

No. 19-50231

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**In the United States Court of Appeals  
for the Ninth Circuit**

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UNITED STATES OF AMERICA,  
*Plaintiff-Appellee,*

v.

NIKISHNA POLEQUAPTEWA,  
*Defendant-Appellant.*

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On Appeal from the United States District Court  
for the Central District of California  
The Honorable Cormac J. Carney, Presiding  
No. CR-16-00036-CJC

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**Appellant's Excerpts of Record**  
[Volume 1 of 6]

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**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
SOUTHERN DIVISION**

**UNITED STATES OF AMERICA,**

**Plaintiff,**

**v.**

**NIKISHNA POLEQUAPTEWA,**

**Defendant.**

**Case No.: SACR 16-00036-CJC**

**ORDER DENYING MOTION TO  
SUPPRESS EVIDENCE [33]**

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## I. INTRODUCTION

Defendant Nikishna Polequaptewa is charged with one count of unauthorized impairment of a protected computer in violation of 18 U.S.C. §§ 1030(a)(5)(A), (c)(4)(B)(i), (c)(4)(A)(i)(I) (Count One), arising out of Defendant's alleged transmission of computer information and files that damaged his former employer, Bluestone Strategy Group ("Bluestone"). (*See generally* Dkt. 36 [Opposition, hereinafter "Opp."].) Before the Court is Defendant's motion to suppress a laptop computer and evidence seized from that laptop pursuant to a search warrant. (Dkt. 33 [Motion, hereinafter "Mot."].) Defendant argues that the evidence should be suppressed because the Government allegedly searched Defendant's hotel room and seized the laptop without a warrant, that no exceptions to the warrant requirement apply, and that the affidavit supporting the subsequent search warrant failed to establish probable cause to search the laptop. (*See generally id.*) The Government argues that Defendant lacked a reasonable expectation of privacy in the laptop, which he stole from another former employer, the University of California Irvine ("UCI"). (Opp. at 1–4, 11–13.) For the following reasons, the motion is DENIED.<sup>1</sup>

## II. BACKGROUND

In the summer of 2012, Defendant was employed with UCI. (Dkt. 36-4 [Declaration of Nidavone Niravanh, hereinafter "Niravanh Decl."] ¶ 2.) On June 19, 2012, Defendant purchased a laptop using UCI funds allocated to Professor Kathleen Johnson ("the June laptop"). (Dkt. 36-5 [Declaration of Elizabeth Trammell, hereinafter "Trammell Decl."] ¶¶ 3–4, Ex. 1.) On July 9, 2012, Defendant purchased another laptop

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<sup>1</sup> Having read and considered the papers presented by the parties, the Court finds this matter appropriate for disposition without a hearing. Accordingly, the hearing set for May 21, 2018, at 9:00 a.m. is hereby vacated and off calendar.

1 again using UCI funds allocated to Professor Johnson (“the July laptop”). (*Id.* ¶¶ 3–4,  
2 Ex. 2; Niravanh Decl. ¶ 2a, Ex. 1.) As an employee, Defendant’s use and ownership  
3 interest in the June and July laptops were limited by UCI’s policies. (Niravanh Decl. ¶  
4 2b, Ex. 2.)

5  
6 On March 3, 2014, UCI terminated Defendant’s employment after he was found to  
7 have violated the University’s policy on sexual harassment. (*Id.* ¶ 2c, Ex. 3.) Defendant  
8 was required to return the June and July laptops at that time. (*Id.*) In his notice of  
9 dismissal, Defendant and his counsel were advised “You are directed to immediately  
10 return all UC equipment, including without limitation computers, laptops, cell phone[s],  
11 other electronic devices and audio-visual equipment that is in your possession.” (*Id.* Ex.  
12 3 at 2.) In August 2014, Defendant’s wife returned the June laptop to UCI. (*Id.* ¶ 2d,  
13 Exs. 4, 5.) In January 2015, UCI sent Defendant and his wife letters regarding the  
14 outstanding return of the July laptop, and stated that the July laptop must be returned to  
15 UCI. (*Id.* ¶ 2e, Exs. 4, 5.) Since July 9, 2012, UCI has viewed the July laptop as its  
16 property, and now considers it stolen property. (*Id.* ¶ 3.) Defendant has not returned the  
17 July laptop to UCI. (*Id.*)

18  
19 Sometime after his termination from UCI, Defendant began to work with  
20 Bluestone, a consulting firm in Irvine, California. (Dkts. 33 Ex. A [FBI Search Warrant]  
21 at 4, 33-1 [Declaration of Nikishna Polequaptewa, hereinafter “Polequaptewa Decl.”] ¶  
22 2.) Initially, Defendant worked as an information technology (“IT”) administrator, but on  
23 November 14, 2014, Bluestone relieved Defendant of his IT duties, as it had hired a third-  
24 party vendor to handle IT going forward. (FBI Search Warrant at 4–5.) Bluestone  
25 revoked Defendant’s administrative access to the company’s systems, and made  
26 Defendant a product strategist, the position for which he was originally hired. (*Id.*) On  
27 November 15, 2014, Defendant traveled to Florida for a business meeting. (*Id.* at 5;  
28 Polequaptewa Decl. ¶ 2.)

