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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CRIMINAL ACTION2:11-cr-470-SDW

UNITED STATES OF AMERICA, : TRANSCRIPT OF PROCEEDINGS
:
: J U R Y C H A R G E
-vs- :
:
ANDREW AUERNHEIMER, : Pages 1 - 37
:
Defendant. :
- - - - -

Newark, New Jersey
November 20, 2012

B E F O R E: HONORABLE SUSAN D. WIGENTON,
UNITED STATES DISTRICT JUDGE
and a Jury

A P P E A R A N C E S:

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Pursuant to Section 753 Title 28 United States Code, the
following transcript is certified to be an accurate record as
taken stenographically in the above entitled proceedings.

S/Carmen Liloia
CARMEN LILOIA
Official Court Reporter
(973) 477-9704

1 THE COURT: Ladies and gentlemen, you can have a seat.
2 What you have is the jury instructions and I'm going to read
3 them verbatim, but I do like to give you a copy so you can
4 follow along with us. Sometimes it helps a little bit. We
5 will be sending in a copy or a copy of copies into the juryroom
6 with you so you will have access to that during the course of
7 your deliberation. You are not required to follow along with
8 me and be lulled by my voice, it's up to you. Whatever makes
9 you happy. But you do have the opportunity to follow along, if
10 you choose. In an effort to save paper, it's on both sides of
11 the page, so just make sure you're conscious of that. Everyone
12 has their copy? Okay.

13 So I will begin with instruction number one, the role
14 of the jury. Members of the jury, you have seen and heard all
15 the evidence and the arguments of the parties. Now I will
16 instruct you on the law.

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

24 Your second duty is to apply the law that I give to
25 you the facts. My role now is to explain to you the legal

1 Principles that must guide you in your decisions. You must
2 apply my instructions carefully. Each of the instructions is
3 important and you must apply all of them you must not
4 substitute or follow your own notion or opinion of what the law
5 is or ought to be. You must apply the law that I give to you
6 whether you agree with it or not.

7 Whatever your verdicts, it will have to be anonymous.
8 All of you will have to agree on it or there will be no
9 verdict. In the juryroom you will discuss the case among
10 yourselves, but ultimately each of you will have to make up his
11 or her own mind. This is a responsibility that each of you has
12 and that you cannot avoid.

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

19 Evidence. You must make your decision in this case
20 based solely and only on the evidence that you saw and heard in
21 the courtroom. Do not let rumors, suspicions or anything else
22 that you may have seen or heard outside of court influence your
23 decision in any way. The evidence from which you are to find
24 the facts consists of the following: The testimony of
25 witnesses, documents and other things received as exhibits; and

1 any fact or testimony that was stipulated, that is, formally
2 agreed to by the parties.

3 The following are not evidence: The superseding
4 indictment; statements and arguments of the lawyers for the
5 parties in this case; questions by the lawyers and questions
6 that I might have asked; objections by lawyers, including
7 objections in which the lawyers stated facts; any testimony
8 that I struck or told you to disregard; or anything you may
9 have seen or heard about this case outside the courtroom. You
10 should use your common sense in weighing the evidence, consider
11 it in light of your everyday experience with people and events
12 and give it whatever weight you believe it deserves. If your
13 experience and common sense tells you that certain evidence
14 reasonably leads to a conclusion, you may reach that
15 conclusion.

16 As I told you in my preliminary instructions, the
17 rules of evidence control what can be received into evidence.
18 During the trial, the lawyers objected when they thought that
19 evidence was offered that was not permitted by the rules of
20 evidence. These objections simply meant that the lawyers were
21 asking me to decide whether the evidence should be allowed
22 under the rules. You should not be influenced by the fact that
23 an objection was made. You should also not be influenced by my
24 rulings on objections or any sidebar conferences you may have
25 overheard. When I overruled an objection, the question was

1 answered or the exhibit was received as evidence, and you
2 should treat that testimony or exhibit like any other. When I
3 allowed evidence, testimony or exhibits for a limited purpose
4 only, I instructed to you consider that evidence only for that
5 limited purpose and you must do that. When I sustained an
6 objection, the question was not answered or the exhibit was not
7 received as evidence. You must disregard the question or the
8 exhibit entirely. Do not think about or guess what the witness
9 might have said in answer to the question. Do not think about
10 or guess what the exhibit might have shown. Sometimes a
11 witness may have already answered before a lawyer objected or
12 before I ruled on the objection. If that happened, and if I
13 sustained the objection, you must disregard the answer that was
14 given. Also, if I ordered that some testimony or other
15 evidence be stricken or removed from the record, you must
16 disregard that evidence.

