - - - why couldn't
21 you get the bank records from the bank?

22 MR. PATCH: Because banking laws down there
23 are extraordinary, number one, but second, why
24 couldn't we get them from VarigLog? And we told - -
25 - and the court ordered VarigLog - - - Justice

1 Kapnick said, go get the records yourself and produce
2 them, and they didn't - - - wouldn't - - - refused to
3 do so. That's why they were defaulted. But I don't
4 want - - - I don't want - - -

5 JUDGE PIGOTT: Is it - - - is it - - - is
6 it part of your argument that now - - - all right,
7 Varig's gone, they - - - I mean, you got a judgment
8 against them, I assume - - - that MP can do
9 everything that you would have asked Varig to do
10 because - - - go ahead.

11 MR. PATCH: I didn't want - - - I - - - I
12 think the answer to that is absolutely. They clearly
13 have the ability to go down there and look, one of
14 the reasons this is not GenOn, and you'll hear about
15 it, this is not a parent-subsiary case. This is a
16 very - - - case where they asked for, demanded, and
17 received - - -

18 CHIEF JUDGE LIPPMAN: But you think it's a
19 deliberate bad faith case?

20 MR. PATCH: I think - - - no - - - no - - -
21 how - - - I don't want - - - I want to say they're
22 grossly negligent. Voom says if you don't - - - if
23 you do - - - don't do these things, if you do them
24 late, that's gross negligence. Anoth - - - the other
25 cases say if you don't make inquiry, follow up the

1 case that says - - - you know, 915 Broadway. They
2 never asked. They sent out the late order - - -

3 CHIEF JUDGE LIPPMAN: Not negligence, gross
4 negligence.

5 MR. PATCH: Gross negligence.

6 JUDGE ABDUS-SALAAM: And then - - -

7 MR. PATCH: And then finally - - - and I
8 don't want to forget to say this - - -

9 JUDGE ABDUS-SALAAM: Go ahead. I'm sorry,
10 counsel. I don't want you to forget to say anything.
11 Go ahead.

12 MR. PATCH: - - - is that there's a
13 disposal here. When they were clearly in charge in
14 March of 2009, when the so-called computer crash
15 occurred and the e-mails were lost, they destroyed
16 the hard drive. We have two cases - - - the Weiss
17 case - - -

18 JUDGE ABDUS-SALAAM: You're saying MP
19 destroyed or MatlinPatterson - - -

20 MR. PATCH: And - - -

21 JUDGE ABDUS-SALAAM: - - - they destroyed
22 it, not VarigLog?

23 MR. PATCH: They were in charge, they
24 destroyed it.

25 CHIEF JUDGE LIPPMAN: Yeah, yeah. But - -

1 - but you think they made a conscious decision to
2 destroy it?

3 MR. PATCH: I think they - - - yes, they
4 made a conscious decision to get - - - to destroy - -
5 -

6 CHIEF JUDGE LIPPMAN: That's - - - that's
7 more than gross negligence, isn't it?

8 MR. PATCH: That is, and that is a separate
9 grounds for - - -

10 CHIEF JUDGE LIPPMAN: It's more than - - -
11 it is more than gross negligence in your mind?

12 MR. PATCH: I - - - I believe it is.

13 CHIEF JUDGE LIPPMAN: Okay.

14 MR. PATCH: I - - - I think that you can't
15 - - - they took away the - - - the - - -

16 JUDGE RIVERA: You say it's a voluntary
17 decision to put you in a worse position?

18 MR. PATCH: They - - - I don't know whether
19 they did it - - - why they did it, all I know is that
20 we today - - - you know, forensically you can recover
21 data. And if they had corrupt hard drives, we would
22 have said, give them to us, we'll hire somebody, and
23 we'll see what we can find. Instead they destroyed
24 them.

25 JUDGE ABDUS-SALAAM: Before you sit down,

1 counsel, I just wanted to ask about the relevance of
2 the documents, because you're saying we should find
3 that they were at least grossly negligent and then
4 there would be a presumption of relevance. Did the -
5 - - did the court below say that there was relevance
6 to these documents or - - -

7 MR. PATCH: Yes. Yes, she did, three
8 times, and it's at - - -

9 JUDGE ABDUS-SALAAM: But - - - but wasn't
10 it based on the presumption of gross negligence?

11 MR. PATCH: She eventually relied upon the
12 - - - she found gross negligence and she found the
13 presumption but she also found relevance. And - - -

14 JUDGE FAHEY: What if it wasn't gross
15 negligence?

16 MR. PATCH: Then she - - - then we proved
17 relevance. She found it.

18 JUDGE FAHEY: Could you establish - - -
19 could you - - - could you establish sufficient
20 relevance to - - - to establish ordinary negligence?

