UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA	:	Criminal No. 11-470
	:	Hon. Susan D. Wigenton
v.	:	United States District Judge
ANDREW AUERNHEIMER a/k/a "Weev," a/k/a "Weevlos" a/k/a "Escher"	:	

JURY INSTRUCTIONS

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INSTRUCTION NO. 1
Role of Jury

Members of the jury, you have seen and heard all the evidence and the arguments of the parties. Now I will instruct you on the law.

You have two duties as a jury. Your first duty is to decide the facts from the evidence that you have heard and seen in court during this trial. That is your job and yours alone. I play no part in finding the facts. You should not take anything I may have said or done during the trial as indicating what I think of the evidence or what I think about what your verdict should be.

Your second duty is to apply the law that I give you to the facts. My role now is to explain to you the legal principles that must guide you in your decisions. You must apply my instructions carefully. Each of the instructions is important, and you must apply all of them. You must not substitute or follow your own notion or opinion about what the law is or ought to be. You must apply the law that I give to you, whether you agree with it or not.

Whatever your verdict, it will have to be unanimous. All of you will have to agree on it, or there will be no verdict. In the jury room you will discuss the case among yourselves, but ultimately each of you will have to make up his or her own mind. This is a responsibility that each of you has and that you cannot avoid.

Perform these duties fairly and impartially. Do not allow sympathy, prejudice, fear, or public opinion to influence you. You should also not be influenced by any person's race, color, religion, national ancestry, gender, profession, occupation, celebrity, economic circumstances, or position in life or in the community.

INSTRUCTION NO. 2
Evidence

You must make your decision in this case based only on the evidence that you saw and heard in the courtroom. Do not let rumors, suspicions, or anything else that you may have seen or heard outside of court influence your decision in any way.

The evidence from which you are to find the facts consists of the following:

(1) The testimony of the witnesses;

(2) Documents and other things received as exhibits; and

(3) Any fact or testimony that was stipulated; that is, formally agreed to by the parties.

The following are not evidence:

(1) The Superseding Indictment;

(2) Statements and arguments of the lawyers for the parties in this case;

(3) Questions by the lawyers and questions that I might have asked;

(4) Objections by lawyers, including objections in which the lawyers stated facts;

(5) Any testimony I struck or told you to disregard; and

(6) Anything you may have seen or heard about this case outside the courtroom.

You should use your common sense in weighing the evidence. Consider it in light of your everyday experience with people and events, and give it whatever weight you believe it deserves. If your experience and common sense tells you that certain evidence reasonably leads to a conclusion, you may reach that conclusion.

As I told you in my preliminary instructions, the rules of evidence control what can be received into evidence. During the trial the lawyers objected when they thought that evidence was offered that was not permitted by the rules of evidence. These objections simply meant that the lawyers were asking me to decide whether the evidence should be allowed under the rules.

You should not be influenced by the fact that an objection was made. You should also not be influenced by my rulings on objections or any sidebar conferences you may have overheard. When I overruled an objection, the question was answered or the exhibit was received as evidence, and you should treat that testimony or exhibit like any other. When I allowed evidence, testimony, or exhibits for a limited purpose only, I instructed you to consider that evidence only for that limited purpose and you must do that.

When I sustained an objection, the question was not answered or the exhibit was not received as evidence. You must disregard the question or the exhibit entirely. Do not think about or guess what the witness might have said in answer to the question; do not think about or guess what the exhibit might have shown. Sometimes a witness may have already answered before a lawyer objected or before I ruled on the objection. If that happened, and if I sustained the objection, you must disregard the answer that was given.

Also, if I ordered that some testimony or other evidence be stricken or removed from the record, you must disregard that evidence. When you are deciding this case, you must not consider or be influenced in any way by the testimony or other evidence that I told you to disregard.

Although the lawyers may have called your attention to certain facts or factual conclusions that they thought were important, what the lawyers said is not evidence and is not binding on you. It is your own recollection and interpretation of the evidence that controls your decision in this case. Also, do not assume from anything I may have done or said during the trial that I have any opinion about any of the issues in this case or about what your verdict should be.

INSTRUCTION NO. 3
Direct and Circumstantial Evidence

Two types of evidence may be used in this trial, "direct evidence" and "circumstantial (or indirect) evidence." You may use both types of evidence in reaching your verdict.

"Direct evidence" is simply evidence which, if believed, directly proves a fact. An example of "direct evidence" occurs when a witness testifies about something the witness knows from his or her own senses — something the witness has seen, touched, heard, or smelled.

"Circumstantial evidence" is evidence which, if believed, indirectly proves a fact. It is evidence that proves one or more facts from which you could reasonably find or infer the existence of some other fact or facts. A reasonable inference is simply a deduction or conclusion that reason, experience, and common sense lead you to make from the evidence. A reasonable inference is not a suspicion or a guess. It is a reasoned, logical decision to find that a disputed fact exists on the basis of another fact.