1 While in Florida on the evening of November 18, 2014, the Government alleges  
2 that Defendant began to delete Bluestone's digital files using the login of another  
3 Bluestone employee, William Moon, without authorization. (FBI Search Warrant at 6.)  
4 At 7:25 p.m., Defendant announced at a Bluestone client meeting that he was resigning  
5 from Bluestone. (*Id.*; Polequaptewa Decl. ¶ 3.) Immediately following his resignation,  
6 the Government alleges that Defendant continued to delete Bluestone's files, ultimately  
7 deleting approximately 200 files, which caused significant harm to Bluestone. (FBI  
8 Search Warrant at 6, 20–23; Dkt. 36-2.)

9  
10 Later that night when Bluestone learned that Defendant allegedly was deleting its  
11 files, Moon went to Defendant's hotel room with deputies from the Broward County  
12 Sheriff's Office ("BSO"). (FBI Search Warrant at 9.) Moon told BSO Deputy Laughten  
13 Hall that Defendant was not responding to calls or knocks at his hotel room door, and that  
14 Defendant had deleted Bluestone files using what Moon believed was a company  
15 computer. (Dkt. 36-6 [Declaration of Deputy Laughten Hall, hereinafter "Hall Decl."] Ex. 1 at 3.)  
16 Moon also told Deputy Hall that he believed Defendant had Bluestone's  
17 computer in his hotel room. (*Id.*) Deputy Hall informed Moon that unless he had proof  
18 of ownership of the computer in question or Defendant voluntarily surrendered it, he  
19 could not remove the computer from the hotel room. (*Id.*) A deputy knocked on  
20 Defendant's hotel room door for about 10 to 15 minutes, with no response, (FBI Search  
21 Warrant at 9–10), but eventually Deputy Hall made contact with Defendant, (*id.*; Hall  
22 Decl. Ex. 1 at 3). The parties dispute whether Defendant or a deputy opened the door,  
23 whether Defendant voluntarily allowed Deputy Hall and other deputies to enter the hotel  
24 room, and whether Defendant voluntarily gave Deputy Hall his laptop. (Mot. at 8–13;  
25 Polequaptewa Decl. ¶¶ 6–17; Opp. at 6–7.) The parties agree, however, that at some  
26 point Defendant handed over his laptop to Deputy Hall, who then handed the laptop to  
27 Moon. (Polequaptewa Decl. ¶¶ 16–17; Hall Decl. ¶ 10, Ex. 1 at 3.)  
28



1 After Moon obtained the laptop, he did not open it and instead sent it to  
2 Bluestone's Irvine offices the morning of November 19, 2014. (FBI Search Warrant at  
3 10–11.) On November 19, 2014, Defendant came to Bluestone's Irvine offices and  
4 demanded the laptop be returned to him. (*Id.* at 14–15.) The Irvine Police Department  
5 ("IPD") was called, and eventually escorted Defendant out of the building. (*Id.* at 15.)  
6 On November 20, 2014, the Bluestone CEO gave the laptop to the company's attorney.  
7 (*Id.*) At some point after, Defendant again requested the laptop be returned to him,  
8 resulting in an IPD officer taking possession of the laptop on December 9, 2014. (*Id.* at  
9 20–21.) At that time, Bluestone told the IPD that the laptop contained stolen company  
10 files. (*Id.*)

11  
12 Also, on November 20, 2014, the Bluestone CEO had reported Defendant's alleged  
13 actions to the FBI on a public access line. (Dkt. 36-3.) During the FBI's investigation  
14 into the matter, a FBI Special Agent applied for and obtained a warrant to seize and  
15 search the laptop whose ownership was disputed by Defendant and Bluestone, and which  
16 was in IPD's custody. (FBI Search Warrant Ex. A.) The warrant relied on an Affidavit  
17 executed by FBI Special Agent Todd Munoz. (*Id.* at 1.) Magistrate Judge Jay C. Gandhi  
18 signed the warrant for the laptop on December 11, 2014. (*Id.*) The parties dispute  
19 whether the warrant was supported by probable cause. (Mot. at 13–16; Opp. at 18–23.)