21 MR. PATCH: Yes, absolutely.

22 JUDGE FAHEY: Where so?

23 MR. PATCH: We did it three different - - -
24 three different ways and the real problem, the second
25 mistake - - -

1 JUDGE FAHEY: No, just tell me the three
2 ways. You said you did it three ways. Tell me, what
3 are they?

4 MR. PATCH: The first way we did it is we
5 showed other e-mail where employees were complaining
6 about MatlinPatterson.

7 JUDGE FAHEY: Um-hum.

8 MR. PATCH: That leads a natural inference
9 that their other e-mail would have been talking about
10 it and importantly, not a single e-mail was produced
11 that even says the word MatlinPatterson.

12 CHIEF JUDGE LIPPMAN: What are the other
13 two ways?

14 JUDGE FAHEY: You got the - - - the chain
15 e-mail to Born; is that the one you're talking about?

16 MR. PATCH: Yes.

17 JUDGE FAHEY: All right, that's one. What
18 are the other two?

19 MR. PATCH: The other - - - on the bank
20 records - - -

21 CHIEF JUDGE LIPPMAN: Finish - - - finish
22 the two up.

23 MR. PATCH: - - - on the bank records, we
24 showed other bank records that showed payments going
25 out to Matlin-controlled companies. The court found

1 - - - the - - - the court agreed and then said that's
2 cumulative. But in Voom, the same argument was made
3 and the court found the same division - - - the court
4 found - - -

5 CHIEF JUDGE LIPPMAN: Okay, what's the
6 third way, counsel?

7 MR. PATCH: And the third way is - - - is
8 on these communications with the government
9 authorities. Remember, this is hard documents, not
10 just ESI; hard documents.

11 JUDGE FAHEY: So in the hard documents you
12 got the e-mail from Chan to Born, the banking
13 records, and the communications with government
14 agencies?

15 MR. PATCH: That's right.

16 JUDGE FAHEY: All right.

17 CHIEF JUDGE LIPPMAN: Okay, counsel.
18 You'll have your rebuttal. Let's hear from your
19 adversary.

20 MR. PATCH: Thank you.

21 CHIEF JUDGE LIPPMAN: Thank you, counsel.

22 MR. RICE: Thank you, good afternoon. May
23 it please the court, Tom Rice from Simpson Thacher
24 for the respondents, the MatlinPatterson defendants.

25 CHIEF JUDGE LIPPMAN: Counsel, what is - -

1 - what is - - - what is MatlinPatterson guilty of, if
2 anything?

3 MR. RICE: Matlin - - -

4 CHIEF JUDGE LIPPMAN: Negligence, gross
5 negligence, deliberate? What - - - what went on
6 here?

7 MR. RICE: Honestly, Your Honor,
8 MatlinPatterson is not guilty of any degree and I
9 think - - -

10 CHIEF JUDGE LIPPMAN: Why, because they're
11 not - - - they're not an alter ego and therefore they
12 have no control?

13 MR. RICE: Well - - - well, a few - - - a
14 few reasons, number one - - -

15 CHIEF JUDGE LIPPMAN: Go ahead. Go ahead.

16 MR. RICE: - - - number one, on the
17 question of control - - - and again, I don't need to
18 argue these because ultimately, we have a - - - we
19 have a exercise of discretion which assumes control -
20 - -

21 CHIEF JUDGE LIPPMAN: No, no, we understand
22 those arguments.

23 MR. RICE: - - - assumes negligence but - -
24 -

25 CHIEF JUDGE LIPPMAN: Argue it for now, go

1 ahead.