For example, if someone walked into the courtroom wearing a wet raincoat and carrying a wet umbrella, that would be circumstantial or indirect evidence from which you could reasonably find or conclude that it was raining. You would not have to find that it was raining, but you could.

Sometimes different inferences may be drawn from the same set of facts. The government may ask you to draw one inference, and the defense may ask you to draw another. You, and you alone, must decide what reasonable inferences you will draw based on all the evidence and your reason, experience and common sense.

You should consider all the evidence that is presented in this trial, direct and circumstantial. The law makes no distinction between the weight that you should give to either direct or circumstantial evidence. It is for you to decide how much weight to give any evidence.

INSTRUCTION NO. 4
Credibility of Witnesses

As I stated in my preliminary instructions at the beginning of the trial, in deciding what the facts are you must decide what testimony you believe and what testimony you do not believe. You are the sole judges of the credibility of the witnesses. Credibility refers to whether a witness is worthy of belief: Was the witness truthful? Was the witness's testimony accurate? You may believe everything a witness says, or only part of it, or none of it.

You may decide whether to believe a witness based on his or her behavior and manner of testifying, the explanations the witness gave, and all the other evidence in the case, just as you would in any important matter where you are trying to decide if a person is truthful, straightforward, and accurate in his or her recollection. In deciding the question of credibility, remember to use your common sense, your good judgment, and your experience.

In deciding what to believe, you may consider a number of factors:

(1) The opportunity and ability of the witness to see or hear or know the things about which the witness testified;

(2) The quality of the witness's knowledge, understanding, and memory;

(3) The witness's appearance, behavior, and manner while testifying;

(4) Whether the witness has an interest in the outcome of the case or any motive, bias, or prejudice;

(5) Any relation the witness may have with a party in the case and any effect the verdict may have on the witness;

(6) Whether the witness said or wrote anything before trial that was different from the witness's testimony in court;

(7) Whether the witness's testimony was consistent or inconsistent with other evidence that you believe; and

(8) Any other factors that bear on whether the witness should be believed.

Inconsistencies or discrepancies in a witness's testimony or between the testimony of different witnesses may or may not cause you to disbelieve a witness's testimony. Two or more persons witnessing an event may simply see or hear it differently. Mistaken recollection, like failure to recall, is a common human experience. In weighing the effect of an inconsistency, you should also consider whether it was about a matter of importance or an insignificant detail. You should also consider whether the inconsistency was innocent or intentional.

You are not required to accept testimony even if the testimony was not contradicted and the witness was not impeached. You may decide that the witness is not worthy of belief because of the witness's bearing and demeanor, or because of the inherent improbability of the testimony, or for other reasons that are sufficient to you.

After you make your own judgment about the believability of a witness, you can then attach to that witness's testimony the importance or weight that you think it deserves.

The weight of the evidence to prove a fact does not necessarily depend on the number of witnesses who testified or the quantity of evidence that was presented. What is more important than numbers or quantity is how believable the witnesses were, and how much weight you think their testimony deserves.

INSTRUCTION NO. 5
Not All Evidence, Not All Witnesses Needed

Although the government is required to prove the defendant guilty beyond a reasonable doubt, the government is not required to present all possible evidence related to the case or to produce all possible witnesses who might have some knowledge about the facts of the case. In addition, as I will explain to you, the defendant is not required to present any evidence or produce any witnesses.

INSTRUCTION NO. 6

Separate Consideration—Single Defendant Charged with Multiple Offenses

Defendant Andrew Auernheimer is charged with more than one offense; each offense is charged in a separate count of the Superseding Indictment.

The number of offenses charged is not evidence of guilt, and this should not influence your decision in any way. You must separately consider the evidence that relates to each offense, and you must return a separate verdict for each offense. For each offense charged, you must decide whether the government has proved beyond a reasonable doubt that the defendant is guilty of that particular offense.

Your decision on one offense, whether guilty or not guilty, should not influence your decision on any of the other offenses charged. Each offense should be considered separately.

INSTRUCTION NO. 7
Stipulation of Facts

A stipulation of fact is an agreement between the parties that a certain fact is true. Whenever the government and a defendant have reached a stipulation of fact, you may treat that fact as having been proved. You are not required to do so, however, since you are the sole judge of the facts.

INSTRUCTION NO. 8
Specific Investigation Techniques Not Required

During the trial you heard testimony of witnesses and argument by counsel that the government did not use specific investigative techniques. You may consider these facts in deciding whether the government has met its burden of proof, because as I told you, you should look to all of the evidence or lack of evidence in deciding whether the defendant is guilty. However, there is no legal requirement that the government use any specific investigative techniques or all possible techniques to prove its case.

Your concern, as I have said, is to determine whether or not the evidence admitted in this trial proves the defendant's guilt beyond a reasonable doubt.

INSTRUCTION NO. 9
Opinion Evidence (Expert Witness)

The rules of evidence ordinarily do not permit witnesses to state their own opinions about important questions in a trial, but there are exceptions to these rules.

In this case, you heard testimony from Sergey Bratus. Because of his knowledge, skill, experience, training, or education in the field of computers Mr. Bratus was permitted to offer an opinion in that field and the reasons for that opinion.