20  
21 Based on this warrant, the FBI seized the laptop from IPD custody and searched it.  
22 (Opp. at 9.) The seized laptop's serial number was C02HX6SMDKQ5, (FBI Search  
23 Warrant at 21), the same serial number as the July laptop, (Niravanh Decl. Ex. 1). The  
24 evidence seized from the July laptop corroborated the other evidence the FBI had  
25 obtained showing that Defendant had hacked into Bluestone's systems and deleted files,  
26 causing damage to the company. (Opp. at 9.) On March 24, 2016, a grand jury returned  
27 a single-count indictment against Defendant, charging him with unauthorized impairment  
28 of a protected computer, in violation of 17 U.S.C. §§ 1030(a)(5)(A), (c)(4)(B)(i),

1 (c)(4)(A)(i)(I). (Dkt. 1.)

### 2 3 **III. DISCUSSION**

4  
5 The Fourth Amendment to the U.S. Constitution protects against unlawful searches  
6 and seizures. “In order to contest the legality of a search or seizure, the defendant must  
7 establish that he or she had a ‘legitimate expectation of privacy’ in the place searched or  
8 in the property seized.” *United States v. Kovac*, 795 F.2d 1509, 1510 (9th Cir. 1986).  
9 “The term ‘standing’ is often used to describe an inquiry into who may assert a particular  
10 fourth amendment claim. Fourth amendment standing is quite different, however, from  
11 ‘case or controversy’ determinations of article III standing. Rather, it is a matter of  
12 substantive fourth amendment law; to say that a party lacks fourth amendment standing is  
13 to say that his reasonable expectation of privacy has not been infringed.” *United States v.*  
14 *Taketa*, 923 F.2d 665, 669 (9th Cir. 1991) (internal citations omitted). A defendant has a  
15 reasonable expectation of privacy if he can “demonstrate a subjective expectation that his  
16 activities would be private, and he must show that his expectation was one that society is  
17 prepared to recognize as reasonable.” *United States v. Bautista*, 362 F.3d 584, 589 (9th  
18 Cir. 2004) (quoting *United States v. Nerber*, 222 F.3d 597, 599 (9th Cir. 2000)). For the  
19 purpose of a suppression hearing, a defendant “has the burden of establishing that his  
20 own Fourth Amendment rights were violated by the challenged search or seizure.”  
21 *United States v. Caymen*, 404 F.3d 1196, 1199 (9th Cir. 2005) (quoting *Rakas v. United*  
22 *States*, 439 U.S. 128, 131 n.1 (1978)).

23  
24 Under Ninth Circuit law, a defendant does not have a reasonable expectation of  
25 privacy in stolen property. “The Fourth Amendment does not protect a defendant from a  
26 warrantless search of property that he stole, because regardless of whether he expects to  
27 maintain privacy in the contents of the stolen property, such an expectation is not one that  
28 ‘society is prepared to accept as reasonable.’” *Caymen*, 404 F.3d at 1200 (quoting *Smith*

1 *v. Maryland*, 442 U.S. 735, 740 (1979)). “A legitimate expectation of privacy means  
2 more than a subjective expectation of not being discovered.” *Id.* (holding that the  
3 defendant did not have a reasonable expectation of privacy in a laptop he fraudulently  
4 obtained). Indeed, in *United States v. Wong*, 334 F.3d 831, 839 (9th Cir. 2003), the Ninth  
5 Circuit held that a person lacks a reasonable expectation of privacy in the contents of a  
6 laptop computer he stole from his former employer. In *Wong*, the evidence showed that  
7 the laptop searched belonged to the defendant’s former employer, and that the defendant  
8 had stolen the laptop. *Id.* at 839. The Ninth Circuit affirmed the district court’s holding  
9 that the defendant “d[id] not have standing to object to the search of that laptop because  
10 he failed to establish that he had a reasonable expectation of privacy in it.” *Id.* (citing  
11 *United States v. Cormier*, 220 F.3d 1103, 1108 (9th Cir. 2000) (a person does not have a  
12 reasonable expectation of privacy in an item in which he has no possessory or ownership  
13 interest)).