17 When you are deciding this case, you must not consider
18 or be influenced in any way by the testimony or other evidence
19 that I told you to disregard. Although the lawyers may have
20 called your attention to certain facts or factual conclusions
21 that they thought were important, what the lawyers say is not
22 evidence and is not binding on you. It is your own
23 recollection and interpretation of the evidence that controls
24 your decision in this case. Also, do not assume from anything
25 I may have done or said during the trial that I have any

1 opinion about any of the issues in this case or about what your
2 verdict should be.

3 Direct and Circumstantial Evidence. Two types of
4 evidence maybe used in this trial: Direct evidence and
5 circumstantial or indirect evidence. You may use both types of
6 evidence in reaching your verdict. Direct evidence is simply
7 evidence which, if believed, directly proves a fact. An
8 example of direct evidence occurs when a witness testifies
9 about something the witness knows from his or her own senses,
10 something the witness has seen, touched, heard or smelled.

11 Circumstantial evidence is evidence which, if
12 believed, indirectly proves a fact. It is evidence that proves
13 one or more facts from which you could reasonably find or infer
14 the existence of some other fact or facts. A reasonable
15 inference is simply a deduction or conclusion that reason,
16 experience, and common sense leads you to make from the
17 evidence. A reasonable inference is not a suspicion or a
18 guess, it is a reasoned, logical decision to find that a
19 disputed fact exists on the basis of another fact. For
20 example, if someone walked into the courtroom wearing a wet
21 raincoat and carrying a wet umbrella, that would be
22 circumstantial or indirect evidence from which you could
23 reasonably find or conclude that it was raining. You would not
24 have to find that it was raining, but you could. Sometimes
25 different inferences maybe drawn from the same set of facts.

1 The Government may ask you to draw one inference, and the
2 defense may ask you to draw another. You and you alone must
3 decide what reasonable inferences you will draw based on all
4 the evidence and your reason, experience and common sense.

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

10 Credibility of Witnesses. As I stated in my
11 preliminary instructions at the beginning of the trial, in
12 deciding what the facts are, you must decide what testimony you
13 believe and what testimony you do not believe. You are the
14 sole judges of the credibility of the witnesses. Credibility
15 refers to whether a witness is worthy of belief. Was the
16 witness truthful? Was the witness's testimony accurate? You
17 may believe everything a witness says or only part of it, or
18 none of it. You may decide whether to believe a witness based
19 on his or her behavior and manner of testifying; the
20 explanations the witness gave; and all the other evidence in
21 the case; just as you would in any important matter where you
22 are trying to decide if a person is truthful, straight forward,
23 and accurate in his or her recollection. In deciding the
24 question of credibility, remember to use your common sense,
25 your good judgment, and your experience.

1 In deciding what to believe you may consider a number
2 of factors: The opportunity and ability of the witness to see
3 or hear or know the things about which the witness testified;
4 the quality of the witness's knowledge, understanding and
5 memory; the witness's appearance, behavior and manner while
6 testifying; whether the witness has an interest in the outcome
7 of the case; or any motive, bias or prejudice; any relation the
8 witness may have with a party in the case; and any effect the
9 verdict may have on the witness; whether the witness said or
10 wrote anything before trial that was different from the
11 witness's testimony in court; whether the witness's testimony
12 was consistent or inconsistent with other evidence that you
13 believe; and any other factors that bear on whether the witness
14 should be believed.

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

25 You are not required to accept testimony even if the

1 testimony was not contradicted and the witness was not
2 impeached. You may decide that the witness is not worthy of
3 belief because of the witness's bearing and demeanor or because
4 of the inherent improbability of the testimony, or for other
5 reasons that are sufficient to you. After you make your own
6 judgment about the believability of a witness, you can then
7 attach to that witness's testimony the importance or weight
8 that you think it deserves.

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

15 Not all evidence and not all witnesses needed.
16 Although the Government is required to prove the defendant
17 guilty beyond a reasonable doubt, the Government is not
18 required to present all possible evidence related to the case
19 or to produce all possible witnesses who might have some
20 knowledge about the facts of the case. In addition, as I will
21 explain to you, the defendant is not required to present any
22 evidence or produce any witnesses.

23 Separate Considerations, Single Defendant Charged with
24 Multiple Offenses. Defendant Andrew Auernheimer is charged
25 with more than one offense. Each offense is charged in a

1 separate count of the superseding indictment. The number of
2 offenses charged is not evidence of guilt and this should not
3 influence your decision in any way. You must separately
4 consider the evidence that relates to each offense and you must
5 return a separate verdict for each offense.

6 For each offense charged you must decide whether the
7 Government has proved beyond a reasonable doubt that the
8 defendant is guilty of that particular offense. Your decision
9 on one offense, whether guilty or not guilty, should not
10 influence your decision on any of the other offenses charged.
11 Each offense should be considered separately.

12 Stipulation of Facts. A stipulation of fact is an
13 agreement between the parties that a certain fact is true.
14 Whenever the Government and a defendant have reached a
15 stipulation of fact, you may treat that fact as having been
16 proved. You are not required to do so, however, since you are
17 the sole judges of the facts.