The opinion this witness states should receive whatever weight you think appropriate, given all the other evidence in the case. In weighing this opinion testimony you may consider the witness's qualifications, the reasons for the witness's opinions, and the reliability of the information supporting the witness's opinions, as well as the other factors discussed in these instructions for weighing the testimony of witnesses. You may disregard the opinion entirely if you decide that Mr. Bratus's opinion is not based on sufficient knowledge, skill, experience, training, or education. You may also disregard the opinion if you conclude that the reasons given in support of the opinion are not sound, or if you conclude that the opinion is not supported by the facts shown by the evidence, or if you think that the opinion is outweighed by other evidence.

INSTRUCTION NO. 10
Credibility of Witnesses – Cooperating Witnesses

You have heard evidence that Daniel Spitler entered into a plea agreement with the government. This testimony was received in evidence and may be considered by you. The government is permitted to present the testimony of someone who has reached a plea agreement with the government in exchange for his testimony, but you should consider his testimony with great care and caution. In evaluating such a witness's testimony, you should consider this factor along with the others I have called to your attention. Whether or not his testimony may have been influenced by the plea agreement is for you to determine. You may give his testimony such weight as you think it deserves.

You must not consider a witness's guilty plea as evidence of the guilt of the defendant charged in the Superseding Indictment. A witness's decision to plead guilty was a personal decision about his own guilt. Such evidence is offered only to allow you to assess the credibility of the witness; to eliminate any concern that the defendant has been singled out for prosecution; and to explain how the witness came to possess detailed first-hand knowledge of the events about which he or she testified. You may consider the witness's guilty plea only for these purposes.

INSTRUCTION NO. 11
Credibility of Witnesses — Law Enforcement Officer

You have heard the testimony of a law enforcement officer. The fact that a witness is employed as a law enforcement officer does not mean that his or her testimony necessarily deserves more or less consideration or greater or lesser weight than that of any other witness.

INSTRUCTION NO. 12
False in One, False in All

If you believe that a witness knowingly testified falsely concerning any important matter, you may distrust the witness' testimony concerning other matters. You may reject all of the testimony or you may accept such parts of the testimony that you believe are true and give it such weight as you think it deserves.

INSTRUCTION NO. 13
Consciousness of Guilt

You have heard testimony that after the crime was supposed to have been committed, defendant Andrew Auernheimer tried to delete files from his computer while the FBI was executing a search warrant at his home.

If you believe that defendant Auernheimer did try to delete these files from his computer, then you may consider this conduct, along with all the other evidence, in deciding whether the government has proved beyond a reasonable doubt that defendant Auernheimer committed the crimes charged. This conduct may indicate that defendant Auernheimer thought he was guilty of the crime charged and was trying to avoid punishment. On the other hand, sometimes an innocent person may delete computer files for some other reason. Whether or not this evidence causes you to find that the defendant was conscious of his guilt of the crime charged, and whether that indicates that he committed the crime charged, is entirely up to you as the sole judges of the facts.

INSTRUCTION NO. 14
Prior Statement of Defendant—Single Defendant on Trial

The government introduced evidence that the defendant Andrew Auernheimer made a statement to FBI Special Agent Philip Frigm. You must decide whether defendant Auernheimer did in fact make the statement. If you find that defendant Auernheimer did make the statement, then you must decide what weight, if any, you feel the statement deserves. In making this decision, you should consider all matters in evidence having to do with the statement, including those concerning defendant Auernheimer himself and the circumstances under which the statement was made.

INSTRUCTION NO. 15
Defendant's Testimony

In a criminal case, a defendant has a constitutional right not to testify. However, if a defendant chooses to testify, he or she is, of course, permitted to take the witness stand on his or her own behalf. In this case, defendant Andrew Auernheimer testified. You should examine and evaluate his testimony just as you would the testimony of any witness.

INSTRUCTION NO. 16
Impeachment of Defendant—Prior Inconsistent Statement Not Taken in Violation of Miranda

You will recall that defendant Andrew Auernheimer testified during the trial on his own behalf. You will also recall that there was evidence that defendant Auernheimer made a number of statements before trial. These earlier statements by defendant Auernheimer were brought to your attention in part to help you decide if you believe what the defendant testified to here in court. If you find that defendant Auernheimer once said something different, then you should decide if what he said here in court was true. In addition, however, you may consider the earlier statements as evidence of defendant Auernheimer's guilt.

INSTRUCTION NO. 17
Defendants' Prior Bad Acts or Crimes (F.R.E. 404(b))

You have heard evidence that defendant Andrew Auernheimer's security research group, Goatse Security, claimed that it engaged in two prior computer exploits – one in or around January 2010, and another in or around March 2010.