2 MR. RICE: - - - but - - - okay, if I can.
3 First on the question of control, this is yes, they
4 put forward some facts about control. Those are
5 hotly contested, everybody concedes they haven't
6 tried and won that issue. And what Mr. Patch has
7 conceded in his papers is they need to show control
8 over the documents and there - - -

9 CHIEF JUDGE LIPPMAN: Your - - - your - - -
10 is your argument that the board is independent or was
11 independent?

12 MR. RICE: Abs - - - absolutely it was,
13 Your Honor, but - - - but - - - but I think that goes
14 to the ultimate mer - - - that goes more to the
15 ultimate merits of the alter ego question. Here my
16 adversary agrees that the question is control over
17 documents, and there is almost no evidence of the
18 record of control - - -

19 CHIEF JUDGE LIPPMAN: What - - -

20 MR. RICE: - - - of the documents.

21 JUDGE ABDUS-SALAAM: Well, but six judges
22 determined that you did have control over the
23 documents, the - - -

24 MR. RICE: I'm - - - I'm sorry?

25 JUDGE ABDUS-SALAAM: Six judges determined

1 that you did have - - -

2 MR. RICE: At which - - - which is why,
3 Your Honor, I - - - I don't - - - I - - - I frankly
4 am trying to answer the court's questions. Even
5 assuming that, right, I think the exercise of
6 discretion here was that we don't have - - - that - -
7 - that there wasn't negligence - - - there wasn't gross
8 negligence and there wasn't a showing of prejudice.
9 I'm trying to - - -

10 CHIEF JUDGE LIPPMAN: So if you - - -

11 MR. RICE: I'm just trying to be
12 responsive.

13 CHIEF JUDGE LIPPMAN: - - - if you
14 controlled it and you were negligent, still not
15 enough for them to prevail?

16 MR. RICE: They still need to show under
17 the law of the - - - of the courts as - - - as it's
18 developing in this state, Your Honor, it still - - -
19 they still have to show that the - - - that they were
20 prejudiced, the documents were relevant and that they
21 were likely to be held from them - - -

22 CHIEF JUDGE LIPPMAN: Your view is - - -

23 MR. RICE: - - - and they haven't done
24 that.

25 CHIEF JUDGE LIPPMAN: - - - the same as the

1 Appellate Division that - - - that they weren't
2 prejudiced and you are by the lower court decision?

3 MR. RICE: We would - - - we would be
4 terribly prejudiced. The charge - - -

5 CHIEF JUDGE LIPPMAN: Is the case over if -
6 - - if - - -

7 MR. RICE: I - - - I don't - - - you know,
8 I mean, the - - - is the case over? We would
9 certainly - - - would - - - would argue below it's
10 not over, but - - - but a charge that would say - - -
11 in an alter ego case that would say that we had a
12 duty to preserve the documents and didn't because we
13 had some sort of control or enough control, that, in
14 an alter ego case, would be terrible and would be
15 damaging.

16 JUDGE STEIN: Is - - -

17 JUDGE PIGOTT: Well, that's not what you're
18 going to get. It - - - it - - - it seems to - - -
19 I'm - - - I'm wondering why this doesn't wait. I - -
20 - I - - - I kind of thought that Judge Andrias, you
21 know, had a point there. So many of these spoliation
22 cases rel - - - one lawyer can say something and - -
23 - and - - - and you know, if that lawyer's saying it,
24 it's probably not true; another lawyer can say
25 something that say if he says that or she says that,

1 it's probably gospel, and there's just so much stuff
2 that goes into, you know, the preparation for trial
3 and in the trial.

4 MR. RICE: Um-hum.

5 JUDGE PIGOTT: Why wouldn't this wait and -
6 - - and if - - - and if the facts so prove, why
7 wouldn't Judge Kapnick be able to make whatever
8 determination she determined in - - - in terms of the
9 - - - of what inference ought to be drawn, et cetera?

10 MR. RICE: I mean, if - - - if, Your Honor,
11 there's going to be - - - well - - - well, first of
12 all, because the plaintiff move on a fully-developed
13 factual record which had been going on for three-and-
14 a-half years, they had every chance, every
15 possibility to show everything here, control,
16 negligence - - -

17 JUDGE STEIN: Except for that the - - - the
18 records were gone.

19 MR. RICE: Except - - - though, but - - -
20 but, Your Honor - - - but the - - - on the records
21 that were there, they had everything that they
22 needed, everything that they're going to be able to
23 develop in order to put forward the case before the
24 court as to whether or not the negligence was gross
25 and as to whether or not these documents were

1 relevant.