18 Specific Investigation Techniques not Required.
19 During the trial, you heard testimony of witnesses and
20 arguments by counsel that the Government did not use specific
21 investigative techniques. You may consider these facts in
22 deciding whether the Government has met its burden of proof
23 because, as I told you, you should look to all of the evidence
24 or lack of evidence in deciding whether the defendant is
25 guilty. However, there is no legal requirement that the

1 Government use any specific investigative techniques or all
2 possible techniques to prove its case. Your concern, as I have
3 said, is to determine whether or not the evidence admitted in
4 this trial proves the defendant's guilt beyond a reasonable
5 doubt.

6 Opinion Evidence, Expert Witness. The rules of
7 evidence ordinarily do not permit witnesses to state their own
8 opinions about important questions in a trial. But there are
9 exceptions to these rules. In this case you heard testimony
10 from Sergey Bratus. Because of his knowledge, skill,
11 experience, training or education in the field of computers,
12 Mr. Bratus was permitted to offer an opinion in that field and
13 the reasons for that opinion. The opinion this witness states
14 should receive whatever weight you think appropriate, given all
15 the other evidence in the case.

16 In weighing this opinion testimony, you may consider
17 the witness's qualifications, the reasons for the witness's
18 opinions, and the reliability of the information supporting the
19 witness's opinions as well as the other factors discussed in
20 these instructions for weighing the testimony of witnesses.
21 You may disregard the opinion entirely if you decide that Mr.
22 Bratus's opinion is not based on sufficient knowledge, skill,
23 experience, training or education. You may also disregard the
24 opinion if you conclude that the reasons given in support of
25 the opinion are not sound, or if you conclude that the opinion

1 is not supported by the facts shown by the evidence, or if you
2 think that the opinion is outweighed by other evidence.

3 Credibility of Witnesses, Cooperating Witnesses. You
4 have heard evidence that Daniel Spitler entered into a plea
5 agreement with the Government. This testimony was received in
6 evidence and maybe considered by you. The Government is
7 permitted to present the testimony of someone who has reached a
8 plea agreement with the Government in exchange for his
9 testimony, but you should consider his testimony with great
10 care and caution. In evaluating such a witness's testimony,
11 you should consider this fact along with the others I have
12 called to your attention. Whether or not his testimony may
13 have been influenced by the plea agreement is for you to
14 determine. You may give his testimony such weight as you think
15 it deserves. You must not consider a witness's guilty plea as
16 evidence of the guilt of the defendant charged in the
17 superseding indictment. A witness's decision to plead guilty
18 was a personal decision about his own guilt. Such evidence is
19 offered only to allow you to assess the credibility of the
20 witness, to eliminate any concern that the witness -- that the
21 defendant has been singled out for prosecution and to explain
22 how the witness came to possess detailed firsthand knowledge of
23 the events about which he or she testified. You may consider
24 the witness's guilty plea only for these purposes.

25 Credibility of Witnesses, law enforcement officer.

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

6 False in One, False in All. If you believe that a
7 witness knowingly testified falsely concerning any important
8 matter, you may distrust the witness's testimony concerning
9 other matters. You may reject all of the testimony or you may
10 accept such parts of the testimony that you believe are true
11 and give it such weight as you think it deserves.

12 Consciousness of Guilt. You have heard testimony that
13 after the crime was supposed to have been committed, defendant
14 Andrew Auernheimer tried to delete files from his computer
15 while the FBI was executing a search warrant at his home. If
16 you believe that defendant Auernheimer did try to delete these
17 files from his computer, then you may consider this conduct,
18 along with all the other evidence, in deciding whether the
19 Government has proved beyond a reasonable doubt that defendant
20 Auernheimer committed the crimes charged. This conduct may
21 indicate that defendant Auernheimer thought he was guilty of
22 the crime charged and was trying to avoid punishment. On the
23 other hand, sometimes an innocent person may delete computer
24 files for some other reason. Whether or not this evidence
25 causes you to find that the defendant was conscious of his

1 guilt of the crime charged, and whether that indicates that he
2 committed the crime charged, is entirely up to you as the sole
3 judges of the facts.

4 Prior Statement of Defendant. The Government
5 introduced evidence that the defendant Andrew Auernheimer made
6 a statement to FBI Special Agent Phillip Frigm. You must
7 decide whether defendant Auernheimer did in fact make the
8 statement. If you find that defendant Auernheimer did make the
9 statement, then you must decide what weight if any you feel the
10 statement deserves. In making this decision you should
11 consider all matters in evidence having to do with the
12 statement, including those concerning defendant Auernheimer
13 himself and the circumstances under which the statement was
14 made.

