USA v. Grupe

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UNITEDSTATESDISTRICTCOURT

DISTRICTOFMINNESOTA

UNITEDSTATESOFAMERICA,

Plaintiff, v. CHRISTOPHERVICTORGRUPE,

Defendant.

CaseNo.17 CR 0090(1)(PJS/DTS)

ORDER

AaronR.Cooper,UNITEDSTATESDEPARTMENTOFJUSTICE;TimothyC. Rank,UNITEDSTATESATTORNEY'SOFFICE,forplaintiff. TorEkeland,FredericB.Jennings,andAmandaGrannis,TOREKELANDLAW, PLLC;andDanielMohs,fordefendant. DefendantChristopherGrupewasconvictedbyajuryofonecountofintentional damagetoaprotectedcomputerinviolationoftheComputerFraudandAbuseAct ("CFAA"),18U.S.C.§1030(a)(5)(A)and(c)(4)(B)(i). ThismatterisbeforetheCourton Grupe'smotionforacquittalor,inthealternative,anewtrial. Forthereasonsthat follow,themotionisdenied.

I. BACKGROUND FromSeptember2013toDecember2015,Grupewasaseniornetworkdesign engineerforCanadianPacificRailway("CP"). TrialTr.("TT")16 17. Inearly December2015,Grupewasworkingonanetworkupgradeat CP'sNahantYard,a majordieselservicingyardinDavenport,Iowa. TT19 20,27. Thecutovertothenew system(whichrequiredtakingdowntheexistingsystem)wasscheduledtotakeplace duringa"changewindow"startingat8:00pmonDecember3. TT20 23. Grupehad requestedthatthechangewindowbemovedtoDecember2,butseniormanagement deniedhisrequest. TT31. Grupeneverthelessdecidedonhisowntoproceedwiththeupgradeon

December2. Insodoing,Grupecausedanunexpectedoutagethat Grupe'ssupervisor, ErnestSeguin,hadtorectify. TT19,26 27,31 32. Afterrestoringservice,Seguin instructedGrupethatthetwoofthemwouldupgradethesystemtogetherduringthe

scheduledchangewindowonDecember3andthatGrupeshouldnotproceedby himself. TT34 35. Seguinwasconcernedthattherewasanunderlyingprobleminthe systemandbelievedthattheupgrademightnotbesuccessful. Seguinwantedtowork withGrupesothat,intheeventofaproblem,Seguincouldquicklyrestoretheexisting service. TT34 35. SeguinalsoremindedGrupethatmakingchangesoutsideofthe scheduledchangewindowwouldbecausefortermination. TT34 35.

Despitethatwarning,GrupeagaindisregardedSeguin's instructionsandagain triedtoupgradethesystemonhisown. TT37 40. AsSeguinhadanticipated,the upgradecausedproblems. TT38. AfterGrupeignoredSeguin's multipleattemptsto contacthim(includingthroughtheon siteprojectmanager),Seguintoldtheon site

2 projectmanagerthathewasgoingtohaveGrupeescortedfromthepropertybyCP police. TT40 45. ThatgotGrupe's attention. GrupefinallycalledSeguinandwas verballyabusivetoSeguinonthephone. TT45 46("Andthenhebrokeintoastateof profanitiesandstartedliterallyyellingandscreamingonthephoneaboutunrelated thingslikeyouCanadiansdon'tknowhowtorunarailway. Itwentonforquite awhile,veryloud,veryprofane."). Attheendofthecall,SeguinsuspendedGrupe,althoughthetwocontinuedto

workwithotherCPemployeestocompletetheupgrade. TT47,51,54 56. Seguinlater toldGrupetostayoffCPpropertyduringhissuspension. TT61. Seguinalsotooksteps tosuspendGrupe'scomputeraccountsandbuildingaccess. TT63 64. Yetagain, GrupedisregardedSeguin'sinstructions,thistimebyshowinguponCPpropertyand communicatingwithon siteCPstaff. TT70 71.