2 JUDGE STEIN: Let me ask you this; if - - -
3 if there's negligence, if there's gross negligence,
4 if some sanction is appropriate, does it have to be
5 an adverse inference?

6 MR. RICE: Of course it doesn't have to be
7 an adverse inference and - - - and - - -

8 JUDGE STEIN: And if it is an adverse
9 inference, couldn't the - - - what you describe as
10 the extreme prejudice, couldn't that be mitigated by
11 the nature of whatever the instruction from the court
12 would be?

13 MR. RICE: I - - - I - - - I mean, I don't
14 believe, Your Honor, it can - - - it can be mitigated
15 enough in - - - in this case, or frankly, in any
16 case, and ultimately what - - - what the Appellate
17 Division did was said, we're doing a balancing, we're
18 looking at the degree of negligence, we're looking at
19 the weakness of the showing of any relevance, we're
20 looking at the severity of the sanction, and we don't
21 think something's relevant here. That's - - - that
22 is an exercise of discretion - - -

23 JUDGE ABDUS-SALAAM: Didn't - - - didn't
24 the Appellate Division - - -

25 MR. RICE: - - - that's an - - -

1 JUDGE ABDUS-SALAAM: Excuse me, counsel,
2 didn't the Appellate Division majority say that the
3 plaintiffs didn't raise relevance or they didn't say
4 that the documents were relevant, that they were
5 relying on the - - - the presumption of gross
6 negligence?

7 MR. RICE: Here - - - here's what happened.

8 JUDGE ABDUS-SALAAM: But that's not true,
9 is it?

10 MR. RICE: Well, it - - - it is true. What
11 - - - what - - - what the Appellate Division said is
12 in the brief before them, they didn't affirmatively
13 raise the question of relevance. What they did do is
14 put forward - - - and they said they put forward all
15 the facts they have in response to our showing,
16 trying to rebut any - - - any showing of relevance.
17 But they put forward facts in that context, so the
18 plaintiff has told this court on this appeal, we put
19 forward the facts there. So I think what the
20 Appellate Division said in the footnote is absolutely
21 true that the facts were there, they had a chance to
22 do it.

23 Here we're talking about - - - here we are
24 talking about an - - - an exercise of discretion by
25 the majority, three experienced judges who had before

1 them the fully developed record, and on that, they
2 found that they didn't meet their requirements. And
3 they did it - - - we heard about - - - something
4 about a fundamental issue before the court. There's
5 a real question in the area of ESI as to whether or
6 not negligence should be enough. It's been en - - -
7 enough in this court's jurisprudence so far that
8 we've adduced to the court the proposed federal rule,
9 which it will be effective absent congressional
10 action on December 1, in which there's a study in
11 which they said in the world of the ESI where there's
12 so much room for error and so much room for a game of
13 got you, you should not be able to - - -

14 JUDGE STEIN: This is dest - - - this is
15 more than just that. This is a actual destruction of
16 - - - of - - - of hardware.

17 MR. RICE: This - - - this is - - - this is
18 not - - - okay, okay, destruction of hard drives.
19 Thank you so much for raising that. They're trying
20 to pin that on my clients? The - - - the - - - the
21 hard drives failed in February and March. My
22 clients, this administration and management was up at
23 the end of the year before that. The company filed
24 for bankruptcy in December. It's in the record at R-
25 604 and 605 that VarigLog's CEO herself didn't know

1 about the - - - the problem with the - - - you know,
2 the - - - the crashes until after the bankruptcy.

3 JUDGE PIGOTT: Was that Born?

4 JUDGE FAHEY: That's - - - that's not the
5 point. Isn't the point when you - - - when you
6 should have put a litigation hold and preserve the
7 information on it, not when it happened later?