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

22 Impeachment of Defendant, Prior Inconsistent Statement
23 not Taken in Violation of Miranda. You will recall that
24 defendant Andrew Auernheimer testified during the trial on his
25 own behalf. You will also recall that there was evidence that

1 defendant Auernheimer made a number of statements before trial.
2 These earlier statements by defendant Auernheimer were brought
3 to your attention in part to help you decide if you believe
4 what the defendant testified to here in court. If you find
5 that defendant Auernheimer once said something different, than
6 you should decide if what he said here in court was true. In
7 addition, however, you may consider the earlier statements as
8 evidence of defendant Auernheimer's guilt.

9 Defendant's Prior Bad Acts or Crimes. You have heard
10 evidence that defendant Andrew Auernheimer's security research
11 group Goatse Security claimed that it engaged in two prior
12 computer exploits, one in or around January of 2010 and another
13 in or around March, 2010. This evidence relates to conduct
14 that Goatse Security claimed occurred before the time period of
15 the conspiracy alleged in the superseding indictment and was
16 therefore admitted only for a limited purpose. You may
17 consider this evidence only for the purpose of deciding whether
18 the defendant was a member of Goatse Security in 2010, worked
19 with other members of Goatse Security in 2010, was motivated to
20 increase Goatse Security's profile in the computer security
21 market through the commission of computer exploits, and/or had
22 a plan to commit the crimes charged in the superseding
23 indictment. Do not consider this evidence for any other
24 purpose. Of course, it is for you to determine whether you
25 believe this evidence, and if you do believe it, whether you

1 accept it for the purpose offered. You may give it such weight
2 as you feel it deserves, but only for the limited purpose that
3 I described to you.

4 The defendant is not on trial for committing these
5 other acts. You may not consider the evidence of these other
6 acts as a substitute for proof that the defendant committed the
7 crimes charged in the superseding indictment. You may not
8 consider this evidence as proof that the defendant has a bad
9 character or any propensity to commit crimes. Specifically,
10 you may not use this evidence to conclude that because the
11 defendant may have committed the other acts, he must also have
12 committed the acts charged in the superseding indictment.
13 Remember that the defendant is on trial here only for the
14 offenses charged in the superseding indictment, not for these
15 other acts. Do not return a guilty verdict unless the
16 Government proves the crimes charged in the superseding
17 indictment beyond a reasonable doubt.

18 Presumption of Innocence, Burden of Proof, Reasonable
19 Doubt. The defendant in this case pleaded not guilty to the
20 offenses charged. The defendant is presumed to be innocent.
21 The defendant started the trial with a clean slate, with no
22 evidence against him. The presumption of innocence stays with
23 the defendant unless and until the Government has presented
24 evidence that overcomes that presumption by convincing you that
25 he is guilty of the offenses charged beyond a reasonable doubt.

1 The presumption of innocence requires that you find the
2 defendant not guilty unless you are satisfied that the
3 Government has proved guilt beyond a reasonable doubt.

4 The presumption of innocence means that the defendant
5 has no burden or obligation to present any evidence at all or
6 to prove that they are not guilty. The burden or obligation of
7 proof is on the Government to prove that the defendant is
8 guilty and this burden stays with the Government throughout the
9 trial. In order for you to find the defendant guilty of the
10 offenses charged, the Government must convince you that he is
11 guilty beyond a reasonable doubt. That means that the
12 Government must prove each and every element of the offenses
13 charged beyond a reasonable doubt. A defendant may not be
14 convicted based on suspicion or conjecture, but only on
15 evidence proving guilt beyond a reasonable doubt.

16 Proof beyond a reasonable doubt does not mean proof
17 beyond all possible doubt or to a mathematical certainty.
18 Possible doubts are doubts based on conjecture, speculation or
19 hunch are not reasonable doubts. A reasonable doubt is a fair
20 doubt based on reason, logic, common sense, or experience. It
21 is a doubt that an ordinary, reasonable person has after
22 carefully weighing all of the evidence and is a doubt of the
23 sort that would cause him or her to hesitate to act in matters
24 of importance in his or her own light. It may arise from the
25 evidence or from the lack of evidence, or from the nature of

1 the evidence.

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

9 Nature of the Superseding Indictment. As you know,
10 defendant Auernheimer is charged in the superseding indictment
11 with violating federal law by conspiring with Daniel Spitler
12 and others to access computer servers belonging to AT&T without
13 authorization, obtain personal identifying information,
14 including e-mail addresses and ICC-IDs, from more than 100,000
15 Apple iPad users, and then disclose that information to an
16 Internet news magazine. Count One of the superseding
17 indictment charges defendant Auernheimer with conspiracy to
18 access AT&T's computer servers without authorization and to
19 disclose the information obtained. Count Two of the
20 superseding indictment charges defendant Auernheimer with
21 possessing or transferring means of identification belonging to
22 the Apple iPad users.