14  
15 Here, like in *Wong*, Defendant stole the laptop at issue from his former employer.  
16 So, Defendant lacks standing to object to the search and seizure of that laptop as he has  
17 failed to establish that he has a reasonable expectation of privacy in it. The undisputed  
18 evidence shows that the laptop searched belonged to UCI. Regardless of any possessory  
19 interest Defendant may have in the July laptop, he lacks a reasonable expectation of  
20 privacy in it. “[O]ne who takes property by theft or fraud cannot reasonably expect to  
21 retain possession and exclude others from it once he is caught. Whatever expectation of  
22 privacy he might assert is not a legitimate expectation that society is prepared to honor.”  
23 *Caymen*, 404 F.3d at 1201. And whatever possessory interest Defendant may have in the  
24 July laptop “is subordinate to the rights of the owner,” UCI. *Id.* at 1200 (citing *Terry v.*  
25 *Enomoto*, 723 F.2d 697, 699 (9th Cir. 1984)). The rightful owner of the July laptop, UCI,  
26 consented to the FBI’s search of that laptop. (*See* Dkt. 36-1.)

27  
28 //

1 Defendant has submitted no evidence or made any argument to dispute that he has  
2 no reasonable expectation of privacy in the July laptop. Defendant did not address his  
3 possessory or ownership interest in the July laptop in his declaration or briefing on this  
4 motion. (*See generally* Mot., Polequeptewa Decl.) Indeed, Defendant does not even  
5 assert that he owns the July laptop, but only states that he “told the deputy that the  
6 computer was not Bluestone’s property.” (Polequeptewa Decl. ¶ 8.) In his reply,  
7 Defendant acknowledges the Government’s argument that UCI owns the July laptop, but  
8 argues that the BSO deputies that arrived at his Florida hotel room “appeared on behalf of  
9 Bluestone, not UCI,” and that he was advised that “there were allegations that he was  
10 committing fraud on a laptop computer belonging to Bluestone, not UCI.” (Dkt. 37 at 2–  
11 3.) Defendant also argues that he has always maintained the July laptop does not belong  
12 to Bluestone, and that “[a]t the time the computer was seized, there was at least an  
13 appearance that Defendant owned and/or possessed the computer.” (*Id.*) But Defendant  
14 does not contest that UCI is the rightful owner of the July laptop or that he failed to return  
15 UCI’s property despite UCI’s efforts to obtain it from him. Simply put, Defendant lacks  
16 standing to object to the search and seizure of the July laptop.<sup>2</sup>

#### 17 18 IV. CONCLUSION

19  
20 For the foregoing reasons, Defendant’s motion to suppress evidence is DENIED.<sup>3</sup>

21  
22 DATED: May 4, 2018



---

23  
24 CORMAC J. CARNEY  
25 UNITED STATES DISTRICT JUDGE

26  
27 <sup>2</sup> Because Defendant lacks standing to challenge the search and seizure of the July laptop, the Court  
need not reach his arguments regarding the constitutionality of the search and seizure of that laptop.

28 <sup>3</sup> For the reasons set forth in this order, the Court also **GRANTS** the Government’s *ex parte* application  
precluding the need for the appearance of the Government’s declarants. (Dkt. 38.)

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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA - SOUTHERN DIVISION  
HONORABLE CORMAC J. CARNEY, U.S. DISTRICT JUDGE

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	<b><u>CERTIFIED TRANSCRIPT</u></b>
	)	
vs.	)	Case No.
	)	8:16-cr-00036-CJC-1
NIKISHNA POLEQUAPTEWA,	)	
	)	<b>Volume I</b>
Defendant.	)	
	)	

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REPORTER'S TRANSCRIPT OF PROCEEDINGS

JURY TRIAL - **DAY 5**

TUESDAY, NOVEMBER 13, 2018

8:40 A.M.

SANTA ANA, CALIFORNIA

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**DEBBIE HINO-SPAAN, CSR 7953, CRR**  
FEDERAL OFFICIAL COURT REPORTER  
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1 MR. KHOURI: Your Honor, the defense rests.

2 THE COURT: Very well. Anything further from the  
3 government?

4 MR. MITTAL: No, Your Honor.

10:24AM 5 THE COURT: All right. Ladies and gentlemen, I  
6 think what makes sense is, then, why don't we go right into  
7 jury instructions.

8 Melissa, do you have copies of all the jury instructions?

9 THE COURTROOM DEPUTY: I have to get them in  
10:24AM 10 chambers.

11 THE COURT: All right. Why don't we just take an  
12 in-place break, ladies and gentlemen. Please stand and  
13 stretch. We have those jury instructions in chambers. Melissa  
14 will go get them for us.