This evidence relates to conduct that Goatse Security claimed occurred before the time period of the conspiracy alleged in the Superseding Indictment and was, therefore, admitted only for a limited purpose. You may consider this evidence only for the purpose of deciding whether the defendant:

- was a member of Goatse Security in 2010;

- worked with other members of Goatse Security in 2010;

- was motivated to increase Goatse Security's profile in the computer security market through the commission of computer exploits; and/or

- had a plan to commit the crimes charged in the Superseding Indictment;

Do not consider this evidence for any other purpose.

Of course, it is for you to determine whether you believe this evidence and, if you do believe it, whether you accept it for the purpose offered. You may give it such weight as you feel it deserves, but only for the limited purpose that I described to you.

The defendant is not on trial for committing these other acts. You may not consider the evidence of these other acts as a substitute for proof that the defendant committed the crimes charged in the Superseding Indictment. You may not consider this evidence as proof that the defendant has a bad character or any propensity to commit crimes. Specifically, you may

not use this evidence to conclude that because the defendant may have committed the other acts, he must also have committed the acts charged in the Superseding Indictment.

Remember that the defendant is on trial here only for the offenses charged in the Superseding Indictment, not for these other acts. Do not return a guilty verdict unless the government proves the crimes charged in the Superseding Indictment beyond a reasonable doubt.

INSTRUCTION NO. 18
Presumption of Innocence; Burden of Proof; Reasonable Doubt

The defendant in this case pleaded not guilty to the offenses charged. The defendant is presumed to be innocent. The defendant started the trial with a clean slate, with no evidence against him. The presumption of innocence stays with the defendant unless and until the government has presented evidence that overcomes that presumption by convincing you that he is guilty of the offenses charged beyond a reasonable doubt. The presumption of innocence requires that you find the defendant not guilty, unless you are satisfied that the government has proved guilt beyond a reasonable doubt.

The presumption of innocence means that the defendant has no burden or obligation to present any evidence at all or to prove that they are not guilty. The burden or obligation of proof is on the government to prove that the defendant is guilty and this burden stays with the government throughout the trial.

In order for you to find the defendant guilty of the offenses charged, the government must convince you that he is guilty beyond a reasonable doubt. That means that the government must prove each and every element of the offenses charged beyond a reasonable doubt. A defendant may not be convicted based on suspicion or conjecture, but only on evidence proving guilt beyond a reasonable doubt.

Proof beyond a reasonable doubt does not mean proof beyond all possible doubt or to a mathematical certainty. Possible doubts or doubts based on conjecture, speculation, or hunch are not reasonable doubts. A reasonable doubt is a fair doubt based on reason, logic, common sense, or experience. It is a doubt that an ordinary reasonable person has after carefully

weighing all of the evidence, and is a doubt of the sort that would cause him or her to hesitate to act in matters of importance in his or her own life. It may arise from the evidence, or from the lack of evidence, or from the nature of the evidence.

If, having now heard all the evidence, you are convinced that the government proved each and every element of an offense charged beyond a reasonable doubt, you should return a verdict of guilty for that offense. However, if you have a reasonable doubt about one or more of the elements of an offense charged, then you must return a verdict of not guilty for that offense.

INSTRUCTION NO. 19
Nature of the Superseding Indictment

As you know, defendant Andrew Auernheimer is charged in the Superseding Indictment with violating federal law by conspiring with Daniel Spitler and others to access computer servers belonging to AT&T without authorization, obtain personal identifying information, including e-mail addresses and ICC-IDs, from more than 100,000 Apple iPad users, and then disclose that information to an internet news magazine. Count 1 of the Superseding Indictment charges defendant Auernheimer with conspiracy to access AT&T's computer servers without authorization and to disclose the information obtained. Count 2 of the Superseding Indictment charges defendant Auernheimer with possessing or transferring means of identification belonging to the Apple iPad users.

As I explained at the beginning of trial, an Indictment, like the Superseding Indictment, is just the formal way of specifying the exact crimes the defendants are accused of committing. An Indictment is simply a description of the charges against the defendant. It is an accusation only. An Indictment is not evidence of anything, and you should not give any weight to the fact that the defendant has been indicted in making your decision in this case.

INSTRUCTION NO. 20
On or About

You will note that the Superseding Indictment charges that the offenses were committed "in or about" or "on or about" certain dates. The government does not have to prove with certainty the exact date of the alleged offenses. It is sufficient if the government proves beyond a reasonable doubt that the offenses were committed on dates reasonably near the dates alleged.

INSTRUCTION NO. 21
Conspiracy to Access Computers without Authorization (18 U.S.C. § 371) – Elements of the Offense

Count 1 of the Superseding Indictment charges that between on or about June 2, 2010 through on or about June 15, 2010, defendant Andrew Auernheimer knowingly and intentionally conspired with Daniel Spitler and others to access a computer without authorization and to exceed authorized access, and thereby obtain information from a protected computer, namely the servers of AT&T, in furtherance of a criminal act in violation of the laws of the State of New Jersey, namely N.J.S.A. 2C:20-31(a), contrary to Title 18, United States Code, Sections 1030(a)(2)(C) and 1030(c)(2)(B)(ii), in violation of Title 18, United States Code, Section 371.