8 MR. RICE: I'm - - - I'm - - -

9 JUDGE FAHEY: And let me just finish my
10 thought. And I could be wrong, but I thought that
11 the New York action beg - - - began approp - - -
12 approximately eleven months before the crash, so you
13 would theoretically then have said okay, we had a
14 problem, we have this Florida action, now that's been
15 closed, now we got a New York action so we got to
16 preserve it. I thought that was the basis of - - -

17 MR. RICE: Judge Fahey, two - - - two
18 different arguments or two different points. One,
19 absolutely; you're absolutely correct. The question
20 of whether we should have preserved or not is one
21 that arose by October of - - - of 2008 when we were
22 brought into the case. That's absolutely right, and
23 at - - - and what the Appellate Division found is our
24 failure to do that was, at worst, mere negligence.
25 What I thought Judge Stein was asking is didn't you

1 do worse than that by not preserv - - - also
2 preserving the crashed drives when they happened in
3 2009, and what I'm telling the court is the record
4 evidence at 604 and 605 and again at - - - at 652 is
5 that the company didn't know about it until after the
6 bankruptcy when we are not in control under anybody's
7 allegation and we didn't know about it.

8 JUDGE RIVERA: But when - - - when - - -
9 when did the hard drives get destroyed?

10 MR. RICE: Hard drives got dest - - - hard
11 drives - - - there was two crashes, one in February -
12 - -

13 JUDGE RIVERA: I'm not asking about the
14 crash. I'm asking about the hard drive being
15 destroyed.

16 MR. RICE: I - - - it - - - it's not in the
17 record, Your Honor, and we don't know when it
18 happened but it happened some - - -

19 JUDGE RIVERA: It's not a problem that you
20 don't know?

21 MR. RICE: It doesn't - - - it's - - - it's
22 not a problem where I don't have a burden of proof on
23 - - - on this issue at all, Your Honor.

24 JUDGE STEIN: Didn't - - - didn't you put
25 somebody in charge of IT? When was that - - -

1 MR. RICE: Didn't we - - - no - - - no,
2 Your Honor, we did not. There were a couple of e-
3 mails in the record that show that a consultant went
4 down to consult on IT. The deposition evidence,
5 which is marshalled in Mr. Hefter's affidavit, is
6 quite clear that the decisions about everything were
7 made by the board and by the management with the
8 consent of the overseers.

9 CHIEF JUDGE LIPPMAN: So absent - - -
10 absent intentional destruction on your part, you
11 don't get the harshest sanction?

12 MR. RICE: I - - - under the federal rule -
13 - -

14 CHIEF JUDGE LIPPMAN: In its simplest for -
15 - - yeah - - -

16 MR. RICE: Under the federal rule, that's
17 true.

18 CHIEF JUDGE LIPPMAN: You think that should
19 be our - - - our rule?

20 MR. RICE: I - - - I think, Your Honor,
21 there's a good case for it, but you don't need to go
22 there. This is - - - there was an exercise of
23 discretion that in no way was an abuse of discretion.
24 It doesn't - - - it wasn't formed by any errors of
25 law. It doesn't shock the conscience. It

1 absolutely, positively - - -

2 JUDGE PIGOTT: Well, one of the things in
3 my experience is is that some of this - - - this
4 stuff evolves, you know, you get in the middle of the
5 trial and somebody says oops, look what we found, and
6 all of a sudden you got - - - you know, not
7 necessarily a spoliation issue but you got an
8 evidentiary issue. And how do - - - how - - - I - -
9 - I think this Judge Andrias's point is, you know,
10 why isn't the trial court, you know, going to be put
11 in charge of this, and if - - - if - - - if there's
12 going to be a charge to the jury as - - - as he was
13 suggesting that they may, but they do not have to,
14 conclude that there has been - - - there's been some
15 mis - - - misbehavior on the part of - - - of MP - -
16 -

17 MR. RICE: So, Judge - - - Judge Pigott - -
18 -

19 JUDGE PIGOTT: - - - why wouldn't that be a
20 better way to do it?

21 MR. RICE: Judge - - - Judge Pigott, what I
22 understood Judge Andrias to be saying is they should
23 get a second bite of the apple now and this should be
24 remanded for an additional discovery and/or hearing.
25 Of cour - - - what - - - what - - - what was before

1 the court was a motion for sanctions, it was - - - it
2 was granted and then that was reversed and that's it.
3 If further facts develop at trial that - - - that
4 give rise to the trial court wanting to do something
5 other and different based on the facts presented, of
6 course the court can do that.

7 JUDGE PIGOTT: So you're saying that - - -
8 that any decision that's made in - - - in - - - in
9 the - - - in the Appellate Division at this time is
10 only binding with respect to the facts as they
11 existed at the time that the Supreme Court made its
12 decision in December of 2012, and anything that's - -
13 - that's developed since is a new ballgame?