10:24AM 15 **(Brief pause.)**

16 THE COURT: We'll go back on the record. Melissa is  
17 now distributing the jury instructions.

18 Ladies and gentlemen, please get comfortable. The law  
19 requires that I read these instructions to you. You've been  
10:26AM 20 each given a copy. And it is your copy that you can take back  
21 to your deliberations. Please feel free to write on it if you  
22 want. It's, again, your copy. (Reading:)

23 **(Jury Instructions)**

24 "Members of the jury, now that you have heard  
10:27AM 25 all the evidence, it is my duty to instruct you on

1 the law that applies to this case. A copy of these  
2 instructions will be available in the jury room for  
3 you to consult.

4 "It is your duty to weigh and to evaluate all  
10:27AM 5 the evidence received in the case and, in that  
6 process, to decide the facts. It is also your duty  
7 to apply the law as I give it to you to the facts  
8 as you find them, whether you agree with the law or  
9 not.

10:27AM 10 "You must decide the case solely on the  
11 evidence and the law and must not be influenced by  
12 any personal likes or dislikes, opinions,  
13 prejudices, or sympathy. You should also not be  
14 influenced by any person's race, color, religion,  
10:27AM 15 national ancestry, or gender. You will recall that  
16 you took an oath promising to do so at the  
17 beginning of the case.

18 "You must follow all these instructions and  
19 do not single out some and ignore others. They are  
10:27AM 20 all important. Please do not read into these  
21 instructions or into anything I may have said or  
22 done any suggestion as to what verdict you should  
23 return. That is a matter entirely up to you.

24 "The First Superseding Indictment is not  
10:28AM 25 evidence. The defendant has pleaded not guilty to

1 the charge. The defendant is presumed to be  
2 innocent unless and until the government proves the  
3 defendant guilty beyond a reasonable doubt.

4 "In addition, the defendant does not have to  
10:28AM 5 testify or present any evidence. The defendant  
6 does not have to prove innocence. The government  
7 has the burden of proving every element of the  
8 charge beyond a reasonable doubt. A defendant in a  
9 criminal case has a constitutional right not to  
10:28AM 10 testify. In arriving at your verdict, the law  
11 prohibits you from considering in any manner that  
12 the defendant did not testify.

13 "Proof beyond a reasonable doubt is proof  
14 that leaves you firmly convinced the defendant is  
10:28AM 15 guilty. It is not required that the government  
16 prove guilt beyond all possible doubt.

17 "A reasonable doubt is a doubt based upon  
18 reason and common sense and is not based purely on  
19 speculation. It may arise from a careful and  
10:29AM 20 impartial consideration of all the evidence or from  
21 lack of evidence.

22 "If, after a careful and partial  
23 consideration of all the evidence, you are not  
24 convinced beyond a reasonable doubt that the  
10:29AM 25 defendant is guilty, it is your duty to find the



1 defendant not guilty. On the other hand, if, after  
2 a careful and impartial consideration of all the  
3 evidence, you are convinced beyond a reasonable  
4 doubt that the defendant is guilty, it is your duty  
10:29AM 5 to find the defendant guilty.

6 "The evidence you are to consider in deciding  
7 what the facts are consists of, one, the sworn  
8 testimony of any witness; two, the exhibits  
9 received in evidence; and, three, any facts to  
10:29AM 10 which the parties have agreed.

11 "In reaching your verdict, you may consider  
12 only the testimony and exhibits received in  
13 evidence. The following things are not evidence,  
14 and you may not consider them in deciding what the  
10:29AM 15 facts are:

16 "One, questions, statements, objections, and  
17 arguments by the lawyers are not evidence. The  
18 lawyers are not witnesses. Although you must  
19 consider a lawyer's questions to understand the  
10:30AM 20 answers of a witness, the lawyers' questions are  
21 not evidence.

22 "Similarly, what the lawyers have said in  
23 their opening statements, will say in their closing  
24 arguments and at other times is intended to help  
10:30AM 25 you interpret the evidence, but it is not evidence.

1 If the facts, as you remember them, differ from the  
2 way the lawyers state them, your memory of them  
3 controls.

4 "Two, any testimony that I have excluded,  
10:30AM 5 stricken, or instructed you to disregard is not  
6 evidence.

7 "Three, anything you may have seen or heard  
8 when the Court was not in session is not evidence.  
9 You are to decide the case solely on the evidence  
10:30AM 10 received at the trial.

11 "Certain charts and summaries have been  
12 admitted into evidence. Charts and summaries are  
13 only as good as the underlying supporting material.  
14 You should, therefore, give them only such weight  
10:30AM 15 as you think the underlying material deserves.

16 "The parties have agreed to certain facts  
17 that have been stated to you. Those facts are now  
18 conclusively established.