In order for you to find the defendant guilty of conspiracy to access computers without authorization, you must find that the government proved beyond a reasonable doubt each of the following four elements:

(1) That two or more persons agreed to access computers without authorization and to disclose data from that unlawful access;

(2) That the defendant was a party to or member of that agreement;

(3) That the defendant joined the agreement or conspiracy knowing of its objective to access computers without authorization and intending to join together with at least one other alleged conspirator to achieve that objective; that is, that the defendant with at least one other alleged conspirator shared a unity of purpose and the intent to achieve that common objective, and

(4) that at some time during the existence of the agreement or conspiracy, at least one of its members performed an overt act in order to further the objective of the agreement."

I will explain each of these elements in more detail.

INSTRUCTION NO. 22
Conspiracy – Existence of an Agreement

The first element of the crime of conspiracy is the existence of an agreement. The government must prove beyond a reasonable doubt that two or more persons knowingly and intentionally arrived at a mutual understanding or agreement, either spoken or unspoken, to work together to achieve the overall objectives of the conspiracy, specifically to commit the offense of accessing a computer without authorization and obtaining information from a protected computer.

The government does not have to prove the existence of a formal or written agreement, or an express oral agreement spelling out the details of the understanding. The government also does not have to prove that all the members of the conspiracy directly met, or discussed between themselves their unlawful objectives, or agreed to all the details, or agreed to what the means were by which the objectives would be accomplished. The government is not even required to prove that all the people named in the Superseding Indictment were, in fact, parties to the agreement, or that all members of the alleged conspiracy were named, or that all members of the conspiracy are even known. What the government must prove beyond a reasonable doubt is that two or more persons in some way or manner arrived at some type of agreement, mutual understanding, or meeting of the minds to try to accomplish the common and unlawful objective.

You may consider both direct evidence and circumstantial evidence in deciding whether the government has proved beyond a reasonable doubt that an agreement or mutual understanding existed. You may find the existence of a conspiracy based on evidence of related

facts and circumstances which prove that the activities of the participants in a criminal venture could not have been carried out except as the result of a preconceived agreement, scheme, or understanding.

INSTRUCTION NO. 23
Conspiracy – Membership in the Agreement

If you find that a criminal agreement or conspiracy existed, then in order to find the defendant guilty of conspiracy you must also find that the government proved beyond a reasonable doubt that he knowingly and intentionally joined that agreement or conspiracy during its existence. The government must prove that the defendant knew the goals or objectives of the agreement or conspiracy and voluntarily joined it during its existence, intending to achieve the common goal or objective and to work together with the other alleged conspirators toward that goal or objective.

The government need not prove that the defendant knew everything about the conspiracy or that he knew everyone involved in it, or that he was a member from the beginning. The government also does not have to prove that the defendant played a major or substantial role in the conspiracy.

You may consider both direct evidence and circumstantial evidence in deciding whether the defendant joined the conspiracy, knew of its criminal objective, and intended to further the objective. Evidence which shows that the defendant only knew about the conspiracy, or only kept "bad company" by associating with members of the conspiracy, or was only present when it was discussed or when a crime was committed, is not sufficient to prove that he was a member of the conspiracy even if he approved of what was happening or did not object to it. Likewise, evidence showing that the defendant may have done something that happened to help a conspiracy does not necessarily prove that he joined the conspiracy. You may, however, consider

this evidence, with all the other evidence, in deciding whether the government proved beyond a reasonable doubt that the defendant joined the conspiracy.

INSTRUCTION NO. 24
Conspiracy – Mental States

In order to find the defendant guilty of conspiracy you must find that the government proved beyond a reasonable doubt that the defendant joined the conspiracy knowing of its objective and intending to help further or achieve that objective. That is, the government must prove: (1) that the defendant knew of the objective of the conspiracy, (2) that the defendant joined the conspiracy intending to help further or achieve that objective, and (3) that the defendant and at least one other alleged conspirator shared a unity of purpose toward that objective.

You may consider both direct evidence and circumstantial evidence, including the defendant's words or conduct and other facts and circumstances, in deciding whether the defendant had the required knowledge and intent. For example, evidence that the defendant derived some benefit from the conspiracy or had some stake in the achievement of the conspiracy's objective might tend to show that the defendant had the required intent or purpose that the conspiracy's objective be achieved.

INSTRUCTION NO. 25
Conspiracy—Overt Acts

With regard to the fourth element of conspiracy – overt acts – the government must prove beyond a reasonable doubt that during the existence of the conspiracy at least one member of the conspiracy performed at least one of the overt acts described in the Superseding Indictment, for the purpose of furthering or helping to achieve the objectives of the conspiracy.

The Superseding Indictment alleges certain overt acts. The government does not have to prove that all of these acts were committed or that any of these acts were themselves illegal. Also, the government does not have to prove that defendant Andrew Auernheimer personally committed any of the overt acts. The government must prove beyond a reasonable doubt that at least one member of the conspiracy committed at least one of the overt acts alleged in the indictment and committed it during the time that the conspiracy existed, for the purpose of furthering or helping to achieve the objectives of the conspiracy. You must unanimously agree on the overt act that was committed.