OnDecember15,CPinformedGrupethathewasbeingterminated. 1

TT75 78. CPinstructedGrupetoreturnallcompanyproperty,includinghislaptopandbuilding accesscards. TT79 80,82. OnDecember17,shortlybeforereturninghislaptop,Grupe

usedthelaptoptologintotwoofCP'snetworkswitches. Theseswitches—locatedin Calgary,Alberta,andreferredtoasthe"Ogdenswitches"—functionas"thecentral nervecenterforalldataandvoicetrafficthrough"CP'scomputernetwork. TT93;see

1 AtGrupe'srequest,CPallowedhimtocharacterizehisterminationasa resignation. TT80.

3 alsoTT11,91. CPnetworkengineersuseadministrative levelaccountstoaccessthe switchestoreconfigurethemtoaccommodatenewapplications,diagnoseandfix problemswiththenetwork,andperformothertasks. TT100. Grupedeletedtwo administrative levelaccounts(includinganaccountthathehadcreatedforhimself

withoutauthorization)andchangedthepasswordforthemainadministrative ("admin")accountthatCPemployeesusetoaccessandadministertheswitches. TT127,131 35,170 71,174,183,332 43.

OnJanuary6,2016,aCPemployeetriedandfailedtologintotheswitchesusing theadminaccount. TT90,95,101 02,312. Theissueescalatedupthechainof commanduntilitbecamean"allhandsondeck"situation. TT499,556 57. CP employeesinvestigatedwhethersomeonehadchangedthepasswordandwhether therewasanotherwaytologintotheswitches. TT100 02. Aspartoftheinvestigation, ThomasGurney,anothernetworkdesignengineer,calledGrupetoaskifheknewof anypreviouspasswordsthatwouldgetthemintotheswitch. Theytalkedforabouta halfanhour,tryingvariouscombinationsofpasswords,noneofwhichworked. TT 322 23. GrupedidnottellGurneythathehadchangedthepasswordfortheadmin account—nor,ofcourse,didGrupegivethenewpasswordtoGurney. TT358.

Eventually,CPdeterminedthatitsonlyoptionwastomanuallypoweroffand rebootheswitchesinthehopethattheadminpasswordwouldresetitself. TT103. 4 Thefollowingevening(January7),CPrebootedeachofthetwoswitches,aprocessthat tookapproximately45to60minutes. TT115,153,178,197. Therebootwassuccessful, andCPregainedadministrativeaccesstotheswitches. TT115.

Inthewakeofthisincident,CPretainedCrowdStrike,aninformation security firm,toinvestigate. TT246,249,557,664. CPwasalreadyusingaCrowdStrikeproduct calledFalconHosttomonitorthecomputersusedbyCPemployees. TT248 49. CP's andCrowdStrike'sinvestigationidentifiedGrupeasthelikelyculprit.

II. ANALYSIS A. MotionforAcquittal UnderFed.R.Crim.P.29,"thecourtonthedefendant'smotionmustentera judgmentofacquittalofanyoffenseforwhichtheevidenceisinsufficienttosustaina conviction." InconsideringaRule29motionforacquittal,thecourtmustviewthe evidenceinthelightmostfavorabletothegovernment,resolveallevidentiaryconflicts inthegovernment'sfavor,andacceptallreasonableinferencesdrawnfromthe evidencethatsupportthejury'sverdict. UnitedStatesv.Cook,603F.3d434,437(8thCir. 2010). Themotionshouldbegrantedonlyifnoreasonablejurycouldhavefoundthe defendantguilty. Id.

Grupewaschargedwithcausingintentionaldamagetoaprotectedcomputerin violationoftheCFAA,18U.S.C.§1030(a)(5)(A)and(c)(4)(B)(i). AstheCourtinstructed thejury,theelementsofthisoffenseareasfollows: (1)thedefendantknowinglycaused

5 thetransmissionofaprogram,code,orcommandtoaprotectedcomputer;(2)the defendantactedwithoutauthorization;(3)thetransmissioncauseddamagetothe

protectedcomputer;and(4)thedefendantintendedtodamagetheprotectedcomputer. ECFNo.61at6. AfterfindingGrupeguilty,thejuryfurtherfoundthatGrupe'soffense

causeda"lossto1ormorepersons...aggregatingatleast$5,000invalue,"asis necessaryforafelony leveloffense. See18U.S.C.§1030(c)(4)(B)(i)(incorporating §1030(c)(4)(A)(i)(I),whichimposesa$5,000lossrequirement). Grupearguesthatthereisinsufficientevidencetosupporthisconviction. Specifically,Grupearguesthatthereisinsufficientevidencetoprovethatheeither

causedorintendedtocause"damage"withinthemeaningoftheCFAA;thatthe networkswitchesare"computers"withinthemeaningoftheCFAA;orthathisoffense causedatleast$5,000inloss. TheCourtconsiderseachargumentinturn.