23 As I explained at the beginning of the trial, an
24 indictment, like the superseding indictment, is just the formal
25 way of specifying the exact crimes the defendants are accused

1 of committing. An indictment is simply a description of the
2 charges against the defendant. It is an accusation only. An
3 indictment is not evidence of anything and you should not give
4 any weight to the fact that the defendant has been indicted in
5 making your decision in this case.

6 On or About. You will note that the superseding
7 indictment charges that the offenses were committed in or about
8 or on or about certain dates. The Government does not have to
9 prove with certainty the exact date of the alleged offenses.
10 It is sufficient if the Government proves beyond a reasonable
11 doubt that the offenses were committed on dates reasonably near
12 the dates alleged.

13 Conspiracy to Access Computers without Authorization,
14 Elements of the Offense. Count One of the superseding
15 indictment charges that between on or about June 2nd, 2010
16 through on or about June 15th, 2010, defendant Andrew
17 Auernheimer knowingly and intentionally conspired with Daniel
18 Spitler and others to access a computer without authorization
19 and to exceed authorized access and thereby obtain information
20 from a protected computer; namely, the servers of AT&T, in
21 furtherance of the criminal act in violation of the laws of the
22 State of New Jersey; namely N.J.S.A. 2C:20-31(a) contrary to
23 Title 18 of the United States Code Sections 1030(a)(2)(C) and
24 1030(c)(2)(B)(ii) in violation of Title 18 United States Code,
25 Section 371.

1 In order for you to find the defendant guilty of
2 conspiracy to access computers without authorization, you must
3 find that the Government proved beyond a reasonable doubt each
4 of the following four elements: One, that two or more persons
5 agreed to access computers without authorization and to
6 disclose data from that unlawful access. Two, that the
7 defendant was a party to or member of that agreement. Three,
8 that the defendant joined the agreement or conspiracy knowing
9 of its objective to access computers without authorization and
10 intending to join together with at least one other alleged
11 conspirator to achieve that objective, that is, that the
12 defendant with at least one other alleged conspirator shared a
13 unity of purpose and the intent to achieve that common
14 objective. And four, that at sometime during the existence of
15 the agreement or conspiracy, at least one of its members
16 performed an overt act in order to further the objective of the
17 agreement. I will explain each of these elements in more
18 detail.

19 Conspiracy, Existence of an Agreement. The first
20 element of the crime of conspiracy is the existence of an
21 agreement. The Government must prove beyond a reasonable doubt
22 that two or more persons knowingly and intentionally arrived at
23 a mutual understanding or agreement, either spoken or unspoken,
24 to work together to achieve the overall objectives of the
25 conspiracy, specifically to commit the offense of accessing a

1 computer without authorization and obtaining information from a
2 protected computer. The Government does not have to prove the
3 existence of a formal or written agreement or an expressed oral
4 agreement spelling out the details of the understanding. The
5 Government also does not have to prove that all the members of
6 the conspiracy directly met or discussed between themselves
7 their unlawful objectives or agreed to all the details, or
8 agreed to what the means were by which the objectives would be
9 accomplished. The Government is not required -- the Government
10 is not even required to prove that all the people named in the
11 superseding indictment were in fact parties to the agreement or
12 that all members of the alleged conspiracy were named, or that
13 all members of the conspiracy are even known. What the
14 Government must prove beyond a reasonable doubt is that two or
15 more persons in some way or manner arrived at some type of
16 agreement, mutual understanding or meeting of the minds, to try
17 to accomplish the common and unlawful objective.

18 You may consider both direct evidence and
19 circumstantial evidence in deciding whether the Government has
20 proved beyond a reasonable doubt that an agreement or mutual
21 understanding existed. You may find the existence of a
22 conspiracy based on evidence of related facts and circumstances
23 which prove that the activities of the participants in a
24 criminal venture could not have been carried out except as the
25 result of a preconceived agreement, scheme or understanding.

1 Conspiracy, Membership in the Agreement. If you find
2 that a criminal agreement or conspiracy existed, then in order
3 to find the defendant guilty of conspiracy, you must also find
4 that the Government proved beyond a reasonable doubt that he
5 knowingly and intentionally joined that agreement or conspiracy
6 during its existence. The Government must prove that the
7 defendant knew the goals or objectives of the agreement or
8 conspiracy and voluntarily joined it during its existence
9 intending to achieve the common goal or objective and to work
10 together with the other alleged conspirators toward that goal
11 or objective.