INSTRUCTION NO. 26
Responsibility For Substantive Offenses Committed By Co-Conspirators

Count 1 of the Superseding Indictment charges that from on or about June 2, 2010 through on or about June 15, 2010, Andrew Auernheimer conspired to access computers without authorization.

The government may prove defendant Auernheimer guilty of this offense by proving that defendant Auernheimer personally committed it. The government may also prove defendant Auernheimer guilty of this offense based on the legal rule that each member of a conspiracy is responsible for crimes and other acts committed by the other members, as long as those crimes and acts were committed to help further or achieve the objective of the conspiracy and were reasonably foreseeable to defendant Auernheimer as a necessary or natural consequence of the agreement. In other words, under certain circumstances the act of one conspirator may be treated as the act of all. This means that all the conspirators may be convicted of a crime committed by any one or more of them, even though they did not all personally participate in that crime themselves.

For you to find defendant Auernheimer guilty of conspiracy to access computers without authorization, charged in Count 1 based on this legal rule, you must find that the government proved beyond a reasonable doubt each of the following four (4) requirements:

First: That defendant Auernheimer was a member of the conspiracy charged in the Superseding Indictment;

Second: That while defendant Auernheimer was still a member of the conspiracy,

one or more of the other members of the conspiracy committed the offense charged in Count 1, by committing each of the elements of that offense, as I explained those elements to you in these instructions. However, the other members of the conspiracy need not have been found guilty of (or even charged with) the offense, as long as you find that the government proved beyond a reasonable doubt that the other members committed the offense.

Third: That the other members of the conspiracy committed this offense within the scope of the unlawful agreement and to help further or achieve the objectives of the conspiracy; and

Fourth: That this offense was reasonably foreseeable to or reasonably anticipated by defendant Auernheimer as a necessary or natural consequence of the unlawful agreement. The government does not have to prove that defendant Auernheimer specifically agreed or knew that this offense would be committed. However, the government must prove that the offense was reasonably foreseeable to defendant Auernheimer, as a member of the conspiracy, and within the scope of the agreement as defendant Auernheimer understood it.

INSTRUCTION NO. 27
Substantive Offense (18 U.S.C. §§ 1030(a)(2)(C)) – Unauthorized Access to Computers

Mr. Auernheimer is charged in Count One of the Superseding Indictment with unlawfully conspiring to obtain information from a protected computer in violation of Section 1030(a)(2)(C) of Title 18 of the United States Code.

I will now instruct you on the elements of a Section 1030(a)(2)(C) violation.

First, the defendant intentionally accessed without authorization or exceeded authorized access to a computer; and

Second, by accessing without authorization, or exceeding authorized access to a computer, the defendant obtained information from a protected computer.

I will define the terms below:

To "access without authorization" is to access a computer without approval or permission.

The term "exceeds authorized access" means to access a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled to obtain or alter.

The term "protected computer" means a computer that is used in or affecting interstate or foreign commerce or communication.

INSTRUCTION NO. 28
Substantive Offense (N.J.S.A. 2C:20-31) – Disclosure of Data from Wrongful Access

Under Title 18, United States Code, section 1030(c)(2)(B)(ii), Mr. Auernheimer is guilty of a felony if the offense was committed in furtherance of any violation of the laws of any state. The government has alleged that the conspiracy was committed in furtherance of a violation of a New Jersey state law.

The phrase "in furtherance of" means for the purpose of assisting in, promoting, accomplishing, advancing, or achieving an objective. The government must therefore show that Mr. Auernheimer engaged in the conduct of intentionally accessing a computer without authorization, or in excess of authorization, to assist in, promote, accomplish, advance, or achieve a violation of New Jersey Statute 2C:20-31.

In order for Mr. Auernheimer to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

I will now instruct you on the elements of a New Jersey State disclosure of data from wrongful access violation.

First, the defendant purposely or knowingly and without authorization, accesses any data, data base, computer, computer storage medium, or computer equipment;

Second, the defendant knowingly or recklessly disclosed or caused to be disclosed any data or personal identifying information.

The following definitions apply to New Jersey Statute 2C:20-31:

"Authorization" means permission, authority or consent given by a person who possesses lawful authority to grant such permission, authority or consent to another person to

access, operate, use, obtain, take, copy, alter, damage or destroy a computer, computer network, computer system, computer equipment, computer software, computer program, computer storage medium, or data. This element is met if a reasonable person would know that he or she lacked authorization or exceeded authorization.

"Access" means to instruct, communicate with, store data in, retrieve data from, or otherwise make use of any resources of a computer, computer storage medium, computer system, or computer network.

"Access without authorization" means access without password-based permission or code-based permission or in violation of a code based restriction by impersonating an authorized user.