1. Damage Under18U.S.C.§1030(e)(8),"'damage'meansanyimpairmenttotheintegrityor availabilityofdata,aprogram,asystem,orinformation[.]" Undertheplainmeaningof thestatute,CP'sinabilitytologintotheswitchesfromDecember17,2015until January7,2016constituted"damage." Cf.UnitedStatesv.Millot,433F.3d1057(8thCir. 2006)(affirmingconvictionundertheCFAAwheredefendantdeletedamanager's accountthatwaseventuallyrestored).

6 Grupeneverthelessarguesthatnorationaljurycouldhaveconcludedthathe causeddamagebecauseCPwasabletoreboottheswitchesandregainadministrative access. Asthegovernmentnotes,however,thedefinitiondoesnotrequirethe permanentdestructionofdataordenialofaccess;instead,thedefinitionincludes"any impairmenttothe...availabilityofdata,aprogram,asystem,orinformation[.]" (Emphasisadded.) Withoutdoubt,Grupeimpairedtheavailabilityofdata,aprogram,

asystem,orinformation.

Grupecitestocasesinwhichcourtshaveheldthatmerelyaccessingconfidential informationisnot"damage"underthisdefinition. See,e.g.,FarmersIns.Exch.v.Auto ClubGrp.,823F.Supp.2d847,852 53(N.D.Ill.2011). Thesecasesareinapposite, though,asGrupedidfarmorethanmerelyaccessinformation. Grupedeletedtwo accountsandchangedthepasswordforathird.

Grupealsocitestothreecasesinwhichformeremployeesdeletedemailsor otherdata,butthecourtneverthelessfoundnodamage. Allthreeofthesecasesare distinguishable,however. InInstantTechnology,LLCv.Defazio,thedistrictcourtfound, asafactualmatterafterabenchtrial,thattherewasnodamagebecausetheemailsthat thedefendanthaddeletedwerereadilyaccessibleinthesystem'strashfolderandon theplaintiff'sserver. 40F.Supp.3d989,1019(N.D.Ill.2014),aff'd ,793F.3d748(7thCir.

7 2015). 2 Inotherwords,InstantTechnologyreliedonthefactthat,althoughthelocationof theemailshadchanged,theemailsremainedreadilyaccessibleatalltimes. Here,by contrast,CPcouldnotaccesstheswitchesuntilafteritperformedacomplexandrisky rebootprocedure. Thesecondcase,DevonEnergyCorp.v.Westacott,isevenlessrelevant. Inthat

case,thedefendantclaimedthatheintendedtodeleteonlyhispersonalfiles,thatany deletionofotherfileswasaccidental,andthathethoughtthathisemployerhadbackup copiesofhisworkproduct. No.09 1689,2011WL1157334,at*11(S.D.Tex.Mar.24, 2011). Thecourtsimplyfoundthattherewasadisputeoffactconcerningthe defendant'sintentandnoted,inpassing,thattheplaintiffdidnotdisputethatthere wouldbenodamageifthefileswereinfact"easilyaccessible"onitsnetwork. Id.

Finally,inCheneyv.IPDAnalytics,L.L.C.,thedistrictcourtdismissedaCFAA claimbecause,althoughtheplaintiffhadallegedthatthedefendanthaddeleted computerfiles,theplaintifffailedtoallegethatthedeleteddatawasunavailable throughothermeans. No.08 23188,2009WL1298405,at*6(S.D.Fla.Apr.16,2009), reportandrecommendationadopted,2009WL2096236(S.D.Fla.May8,2009). Here,the governmentprovedthatthedata,programs,systems,andinformationontheswitches wereunavailabletoCPthroughothermeans. Settingthataside,totheextentthat

2 TheSeventhCircuitaffirmedthedistrictcourt'sjudgment,butitdidnot mentionthedeletedemailsnordiscusstheCFAA'sdefinitionof"damage."