19 "Evidence may be direct or circumstantial.  
10:31AM 20 Direct evidence is direct proof of a fact, such as  
21 testimony by a witness about what that witness  
22 personally saw or heard or did. Circumstantial  
23 evidence is indirect evidence. That is, it is  
24 proof of one or more facts from which you can find  
10:31AM 25 another fact.

1 "You are to consider both direct and  
2 circumstantial evidence. Either can be used to  
3 prove any fact. The law makes no distinction  
4 between the weight to be given to either direct or  
10:31AM 5 circumstantial evidence. It is for you to decide  
6 how much weight to give to any evidence.

7 "In deciding the facts in this case, you may  
8 have to decide which testimony to believe and which  
9 testimony not to believe. You may believe  
10:31AM 10 everything a witness says or part of it or none of  
11 it.

12 "In considering the testimony of any witness,  
13 you may take into account:

14 "No. 1, the opportunity and ability of the  
10:31AM 15 witness to see or hear or know the things testified  
16 to;

17 "No. 2, the witness's memory;

18 "No. 3, the witness's manner while  
19 testifying;

10:32AM 20 "No. 4, the witness's interest in the outcome  
21 of the case, if any;

22 "No. 5, the witness's bias or prejudice, if  
23 any;

24 "6, whether other evidence contradicted the  
10:32AM 25 witness's testimony;

1 "7, the reasonableness of the witness's  
2 testimony in light of all the evidence;

3 "and, 8, any other factors that bear on  
4 believability.

10:32AM 5 "Sometimes a witness may say something that  
6 is not consistent with something else he or she  
7 said. Sometimes different witnesses will give  
8 different versions of what happened. People often  
9 forget things or make mistakes in what they  
10:32AM 10 remember. Also, two people may see the same event  
11 but remember it differently. You may consider  
12 these differences, but do not decide that testimony  
13 is untrue just because it differs from other  
14 testimony.

10:32AM 15 "However, if you decide that a witness has  
16 deliberately testified untruthfully about something  
17 important, you may choose not to believe anything  
18 that witness said. On the other hand, if you think  
19 the witness testified untruthfully about some  
10:33AM 20 things but told the truth about others, you may  
21 accept the part you think is true and ignore the  
22 rest.

23 "The weight of the evidence as to a fact does  
24 not necessarily depend on the number of witnesses  
10:33AM 25 who testify. What is important is how believable

1 the witnesses were and how much weight you think  
2 their testimony deserves.

3 "You've heard testimony that the defendant  
4 made a statement. It is for you to decide whether  
10:33AM 5 the defendant made the statement and, if so, how  
6 much weight to give to it. In making those  
7 decisions, you should consider all the evidence  
8 about the statement including the circumstances  
9 under which the defendant may have made it.

10:33AM 10 "You have heard testimony from persons who,  
11 because of education or experience, were permitted  
12 to state opinions and the reasons for their  
13 opinions. Such opinion testimony should be judged  
14 like any other testimony. You may accept it or  
10:33AM 15 reject it and give it as much weight as you think  
16 it deserves considering the witness's education and  
17 experience, the reasons given for the opinion, and  
18 all of the other evidence in the case.

19 "You are here only to determine whether the  
10:34AM 20 defendant is guilty or not guilty of the charge in  
21 the First Superseding Indictment. The defendant is  
22 not on trial for any conduct or offense not charged  
23 in the First Superseding Indictment.

24 "The First Superseding Indictment charges  
10:34AM 25 that the offense alleged in Count One was committed

1 on or about a certain date. Although it is  
2 necessary for the government to prove beyond a  
3 reasonable doubt that the offense was committed on  
4 a date reasonably near the date alleged in Count  
10:34AM 5 One of the First Superseding Indictment, it is not  
6 necessary for the government to prove that the  
7 offense was committed precisely on the date  
8 charged.

9 "The defendant is charged in the single-count  
10:34AM 10 First Superseding Indictment with intentional  
11 damage, without authorization to a protected  
12 computer in violation of Section 1030(a)(5)(A) of  
13 Title 18 of the United States Code. In order for  
14 the defendant to be found guilty of that charge,  
10:35AM 15 the government must prove each of the following  
16 elements beyond a reasonable doubt:

17 "First, the defendant knowingly caused the  
18 transmission of a program, a code, a command, or  
19 information to Blue Stone Strategy Group's Mac Pro  
10:35AM 20 desktop computer bearing Serial No. F5KMF03YF693;

21 "Second, as a result of the transmission, the  
22 defendant intentionally impaired, without  
23 authorization, the integrity or availability of  
24 data, a program, a system, or information;

10:35AM 25 "And, third, Blue Stone Strategy Group's

1 Mac Pro desktop computer bearing Serial No.  
2 F5KMF03YF693 was used in or affected interstate or  
3 foreign commerce or communication.