12 The Government need not prove that the defendant knew
13 everything about the conspiracy, or that he knew everyone
14 involved in it, or that he was a member from the beginning.
15 The Government also does not have to prove that the defendant
16 played a major role or a substantial role in the conspiracy.
17 You may consider both direct evidence and circumstantial
18 evidence in deciding whether the defendant joined the
19 conspiracy, knew of its criminal objective, and intended to
20 further the objective. Evidence which shows that the defendant
21 only knew about the conspiracy, or only kept bad company by
22 associating with members of the conspiracy, or was only present
23 when it was discussed or when a crime was committed, is not
24 sufficient to prove that he was a member of the conspiracy,
25 even if he approved of what was happening or did not object to

1 it. Likewise, evidence showing that a defendant may have done
2 something that happened to help a conspiracy does not
3 necessarily prove that he joined the conspiracy. You may,
4 however, consider this evidence with all the other evidence in
5 deciding whether the Government proved beyond a reasonable
6 doubt that the defendant joined the conspiracy.

7 Conspiracy, Mental States. In order to find the
8 defendant guilty of conspiracy, you must find that the
9 Government proved beyond a reasonable doubt that the defendant
10 joined the conspiracy knowing of its objective and intending to
11 help further or achieve that objective. That is, the
12 Government must prove: One, that the defendant knew of the
13 objective of the conspiracy; two, that the defendant joined the
14 conspiracy intending help further or achieve that objective;
15 and three, that the defendant and at least one other alleged
16 co-conspirator shared a unity of purpose toward that objective.

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

1 Conspiracy, Overt Acts. With regard to the fourth
2 element of conspiracy, overt acts, the Government must prove
3 beyond a reasonable doubt that during the existence of a
4 conspiracy, at least one member of the conspiracy performed at
5 least one of the overt acts described in the superseding
6 indictment for the purpose of furthering or helping to achieve
7 the objectives of the conspiracy.

8 The superseding indictment alleges certain overt acts.
9 The Government does not have to prove that all of these acts
10 were committed or any of these acts were, themselves, illegal.
11 Also, the Government does not have to prove that defendant
12 Andrew Auernheimer personally committed any of the overt acts.
13 The Government must prove beyond a reasonable doubt that at
14 least one member of the conspiracy committed at least one of
15 the overt acts alleged in the indictment and committed it
16 during the time that the conspiracy existed for the purpose of
17 furthering or helping to achieve the objectives of the
18 conspiracy. You must you unanimously agree on the overt act
19 that was committed.

20 Responsibility for Substantive Offenses Committed by
21 Co-Conspirators. Count one of the superseding indictment
22 charges that from on or about June 2nd, 2010, through on or
23 about June 15, 2010, Andrew Auernheimer conspired to access
24 computers without authorization.

25 The Government may prove defendant Auernheimer guilty

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

14 For you to find defendant Auernheimer guilty of
15 conspiracy to access computers without authorization charged in
16 Count One based on this legal rule, you must find that the
17 Government proved beyond a reasonable doubt each of the
18 following four requirements: First, that defendant Auernheimer
19 was a member of the conspiracy charged in the superseding
20 indictment.

21 Second, that while defendant Auernheimer was still a
22 member of the conspiracy, one or more of the other members of
23 the conspiracy committed the offense charged in Count One by
24 committing each of the elements of that offense, as I explained
25 those elements to you in these instructions. However, the

1 other members of the conspiracy need not have been found guilty
2 or even charged with the offense as long as you find that the
3 Government proved beyond a reasonable doubt that the other
4 members committed the offense.

5 Third, that the other members of the conspiracy
6 committed this offense within the scope of the unlawful
7 agreement and to help further or achieve the objectives of the
8 conspiracy.

9 And fourth, that this offense was reasonably
10 foreseeable to or reasonably anticipated by defendant
11 Auernheimer as a necessary or natural consequence of the
12 unlawful agreement. The Government does not have to prove that
13 defendant Auernheimer specifically agreed or knew that this
14 offense would be committed. However, the Government must prove
15 that the offense was reasonably foreseeable to defendant
16 Auernheimer as a member of the conspiracy and within the scope
17 of the agreement as defendant Auernheimer understood it.

18 Substantive Offense, Unauthorized Access to Computers,
19 Title 18 of the United States Code Section 1030(a)(2)(C). Mr.
20 Auernheimer is charged in Count One of the superseding
21 indictment with unlawfully conspiring to obtain information
22 from a protected computer in violation of Section 1030(a)(2)(C)
23 of Title 18 of the United States Code. I will now instruct you
24 on the elements of a Section 1030(a)(2)(C) violation.

25 First, the defendant intentionally accessed without

1 authorization or exceeded authorized access to a computer. And
2 second, by accessing without authorization or exceeding
3 authorized access to a computer, the defendant obtained
4 information from a protected computer. I will define the terms
5 below.

6 To access without authorization is to access a
7 computer without approval or permission. The term "exceeds
8 authorized access" means to access a computer with
9 authorization and to use such access to obtain or alter
10 information in the computer that the accessor is not entitled
11 to obtain or alter. The term "protected computer" means a
12 computer that is used in or affecting interstate or foreign
13 commerce or communication.