8 Cheneycanbereadtorequirethepermanentdeletionofdata,theCourtdoesnotfindit persuasiveassuchaninterpretationwouldconflictwiththeplainlanguageofthe statute.

GrupealsoarguesthatCPwasneveractuallylockedoutoftheswitchesbecause therewereotheradministrativeaccountsthroughwhichCPcouldhaveaccessedthe switches. GrupecontendsthatitwasCP'sownfaultthatitcouldnotaccessthe switchesbecauseitdidnotmaintainacentralizedlistofadministrativeaccounts. The jurycouldrationallyhavefound,however,thattherewerenosuchaccounts. AfterCP discoveredthatitcouldnotaccesstheswitchesthroughtheadminaccount,CPquickly escalateditsresponseupthroughseverallevelsofmanagement. Itwasan"allhands ondeck"situationandmultipleemployeesattemptedtofindawaytologintothe switches—includingbycontactingGrupe,whohidthefactthathehadchangedthe passwordtotheadminaccount. CPclearlywantedtoavoidrebootingtheswitches becauseoftheriskthatitwouldlosecrucialdata. Areasonablejurycouldhave concludedthat,hadtherebeensomeotheraccountthroughwhichCPcouldhave accessedtheswitches,CPwouldhavediscovereditbeforeitconcludedthatitsonly optionwastoreboottheswitches. 3

3

Grupecitesevidenceofanalternative,functioning“cpadmin”account,seeECF No.78at9(citingTT232 35,whichdiscussesa“cpadmin”account),buttherewasalso evidencethatGrupehimselfdeleteda“cpadmin”account,seeTT332 43.

9 Settingthataside,eveniftherehadbeenanaccountthatcouldhavebeenusedto gainaccesstotheswitchesifonlyCPhadknownaboutit,thatdoesnotmeanthat Grupedidnotcausedamage. TheaccountforwhichGrupedeletedthepasswordwas themainadministrativeaccountthroughwhichCPadministeredtheswitches,anda reasonablejurycouldhavefoundthatCPdideverythingitcouldtogainaccesstothe switchesbeforeundertakingtherebootprocedure. Asafactualmatter,theavailability ofthedata,programs,networks,andinformationontheswitcheswasclearlyimpaired byGrupe’sactions,andthejurywasreasonableinsofinding.

2. Intent Grupearguesthatnoreasonablejurycouldhavefoundthatheintendedtocause damage. Thisargumentappearstodependon Grupe’sclaimthathedidnotinfact causeanydamage,aclaimthattheCourthasalreadyrejected. Asaresult,Grupe’s argumentaboutintentboilsdowntoaclaimthat,becausehecouldhavecausedworse damage,helackedtheintenttocauseanydamage. Thisisobviouslyanon sequitur. Thejurycouldanddidrationallyconcludethat Grupeintendedtocausethedamage

thathecaused—thatis,theimpairmentoftheavailabilityofdata,programs,systems, andinformation. Andasthegovernmentnotes,itisclearthatGrupedidnotact accidentally;heexecutedaseriesofcommandstodeliberatelydeleteaccountsand changeapassword. Moreover,thereisampleevidencethatGrupewasahotheadwho wasangryabouthisterminationandthushadamotivetoharmCP. Finally,therewas

10 evidencethatGrupeattemptedtocoverhistracks. Areasonablejurycouldeasilyhave foundthatGrupeintendedtocausedamage.

3. Computer TheCFAAdefinesa“computer”asfollows:

[T]heterm“computer”meansanelectronic,magnetic, optical,electrochemical,orotherhighspeeddataprocessing deviceperforminglogical,arithmetic,orstoragefunctions, andincludesanydatastoragefacilityorcommunications facilitydirectlyrelatedtooroperatinginconjunctionwith suchdevice,butsuchtermdoesnotincludeanautomated typewriterortypesetter,aportablehandheldcalculator,or othersimilardevice[.] 18U.S.C.§1030(e)(1). Thisisan“exceedinglybroad”definitionthat“capturesany

devicethatmakesuseofa[n]electronicdataprocessor,examplesofwhicharelegion." UnitedStatesv.Kramer,631F.3d900,902(8thCir.2011)(holdingthatacellularphoneis

a"computer"withinthemeaningoftheCFAA).