4 "The term 'computer' means electronic,  
10:36AM 5 magnetic, optical, electrochemical, or other  
6 high-speed data processing device performing  
7 logical, arithmetic, or storage functions and  
8 includes any data storage facility or  
9 communications facility directly related to or  
10:36AM 10 operating in conjunction with such device. But  
11 such term does not include an automated typewriter  
12 or typesetter, a portable handheld calculator, or  
13 other similar device.

14 "An act is done knowingly if the defendant is  
10:36AM 15 aware of the act and does not act or fails to act  
16 through ignorance, mistake, or accident. The  
17 government is not required to prove that the  
18 defendant knew that his acts or omissions were  
19 unlawful. You may consider evidence of the  
10:37AM 20 defendant's words, acts, or omissions along with  
21 all the other evidence in deciding whether the  
22 defendant acted knowingly.

23 "A person acts without authorization with  
24 respect to the integrity or availability of data, a  
10:37AM 25 program, a system, or information on a computer

1 when the person has not received permission from  
2 the owner, person who, or entity which controls  
3 that right of access to the computer to impair the  
4 integrity or availability of data, a program, a  
10:37AM 5 system, or information on the computer or when the  
6 owner, person who, or entity which controls the  
7 right of access to the computer has withdrawn or  
8 rescinded permission to impair the integrity or  
9 availability of data, a program, a system, or  
10:37AM 10 information on the computer and the person impairs  
11 the integrity or availability of data, a program, a  
12 system, or information on the computer anyway.

13 "If you find the defendant guilty of the  
14 charge in Count One of the First Superseding  
10:38AM 15 Indictment, you are then to determine whether the  
16 government proved beyond a reasonable doubt that,  
17 as a result of such conduct, in a related course of  
18 conduct affecting one or more other computers used  
19 in or affecting interstate or foreign commerce or  
10:38AM 20 communication, the defendant caused 'loss' to Blue  
21 Stone Strategy Group during any one-year period of  
22 an aggregate value of \$5,000 or more.

23 "The term loss means any reasonable cost to  
24 Blue Stone Strategy Group including the cost of  
10:38AM 25 responding to an offense, conducting a damage



1 assessment, and restoring the data, program,  
2 system, or information to its condition prior to  
3 the offense and any revenue loss, cost incurred, or  
4 other consequential damages incurred because of  
10:38AM 5 interruption of service. Your decision as to  
6 whether the loss was \$5,000 or more must be  
7 unanimous.

8 "When you begin your deliberations, elect one  
9 member of the jury as your foreperson who will  
10:39AM 10 preside over the deliberations and speak for you  
11 here in court. You will then discuss the case with  
12 your fellow jurors to reach agreement if you can do  
13 so.

14 "Your verdict, whether guilty or not guilty,  
10:39AM 15 must be unanimous. Each of you must decide the  
16 case for yourself, but you should do so only after  
17 you have considered all the evidence, discussed it  
18 fully with the other jurors, and listened to the  
19 views of your fellow jurors.

10:39AM 20 "Do not be afraid to change your opinion if  
21 the discussion persuades you that you should. But  
22 do not come to a decision simply because other  
23 jurors think it is right. It is important that you  
24 attempt to reach a unanimous verdict, but, of  
10:39AM 25 course, only if each of you can do so after having

1 made your own conscientious decision. Do not  
2 change an honest belief about the weight and effect  
3 of the evidence simply to reach a verdict.

4 "Because you must base your verdict only on

10:40AM 5 the evidence received in the case and on these  
6 instructions, I remind you that you must not be  
7 exposed to any other information about the case or  
8 to the issues it involves. Except for discussing  
9 the case with your fellow jurors during your

10:40AM 10 deliberations, do not communicate with anyone in  
11 any way and do not let anyone else communicate with  
12 you in any way about the merits of the case or  
13 anything to do with it.

14 "This includes discussing the case in person,

10:40AM 15 in writing, by phone, or electronic means via  
16 e-mail, text messaging, or any Internet chat room,  
17 blog, website, or other feature. This applies to  
18 communicating with your fellow members, your  
19 employer, the media or press, and the people  
10:40AM 20 involved in the trial.

21 "If you are asked or approached in any way  
22 about your jury service or anything about this  
23 case, you must respond that you have been ordered  
24 not to discuss the matter and to report the contact  
10:40AM 25 to the Court.