"Personal identifying information" means any name, number or other information that may be used, alone or in conjunction with any other information, to identify a specific individual and includes, but is not limited to, the name, address, telephone number, date of birth, social security number, official State issued identification number, employer or taxpayer number, place of employment, employee identification number, demand deposit account number, savings account number, credit card number, mother's maiden name, unique biometric data, such as fingerprint, voice print, retina or iris image or other unique physical representation, or unique electronic identification number, address or routing code of the individual, and also includes passwords and other codes that permit access to any data, data base, computer, computer storage medium, computer program, computer software, computer equipment, computer system or computer network, where access is intended to be secure, restricted or limited.

INSTRUCTION NO. 29
Conspiracy – Success Immaterial

With respect to Count 1 of the Superseding Indictment, the government is not required to prove that any of the members of the conspiracy were successful in achieving the objective of the conspiracy. You may find the defendant guilty of conspiracy if you find that the government proved beyond a reasonable doubt the elements I have explained, even if you find that the government did not prove that any of the conspirators actually committed any other offense against the United States. Conspiracy is a criminal offense separate from the offense that was the objective of the conspiracy; conspiracy is complete without the commission of those offenses.

INSTRUCTION NO. 30
Conspiracy – Acts and Statements of Co-Conspirators

Evidence has been admitted in this case that certain persons, who are alleged to be co-conspirators of the defendant, did or said certain things. The acts or statements of any member of a conspiracy are treated as the acts or statements of all the members of the conspiracy, if these acts or statements were performed or spoken during the existence of the conspiracy and to further the objective of the conspiracy.

Therefore, you may consider as evidence against the defendant any acts done or statements made by any members of the conspiracy, during the existence of and to further the objective of the conspiracy. You may consider these acts and statements even if they were done and made in the defendant's absence and without his knowledge. As with all the evidence presented in this case, it is for you to decide whether you believe this evidence and how much weight to give it.

INSTRUCTION NO. 31
Identity Theft (18 U.S.C. § 1028(a)(7)) – Elements

Count 2 of the Superseding Indictment charges that from on or about June 2, 2010 through on or about June 15, 2010, defendant Andrew Auernheimer knowingly transferred, possessed, and used means of identification of other persons, including means of identification of New Jersey residents, in connection with unlawful activity, specifically, the unlawful accessing of AT&T's servers contrary to Title 18, United States Code, Section 1030(a)(2)(c), in violation of Title 18, United States Code, Section 1028(a)(7).

I will now instruct you on the elements of the identity theft. Identity theft has the following three elements, and in order for Mr. Auernheimer to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly transferred, possessed, or used, without lawful authority, a means of identification of another person;

Second, the defendant did so in connection with the unlawful accessing of a computer – here, AT&T's servers; and

Third, the means of identification was transported by wire communication in interstate commerce.

The term "means of identification" means any name or number that may be used, alone or in conjunction with any other information, to identify a specific individual, including any (A) name, social security number, date of birth, official State or government issued driver's license or identification number, alien registration number, government passport number,

employer or taxpayer identification number; (B) unique electronic identification number, address, or routing code; or (C) telecommunication identifying information or access device.

INSTRUCTION NO. 32
Proof of Required State of Mind

Often the state of mind with which a person acts at any given time cannot be proved directly, because one cannot read another person's mind and tell what he or she is thinking. However, a defendant's state of mind can be proved indirectly from the surrounding circumstances. Thus, to determine a defendant's state of mind at a particular time, you may consider evidence about what the defendant said, what the defendant did and failed to do, how the defendant acted, and all the other facts and circumstances shown by the evidence that may prove what was in the defendant's mind at that time. It is entirely up to you to decide what the evidence presented during this trial proves, or fails to prove, about a defendant's state of mind.

You may also consider the natural and probable results or consequences of any acts a defendant knowingly did, and whether it is reasonable to conclude that the defendant intended those results or consequences. You may find, but you are not required to find, that a defendant knew and intended the natural and probable consequences or results of acts he or she knowingly did. This means that if you find that an ordinary person in the defendant's situation would have naturally realized that certain consequences would result from his or her actions, then you may find, but you are not required to find, that the defendant did know and did intend that those consequences would result from those actions. This is entirely up to you to decide as the finders of the facts in this case.

INSTRUCTION NO. 33
Proof of Required State of Mind – Knowingly

The offense of conspiracy to gain unauthorized access to computers in the Superseding Indictment requires proof that the defendant acted "with knowledge" with respect to certain elements of the offenses. This means that the government must prove beyond a reasonable doubt that the defendant was conscious and aware of the nature of his actions and of the surrounding facts and circumstances, as specified in the definition of the offenses charged.

In deciding whether a defendant acted "with knowledge," you may consider evidence about what a defendant said, what the defendant did and failed to do, how the defendant acted, and all the other facts and circumstances shown by the evidence that may prove what was in the defendant's mind at that time. The government is not required to prove that a defendant knew his acts were against the law.

INSTRUCTION NO. 34
Proof of Required State of Mind – Intentionally

The offense of conspiracy to gain unauthorized access to protected computers in the Superseding Indictment require proof that the defendant acted "intentionally" with respect to an element of the offenses. This means that the government must prove beyond a reasonable doubt either that (1) it was a defendant's conscious desire or purpose to act in a certain way or to cause a certain result, or that (2) the defendant knew that he or she was acting in a way or would be practically certain to cause that result.