Grupearguesthatthegovernmentfailedtointroducesufficientevidencethatthe switchesmeetthisdefinition. TheCourtdisagrees. Thejuryheardagreatdealof testimonyfromwhichtheycouldhaverationallyconcludedthattheswitchesare"high speeddataprocessingdevice[s]"thatperform"logical,arithmetic,orstorage functions." Attheveryleast,thejurycouldrationallyhaveconcludedthattheswitches area"datastoragefacilityorcommunicationsfacilitydirectlyrelatedtooroperatingin conjunctionwith"suchadevice. SeeTT8(aswitchisa"keypartofacomputer

11 network,""thetraffichandlerforallthenetworktrafficfromtheuser'sworkstationto theserversandback,"and"directsthedataflows");TT92(theswitchesarethe"nerve centerofthedatacenter");TT93(theswitchisa"verylarge,veryfastcomputer—that basicallyisthecentralnervecenterforalldataandvoicetraffictheroughtheCP environment"and"basicallyconnectsalloftheservers,alloftheapplicationsthrough whichthoseserverswork,andallthetelecommunicationsgeartoallofthesiteswithin thenetwork");TT100(theswitchesare"thenervecenterofallthedataandphone communicationforCanadianPacificRailway");TT116 17(theswitchesarethe"center ofallthedatafortheCanadianPacificRailway"andiftheyloggedeverythingtheydid, itwouldbecrippling);TT291(switchesarethehubthroughwhichdataisdisbursed acrossthenetwork). Grupecontendsthattheswitchesaremorelike"anautomatedtypewriteror

typesetter,aportablehandheldcalculator,orothersimilardevice,"whicharecarved outfromthedefinitionof"computer." TheCourtthinksnot. Theswitchescontrolthe flowofdataacrossavastcomputernetwork;theyarenothinglikeautomated typewritersorhand heldcalculators. Therewassufficientevidenceforthejurytohave concludedthattheswitchesmettheCFAA'sdefinitionof"computer."

12 4. Loss Tobeconvictedofafelony leveloffense,Grupehadtohavecausedatleast $5,000in"loss." 18U.S.C.§1030(c)(4)(A)(i)(I). "[L]oss"meansanyreasonablecosttoanyvictim,including

thecostofrespondingtoanoffense,conductingadamage assessment,andrestoringthedata,program,system,or informationtoitsconditionpriortotheoffense,andany revenuelost,costincurred,orotherconsequentialdamages incurredbecauseofinterruptionofservice[.] 18U.S.C.§1030(e)(11). Grupearguesthatacostcannotcountasa"loss"unlessitwas "incurredbecauseofinterruptionofservice." Hefurtherarguesthat,evenifalossneed notbetheresultofaninterruptionofservice,therewasinsufficientevidencefrom

whichthejurycouldhaveconcludedthattherewasatleast$5,000inloss. TheCourt considerseachargumentinturn.

a. InterruptioninService Grupearguesthatthequalifier"incurredbecauseofinterruptionofservice" appliestotheentiredefinitionof"loss." TheCourtdisagrees,asdoeseveryfederal appellatecourtthathasaddressedtheissue. SeeBrownJordanInt'l,Inc.v.Carmicle,846 F.3d1167,1173 74(11thCir.2017);Yoder&FreyAuctioneers,Inc.v.EquipmentFacts,LLC, 774F.3d1065,1073 74(6thCir.2014);seealsoFacebook,Inc.v.PowerVentures,Inc.,844 F.3d1058,1066(9thCir.2016)(findingthatplaintiffsuffered"loss"inacaseinvolving nointerruptioninservice);A.V.exrel.Vanderhyev.iParadigms,LLC,562F.3d630,646