1 "Do not read, watch, or listen to any news or  
2 media accounts or commentary about the case or  
3 anything to do with it. Do not do any research,  
4 such as consulting dictionaries, searching the  
10:41AM 5 Internet, or using other reference materials. And  
6 do not make any investigation or in any other way  
7 try to learn about the case on your own.

8 "The law requires these instructions to  
9 ensure the parties have a fair trial based on the  
10:41AM 10 same evidence that each party has had an  
11 opportunity to discuss. A juror who violates these  
12 restrictions jeopardizes the fairness of these  
13 proceedings, and a mistrial could result that would  
14 require the entire trial process to start over. If  
10:41AM 15 any juror is exposed to any outside information,  
16 please notify the Court immediately.

17 "Some of you have taken notes during the  
18 trial. Whether or not you took notes, you should  
19 rely on your own memory of what was said. Notes  
10:41AM 20 are only to assist your memory. You should not be  
21 overly influenced by your notes or those of your  
22 fellow jurors.

23 "The punishment provided by law for this  
24 crime is for the Court to decide. You may not  
10:41AM 25 consider punishment in deciding whether the

1 government has proved its case against the  
2 defendant beyond a reasonable doubt.

3 "A verdict form has been prepared for you.  
4 After you have reached a unanimous agreement on a  
10:42AM 5 verdict, your foreperson should complete the  
6 verdict form according to your deliberations, sign  
7 and date it, and advise the bailiff that you are  
8 ready to return to the courtroom.

9 "If it becomes necessary during your  
10:42AM 10 deliberations to communicate with me, you may send  
11 a note through the bailiff signed by any one or  
12 more of you. No member of the jury should ever  
13 attempt to communicate with me except by a signed  
14 writing, and I will respond to the jury concerning  
10:42AM 15 the case only in writing or here in open court.

16 "If you send out a question, I will consult  
17 with the lawyers before answering it, which may  
18 take some time. You may continue your  
19 deliberations while waiting for the answer to any  
10:42AM 20 question. Remember that you are not to tell  
21 anyone, including me, how the jury stands,  
22 numerically or otherwise, on any question submitted  
23 to you, including the question of the guilt of the  
24 defendant, until after you have reached a unanimous  
10:43AM 25 verdict or have been discharged."

1 All right, ladies and gentlemen. Those are the jury  
2 instructions. As I indicated, we do have a verdict form we  
3 prepared for you. I'm going to walk you through it. I'm  
4 hoping it's pretty simple and straightforward.

10:43AM 5 There's really only two questions that are on the form.  
6 And how you answer the first question will depend if you even  
7 have to answer the second question.

8 The first question is:

9 "We, the jury in the above-captioned case,  
10:43AM 10 unanimously find the defendant, Nikishna  
11 Polequaptewa," and then you have to indicate and  
12 check either "not guilty" or "guilty," "of  
13 intentionally causing damage, without  
14 authorization, to a protected computer in violation  
10:43AM 15 of 18 U.S.C., Section 1030(a)(5)(A) as charged in  
16 Count One of the First Superseding Indictment."  
17 So that's the first question.

18 And then the next paragraph, which I won't read, says  
19 exactly what I told you. If you answer not guilty, then the  
10:44AM 20 foreperson will just date and sign the verdict form. If you  
21 unanimously agree that the government has met its burden and  
22 find the defendant guilty, then you need to answer the second  
23 question on the next page, which asks:

24 "We, the jury, in the above-captioned case,  
10:44AM 25 having found the defendant guilty of the offense

1 charged in Count One of the First Superseding  
2 Indictment, further unanimously find that the  
3 government" -- and then you need to say "did not"  
4 or "did" -- "prove beyond a reasonable doubt that,  
10:44AM 5 as a result of such conduct, in a related course of  
6 conduct, affecting one or more other computers used  
7 in or affecting interstate or foreign commerce or  
8 communication, the defendant caused loss to Blue  
9 Stone Strategy Group during any one period of an  
10:45AM 10 aggregate value of \$5,000 or more."

11 All right, ladies and gentlemen. That is the verdict  
12 form. It is a quarter till. I suggest we get into closing  
13 arguments.

14 Mr. Mittal, are you going to be giving the initial  
10:45AM 15 closing?

16 MR. MITTAL: Yes, Your Honor.

17 THE COURT: Do you need a couple minutes to set up?

18 MR. MITTAL: Yes. We need to go into the well and  
19 the computer.

10:45AM 20 THE COURT: Okay. While they're setting up, ladies  
21 and gentlemen, if you'd like to stand and stretch, please do  
22 so.

23 MR. MITTAL: Your Honor, may I proceed?

24 THE COURT: Please do so.

10:46AM 25 ///