In deciding whether a defendant acted "intentionally," you may consider evidence about what the defendant said, what the defendant did and failed to do, how the defendant acted, and all the other facts and circumstances shown by the evidence that may prove what was in the defendant's mind at that time.

INSTRUCTION NO. 35
Proof of Required State of Mind – Motive Explained

Motive is not an element of the offenses with which the defendant is charged. Proof of bad motive is not required to convict. Further, proof of bad motive alone does not establish that a defendant is guilty and proof of good motive alone does not establish that a defendant is not guilty. Evidence of a defendant's motive may, however, help you find the defendant's intent.

Intent and motive are different concepts. Motive is what prompts a person to act. Intent refers only to the state of mind with which the particular act is done.

Personal advancement and financial gain, for example, are motives for much of human conduct. However, these motives may prompt one person to intentionally do something perfectly acceptable while prompting another person to intentionally do an act that is a crime.

INSTRUCTION NO. 36
Certain Persons Not Named as Defendants

You may not draw any inference, favorable or unfavorable, towards the government or the defendant on trial, from the fact that certain persons were not named as defendants in the Superseding Indictment. Why certain persons were not indicted, or are not on trial here must play no part in your deliberations. It should be of no concern to you, and you should not speculate as to the reason for their absence.

Whether a person should be named as a defendant is a matter within the sole discretion of the United States Attorney and the grand jury. Therefore, you may not consider it in any way in reaching your verdict as to the defendants on trial.

INSTRUCTION NO. 37
Election of Foreperson; Unanimous Verdict; Do Not Consider Punishment; Duty to Deliberate; Communication with Court

That concludes my instructions explaining the law regarding the testimony and other evidence, and the offenses charged. Now let me explain some things about your deliberations in the jury room, and your possible verdicts.

First: The first thing that you should do in the jury room is choose someone to be your foreperson. This person will speak for the jury here in court. He or she will also preside over your discussions. However, the views and vote of the foreperson are entitled to no greater weight than those of any other juror.

Second: I want to remind you that your verdict, whether it is guilty or not guilty, must be unanimous. To find the defendant guilty of an offense, every one of you must agree that the government has overcome the presumption of innocence with evidence that proves each element of that offense beyond a reasonable doubt. To find the defendant not guilty, every one of you must agree that the government has failed to convince you beyond a reasonable doubt.

Third: If you decide that the government has proved the defendant guilty, then it will be my responsibility to decide what the appropriate punishment should be. You should never consider the possible punishment in reaching your verdict.

Fourth: As I have said before, your verdict must be based only on the evidence received in this case and the law I have given to you. You should not take anything I may have said or done during trial as indicating what I think of the evidence or what I think your verdict should be. What the verdict should be is the exclusive responsibility of the jury.

Fifth: Now that all the evidence is in, and once I have finished these instructions, and the arguments are completed, you are free to talk about the case in the jury room. In fact, it is your duty to talk with each other about the evidence, and to make every reasonable effort you can to reach unanimous agreement. Talk with each other, listen carefully and respectfully to each other's views, and keep an open mind as you listen to what your fellow jurors have to say. Do not hesitate to change your mind if you are convinced that other jurors are right and that your original position was wrong. But do not ever change your mind just because other jurors see things differently, or just to get the case over with. In the end, your vote must be exactly that – your own vote. It is important for you to reach unanimous agreement, but only if you can do so honestly and in good conscience. Listen carefully to what the other jurors have to say, and then decide for yourself if the government has proved a defendant guilty beyond a reasonable doubt.

No one will be allowed to hear your discussions in the jury room, and no record will be made of what you say. You should all feel free to speak your minds.

Sixth: Once you start deliberating, do not talk about the case to the court officials, or to me, or to anyone else except each other. If you have any questions or messages, your foreperson should write them down on a piece of paper, sign them, and then give them to the court official who will give them to me. I will first talk to the lawyers about what you have asked, and I will respond as soon as I can. In the meantime, if possible, continue with your deliberations on some other subject.

One more thing about messages. Do not ever write down or tell anyone how you or anyone else voted. That should stay secret until you have finished your deliberations. If you

have occasion to communicate with the court while you are deliberating, do not disclose the number of jurors who have voted to convict or acquit on any offenses.

INSTRUCTION NO. 38
Verdict Form

A verdict form has been prepared that you should use to record your verdicts.

Take this form with you to the jury room. When you have reached your unanimous verdicts, the foreperson should write the verdicts on the form, date and sign it, return it to the courtroom and give the form to my courtroom deputy to give to me. If you decide that the government has proved a defendant guilty of any or all of the offenses charged beyond a reasonable doubt, say so by having your foreperson mark the appropriate place on the form. If you decide that the government has not proved a defendant guilty of some or all of the offenses charged beyond a reasonable doubt, say so by having your foreperson mark the appropriate place on the form.