14 MR. RICE: If something develops at - - -
15 during the course of the trial, Your Honor, I think
16 the court has got discretion to deal with it. That's
17 - - -

18 JUDGE ABDUS-SALAAM: Counsel - - -

19 JUDGE FAHEY: You know, the way I read
20 Judge Andrias is that - - - God, I - - - I could be
21 wrong, but it seemed that he was saying that the - -
22 - it was not gross negligence, which of course would
23 - - - would benefit you and put a greater burden on
24 them. That's what I thought.

25 MR. RICE: He - - - he agreed with that,

1 yes.

2 JUDGE FAHEY: That's what the majority was
3 saying, so he was agreeing with that, but - - - but
4 that - - - so there's no adverse inference but there
5 - - - that's mandatory, but it could be permissive
6 and it - - - it depended on prejudice and it needed a
7 hearing. That's the way I understood him to say.

8 MR. RICE: I - - - I think - - - I think
9 that's what he was suggesting, Your Honor, what - - -
10 Your Honor, was that they should go back and be able
11 to further try to adduce facts in - - - in the
12 context of this motion - - -

13 JUDGE FAHEY: I see.

14 MR. RICE: - - - to do it. And I - - -

15 CHIEF JUDGE LIPPMAN: You don't believe
16 your argument is basically its simplest form that the
17 AD did not - - - the Appellate Division did not abuse
18 its discretion - - -

19 MR. RICE: This - - -

20 CHIEF JUDGE LIPPMAN: - - - in terms of our
21 standards of review, that's as far as you go?

22 MR. RICE: I - - - I think that's
23 absolutely right, Your Honor. This - - - there are
24 lots of interesting and different - - -

25 CHIEF JUDGE LIPPMAN: Without getting into

1 all of these - - -

2 MR. RICE: Right, I think there are lots of
3 interesting and tough questions here, you know, as
4 they relate to the question of what New York is going
5 to do, because this court hasn't really spoken on it,
6 on the question of - - - of, you know - - - of - - -
7 of spoliation in the area of - - - of ESI,
8 electronically stored information, but you don't need
9 to get there in this case in order to affirm, because
10 we're talking about fundamentally a sound exercise of
11 discretion by the Appellate Division.

12 CHIEF JUDGE LIPPMAN: Okay.

13 JUDGE ABDUS-SALAAM: I just want to - - -

14 CHIEF JUDGE LIPPMAN: I'm sorry, Judge
15 Abdus-Salaam.

16 JUDGE ABDUS-SALAAM: - - - clarify this for
17 us. We are talk - - - you - - - you're talking about
18 ESI because there were documents involved here and I
19 believe that plaintiffs also raised issues about the
20 documents, 35,000 boxes of documents that were never
21 looked into. So I just want to be clear that what's
22 before us, you're - - - you're saying is limited to
23 the ESI?

24 MR. RICE: Yeah - - - yes, Your Honor, and
25 thank you for raising that. So let me - - - so - - -

1 so the motion was - - - right, the motion was for - -
2 - for destroyed ESI and hard-copy documents. There
3 is not a shred of evidence in the record that after
4 the litigation was commenced, there were hard-copy
5 documents that were destroyed. In fact, Ms. Ohira,
6 the CEO, said, after I got there in November of 2008,
7 everything was saved, 35,000 boxes of documents; it
8 was a mess. They were keeping everything all
9 together. That stuff not being produced, that
10 happened after my client, by anybody's imagination,
11 is out of control by VarigLog and the bankruptcy
12 trustee. All of those shenanigans in the - - - in
13 the litigation about what they were producing and
14 what they were not is not - - - has nothing to do
15 with my client.

16 CHIEF JUDGE LIPPMAN: Okay, counsel.

17 Thanks, counsel.

18 MR. RICE: Thank you, Your Honor.

19 CHIEF JUDGE LIPPMAN: Counselor, rebuttal?

20 MR. PATCH: Yes, thank you.

21 CHIEF JUDGE LIPPMAN: Counsel, what about
22 the issue of the Appellate Division? Can we say as a
23 matter of law that they abused their discretion?