14 Substantive Offense N.J.S.A. 2C:20-31, Disclosure of
15 Data from Wrongful Access. Under Title 18 of the United States
16 Code Section 1030(c)(2)(B)(ii), Mr. Auernheimer is guilty of a
17 felony if the offense was committed in furtherance of any
18 violation of the laws of any state. The Government has alleged
19 that the conspiracy was committed in furtherance of a violation
20 of a New Jersey State law.

21 The phrase "in furtherance of" means for the purpose
22 of assisting in, promoting, accomplishing, advances or
23 achieving an objective. The Government must therefore show
24 that Mr. Auernheimer engaged in the conduct of intentionally
25 accessing a computer without authorization or in excess of

1 authorization to assist in, promote, accomplish, advance or
2 achieve a violation of New Jersey statute 2C:20-31.

3 In order for Mr. Auernheimer to be found guilty of
4 that charge, the Government must prove each of the following
5 elements beyond a reasonable doubt. I will now instruct you on
6 the elements of a New Jersey State disclosure of data from
7 wrongful access violation.

8 First, the defendant purposely or knowingly and
9 without authorization, accesses any data, database, computer,
10 computer storage medium, or computer equipment.

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

14 The following definitions apply to New Jersey Statute
15 2C:20-31. Authorization means permission, authority or consent
16 given by a person who possess lawful authority to grant such
17 permission, authority or consent to another person to access,
18 operate, use, obtain, take, copy, alter, damage, or destroy a
19 computer, computer network, computer system, computer
20 equipment, computer software, computer program, computer
21 storage medium or data. This element is met if a reasonable
22 person would know that he or she lacked authorization or
23 exceeded authorization.

24 "Access" means to instruct, communicate with, store
25 data in, retrieve data from, or otherwise make use of any

1 resources of a computer, computer storage medium, computer
2 system or computer network.

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

7 "Personal identifying information" means any name,
8 number or other information that maybe used, alone or in
9 conjunction with any other information, to identify a specific
10 individual and includes, but is not limited to, the name,
11 address, telephone number, date of birth, Social Security
12 number, official state-issued identification number, employer
13 or taxpayer number, place of employment, employee
14 identification number, demand deposit account number, savings
15 account number, credit card number, mother's maiden none,
16 unique biometric data, such as fingerprint, voice print, retina
17 or iris image, or other unique physical representation or
18 unique electronic identification number, address or routing
19 code of the individual, and also includes passwords and other
20 codes that permit access to any data, database, computer,
21 computer storage medium, computer program, computer software,
22 computer equipment, computer system or computer network where
23 access is intended to be secure, restricted or limited.

24 Conspiracy, Success Immaterial. With respect to Count
25 One of the superseding indictment, the Government is not

1 required to prove that any of the members of the conspiracy
2 were successful in achieving the objective of the conspiracy.
3 You may find the defendant guilty of conspiracy if you find
4 that the Government proved beyond a reasonable doubt the
5 elements I have explained, even if you find that the Government
6 does not prove that any of the conspirators actually committed
7 any other offense against the United States. Conspiracy is a
8 criminal offense separate from the offense that was the
9 objective of the conspiracy. Conspiracy is complete without
10 the commission of those offenses.

11 Conspiracy, Acts and Statements of Co-conspirators.
12 Evidence has been admitted in this case that certain persons,
13 who are alleged to be co-conspirators of the defendant, did or
14 said certain things. The acts or statements of any member of a
15 conspiracy are treated as the acts and statements of all the
16 members of the conspiracy, if these acts and statements were
17 performed or spoken during the existence of the conspiracy and
18 to further the objective of the conspiracy. Therefore, you may
19 consider as evidence against the defendant any acts done or
20 statements made by any members of the conspiracy during the
21 existence of and to further the objective of the conspiracy.
22 You may consider these acts and statements even if they were
23 done and made in the defendant's absence and without his
24 knowledge. As with all the evidence presented in this case, it
25 is for you to decide whether you believe this evidence and how

1 much weight to give it.

2 Identity Theft, Title 18 United States Code Section
3 1028(a)(7), Elements. Count Two of the superseding indictment
4 charges that from on or about June 2nd, 2010, through on or
5 about June 15th, 2010, defendant Andrew Auernheimer knowingly
6 transferred, possessed and used means of identification of
7 other persons, including means of identification of New Jersey
8 residents in connection with unlawful activity, specifically
9 the unlawful accesses of AT&T's servers, contrary to Title 18
10 of the United States Code Section 1030(a)(2)(C) in violation of
11 Title 18 of the United States Code Section 1028(a)(7).

12 I will now instruct you on the elements of the
13 identity theft. Identity theft has the following three
14 elements. And in order for Mr. Auernheimer to be found guilty
15 of that charge, the Government must prove each of the following
16 elements beyond a reasonable doubt.