13 (4thCir.2009)(holdingthatcostsofinvestigationwererecoverableincaseinwhich therewasnointerruptioninservice);NexansWiresS.A.v.Sark USA,Inc.,166F.App'x 559,562(2dCir.2006)("Asthedistrictcourtcorrectlyrecognized,theplainlanguageof thestatutetreatslostrevenueasadifferentconceptfromincurredcosts,andpermits recoveryoftheformeronlywhereconnectedtoan'interruptioninservice.'"). AstheEleventhCircuitexplained,

Theplainlanguageofthestatutorydefinitionincludestwo separatetypesofloss:(1)reasonablecostsincurredin connectionwithsuchactivitiesasrespondingtoaviolation, assessingthedamagedone,andrestoringtheaffecteddata, program[,]system,orinformationtoitsconditionpriorto theviolation;and(2)anyrevenuelost,costincurred,or otherconsequentialdamagesincurredbecauseof interruptionofservice. See18U.S.C.§1030(e)(11). The statuteiswritteninthedisjunctive,makingthefirsttypeof lossindependentofaninterruptionofservice. Yoder,774 F.3dat1073. Contrarytotheassertionofthecourtin ContinentalGroup,thisinterpretationdoesnotreduce "interruptionofservice"tosurplusage. SeeCont'lGrp.,622 F.Supp.2dat1371. "Loss"includesthedirectcostsof respondingtotheviolationinthefirstportionofthe definition,andconsequentialdamagesresultingfrom interruptionofserviceinthesecond. Thus,underaplain readingofthestatute,[plaintiff]'slossfrom[defendant]'s violationoftheCFAAdoesnotneedtoberelatedtoan interruptionofserviceinordertobecompensable. BrownJordanInt'l,Inc.,846F.3dat1174. TheCourtagreeswiththisanalysis,and accordinglyrejectsGrupe'sargumentthattherecanbeno"loss"withoutan interruptioninservice.

14 Grupeneverthelessarguesthat,becausesomelowercourtshaveagreedwithhis interpretation,thedefinitionof"loss"isnecessarilyambiguousandtheCourtis thereforeobligatedtointerpretitnarrowlyundertheruleoflenity. AstheSupreme Courthasexplained,though,"thisargumentmisconstruesthedoctrine." Moskalv. UnitedStates,498U.S.103,107 08(1990)("[W]ehavedeclinedtodeemastatute

'ambiguous'forpurposesoflenitymerelybecauseitwaspossibletoarticulatea constructionmorenarrowthanthaturgedbytheGovernment....Norhavewe deemedadivisionofjudicialauthorityautomaticallysufficienttotriggerlenity."). Itis possibletoparsethedefinitionof"loss"tofavorGrupe'sinterpretation,butthefar morenaturalandfarbetterreadingisthatthephrase"incurredbecauseofinterruption ofservice"appliestoonlytheconsequential damagesclause. TheCourtthereforeholds thatcostsincurredbyCPtoinvestigateandrespondtoGrupe'soffenseconstitute "loss"undertheCFAA.

b. AmountofLoss Grupenextarguesthattherewasinsufficientevidencetoallowareasonablejury tofindthathisoffensecausedatleast$5,000inlosstoCP. TheCourtdisagrees. There was,infact,ampleevidencethatCP'slossexceeded$5,000,startingwiththefactthat CrowdStrikechargedCP$12,000foritsincident responsereport. TT463 65;Gov't Ex.87. GrupecontendsthatthereisnoevidencethatCPactuallypaidthisamount,but TimWinn,CP'sseniordirectorfornetworkservices,testifiedthatthe"cost...of

15 paying"fortheCrowdStrikereportwas$12,000,TT463,andthatthe"paymentfor CrowdStrikewas$12,000." TT464 65. Winn'stestimonyprovidedasufficientbasisfor thejurytoinferthatCPactuallypaidthatamount. Inaddition,therewasalsotestimonythatthecosttoCPofthestafftimethatit

tooktoinvestigatetheincidentandreboottheswitchesexceeded$5,000. Winntestified that12employeesspent125hoursinvestigatingandrespondingtoGrupe'soffense. TT460 61. Winncalculatedthatthiswouldhaveamountedtoapproximately$15,000

Canadiandollars,whichheestimatedwouldbearound$12,000inU.S.dollars. TT461, 464.