24 MR. PATCH: I don't think that that's the
25 standard. I'm asking you to find - - -

1 CHIEF JUDGE LIPPMAN: The - - - the
2 standard of our - - - what is the standard of our
3 review?

4 MR. PATCH: They said they were rul - - -
5 making a matter - - - ruling as a matter of law, so
6 they made a ruling that this record did not support
7 gross negligence, and in doing that, they made an
8 error. You can correct that error, that's not an
9 abuse - - - that's not discretionary. The evidence
10 is that they didn't do it - - -

11 CHIEF JUDGE LIPPMAN: Or a matter - - - as
12 a matter of law, the Appellate Division was wrong in
13 what it did?

14 MR. PATCH: On gross negligence.

15 JUDGE PIGOTT: Didn't they say on the law
16 and the facts?

17 MR. PATCH: Yes.

18 JUDGE PIGOTT: And we don't review facts,
19 so how do we - - - how do we get - - -

20 MR. PATCH: They said they did not change
21 any of the facts, so they're tak - - - we're all
22 taking the facts as stated, and they made a decision
23 that was different, so, you know, five - - - out of
24 the six people who viewed it, three of them decided
25 that - - - that as a matter of law it was not gross

1 negligence.

2 But we know that the cases say if you don't
3 issue a lit hold, it's gross negligence. If you
4 don't - - - if you do one late - - - late - - - it's
5 gross negligence. If you don't follow up and make
6 sure that every one of the custodians actually does
7 it, that's gross negligence, and if you take hard
8 drives and you destroy them, that's gross negligence.
9 We have case after case after case. So it's not a
10 matter - - - you need to correct that record.

11 The second mistake they made is in the
12 burden of proof they placed on me with respect to
13 proving relevance, and what they did is you have to
14 start at the - - - at the far right. The well-
15 developed common law of spoliation in New York says
16 you don't have to prove relevance. And this same
17 division, literally weeks apart - - - and there's the
18 Strong case holding that once you show negligence,
19 that's enough for common law spoliation so it's not -
20 - - on the non-ESI stuff, we're done.

21 Then you get the ESI and there's two
22 layers, right. There's a layer of cases that say you
23 have to show basically relevance in the broadest
24 sense that it's sort of discoverable, and I cite
25 those four cases to you, and then there's one other

1 case, Voom, that goes the extra mile, adopts the
2 Zubulake standard, and says you have to not only
3 point relevance in a broad sense that they have to do
4 with the issues; you have to prove that they would be
5 favorable to you. And that's the rule they applied
6 here.

7 Now, I think I did that by showing that
8 they - - - that - - - that the communications with
9 the government authorities, if they'd been preserved
10 and produced, would have defeated their argument that
11 they - - - they were somehow under the control of
12 these Fiscals guys. I think I would show by - - - I
13 have to say one thing. This is a wholesale
14 destruction of documents. This isn't like Voom where
15 there was a period of six months where documents were
16 destroyed, where they had stuff before and stuff
17 after. This is everything.

18 CHIEF JUDGE LIPPMAN: So while they were in
19 control, they destroyed these documents and the
20 record shows it?

21 MR. PATCH: They allowed the documents to
22 be destroyed. So the timing, again - - -

23 CHIEF JUDGE LIPPMAN: Let - - - you're now
24 - - - but you're - - -

25 MR. RICE: - - - that's what the timing - -

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CHIEF JUDGE LIPPMAN: - - - you're saying they allowed it because they are one and the same - -

MR. PATCH: Yes.

CHIEF JUDGE LIPPMAN: - - - is your argument? Not that they intentionally destroyed it themselves?

MR. PATCH: I'm saying that the people at MatlinPatterson who were in Brazil, who were in control of this company, didn't take the necessary actions to preserve the documents, and that is Mr. Born, Mr. Miller, and Ms. Ohira - - - Ms. Ohira is the wife - - - the sister. Those are the people that were running the company.

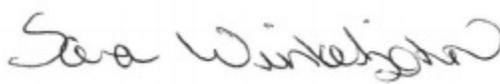
CHIEF JUDGE LIPPMAN: Okay, counsel. Thank you both. Appreciate it.

(Court is adjourned)

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

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Pegasus Aviation I, Inc. v. Varig Logistica S.A., No. 153 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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