Grupederidesthisamountas"speculative,"butdetailedtestimonyconcerning thetimeandresourcesthatCPdevotedtoinvestigatingandrepairingthedamage causedbyGrupefullycorroboratedWinn'stestimony. See,e.g.,TT107,500(CP engagedin"muchconsultationwithCisco,"theswitchmanufacturer,before undertakingthereboot);TT109 11,500(CPstaffhadtospendtimegatheringback up configurationsandotherinformationincaseofproblemsduringthereboot);TT111 13 (multiplestaffmembersparticipatedintherebootprocedure);TT116 17(afterCP regainedaccess,staffhadtoascertainthestateandconditionoftheswitches' configurationsandreviewextensivelogfiles);TT175(CPstaffhadtochecktoseeif otherdeviceshadbeentamperedwith);TT180 81,198 99,200(indicatingthatCP's

16 investigationcontinuedforsometimeafterthereboot);TT458 59(aboutadozenCP employeeswereinvolvedineffortstorecoveraccessandinvestigatetheincident).

Grupealsoarguesthat"loss"doesnotincludethecostofhiringanexpertto assistinlitigation.

Thatmaybetrue,butthereisnoevidencethatCPretained CrowdStrikeorconducteditsowninvestigationforthepurposeoflitigation. Rather,all evidenceisthatCPretainedCrowdStrikeandconducteditsowninvestigationbecause itwantedtoknowhowitssystemhadbeencompromised. Obviously,CrowdStrike's andCP'sinvestigationswereusefultothegovernment'scase,butthatalonecannot removetheassociatedcostsfromthedefinitionof"loss." Thedefinitionexplicitly includes"thecostofrespondingtoanoffense[and]conductingadamageassessment." Moreover,theEighthCircuithasrecognizedthattheimputedcostofanemployee's

timeinrespondingtoaCFAAoffenseagainsttheemployermaybecountedaspartof "loss." Millot,433F.3dat1061. Inshort,therewasmorethansufficientevidenceto supportthejury'sfindingthatCPincurredatleast$5,000in"loss."

C. MotionforaNewTrial UnderFed.R.Crim.P.33,"thecourtmayvacateanyjudgmentandgrantanew trialiftheinterestofjusticesorequires." "Inrulingonamotionforanewtrial,a districtcourtneednotviewtheevidenceinthelightmostfavorabletotheverdict;it mayweightheevidenceandevaluateforitselfthecredibilityofthewitnesses." United Statesv.Collier,527F.3d695,701(8thCir.2008). Butamotionforanewtrialshouldbe

17 grantedonlywhere"theevidencepreponderatessufficientlyheavilyagainsttheverdict thataseriousmiscarriageofjusticemayhaveoccurred...." Id.(citationand quotationsomitted). Thecourt'sauthoritytograntanewtrialonthebasisthatthe verdictisagainsttheweightoftheevidencemustbe"exercisedsparinglyandwith caution." Id.

AlthoughGrupemovesinthealternativeforanewtrial,hedoesnotofferany explicitargumentsinfavorofhismotion. 4

Havingpresidedoverthetrial,theCourthas nodoubtthatGrupeisguiltyofintentionallydamagingaprotectedcomputerand causingatleast$5,000inloss. Becausetheevidencedoesnotweighagainsttheverdict andnomiscarriageofjusticehasoccurred,Grupe'smotionforanewtrialisdenied.

ORDER Basedontheforegoing,andonallofthefiles,records,andproceedingsherein, ITISHEREBYORDEREDTHATdefendant'smotionforacquittalor,inthealternative, anewtrial[ECFNo.71]isDENIED.

Dated: February8,2018 s/PatrickJ.Schiltz PatrickJ.Schiltz

UnitedStatesDistrictJudge

4 GrupeclaimsthatCPfailedtoproperlypreserveallrelevantelectronicevidence,

butdoesnotclaimthatthiswouldentitlehimeithertoacquittalortoanewtrial. Even ifGrupehadmadesuchaclaim,theCourtwouldrejectit. Thejuryheardtestimonyon thisissueandapparentlyrejectedGrupe'sargumentthatCP'sallegedmishandlingof theevidencerendereditunreliable. 18