17 First, the defendant knowingly transferred, possessed
18 or used without lawful authority, a means of identification of
19 another person.

20 Second, the defendant did so in connection with the
21 unlawful accessing of a computer, here AT&T's servers.

22 And third, the means of identification were
23 transported by wire communication in interstate commerce.

24 The term "means of identification" means any name or
25 number that maybe used, alone or in conjunction with any other

1 information, to identify a specific individual, including any
2 names, Social Security number, date of birth, official state or
3 government issued driver's license, or identification number,
4 alien registration number, government passport number, employer
5 or taxpayer identification number, unique electronic
6 identification number, address or routing code, or
7 telecommunication identification information or access device.

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

21 You may also consider the natural and probable results
22 or consequences of any acts a defendant knowingly did, and
23 whether it is reasonable to conclude that the defendant
24 intended those results or consequences. You may find, but you
25 are not required to find, that the defendant knew or intended

1 the natural and probable consequences or results of acts he or
2 she knowingly did. This means that if you find that an
3 ordinary person in the defendant's situation would have
4 naturally realized that certain circumstances would result from
5 his or her actions, then you may find, but you are not required
6 to find, that the defendant did know and did intend that those
7 consequences would result from those actions. This is entirely
8 up to you to decide as the finder of the facts in this case.

9 Proof of Required State of Mind, Knowingly. The
10 offense of conspiracy to gain unauthorized access to computers
11 in the superseding indictment requires proof that the defendant
12 acted with knowledge with respect to certain elements of the
13 offenses. This means that the Government must prove beyond a
14 reasonable doubt that the defendant was conscious and aware of
15 the nature of his actions, and of the surrounding facts and
16 circumstances as specified in the definition of the offenses
17 charged. In deciding whether a defendant acted with knowledge,
18 you may consider evidence about what a defendant said, what the
19 defendant did and failed to do, how the defendant acted, and
20 all of the other factors and circumstances shown by the
21 evidence that may prove what was in the defendant's mind at
22 that time. The Government is not required to prove that a
23 defendant knew his acts were against the law.

24 Proof of Required State of Mind, Intentionally. The
25 offense of conspiracy to gain unauthorized access to protect

1 computers in the superseding indictment requires proof that the
2 defendant acted intentionally with respect to an element of the
3 offenses. This means that the Government must prove beyond a
4 reasonable doubt either: One, that it was the defendant's
5 conscious desire or purpose to act in a certain way or to cause
6 a certain result, or that two, the defendant knew that he or
7 she was acting in a way or would be practically certain to
8 cause that result.

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

14 Proof of Required State of Mind, Motive Explained.
15 Motive is not an element of the offenses with which the
16 defendant is charged. Proof of bad motive is not required to
17 convict. Further, proof of bad motive alone does not establish
18 that a defendant is guilty, and proof of good motive alone does
19 not establish that a defendant is not guilty. Evidence of a
20 defendant's motive may, however, help you find the defendant's
21 intent.

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

25 Personal advancement and financial gain, for example,

1 are motives for much of human conduct. However, these motives
2 may prompt one person to intentionally do something perfectly
3 acceptable while prompting another person to intentionally do
4 an act that is a crime.

5 Certain Persons Not Named as Defendants. You may not
6 draw any inference, favorable or unfavorable, towards the
7 Government or the defendant on trial from the fact that certain
8 persons were not named as defendants in the superseding
9 indictment. Why certain persons were not indicted or not on
10 trial here must play no part in your deliberations. It should
11 be of no concern to you and you should not speculate as to the
12 reason for their absence. Whether a person should be named as
13 a defendant is a matter within the sole discretion of the
14 United States Attorney and the grand jury. Therefore, you may
15 not consider it in any way in reaching your verdict as to the
16 defendant on trial.

17 Election of Foreperson, Unanimous Verdict; Do Not
18 Consider Punishment; Duty to Deliberate or Communication with
19 the Court. Now, this is the final instruction, ladies and
20 gentlemen, which I usually reserve reading until you heard the
21 closing arguments of the attorneys, so we will save instruction
22 37 until then. And at that time I will also go over with you
23 the verdict sheet.

24 So at this point, we'll take about five minutes just
25 so the attorneys can get situated so they can prepare for their

1 closing arguments, okay? And we'll come back out and I would
2 just once again remind you what the attorneys say is not
3 evidence in case. This is their recollection of what they
4 believe the evidence proved and showed to you. Okay? You
5 alone decide what the evidence did in fact prove.

6 We'll take five minutes, you guys can excuse yourself
7 for two minutes and you can leave those sheets right on the
8 seat. Thank you, very much.

9 Also, we will have to collect your phones. Not now,
10 soon. And make sure you turn them off because there's nothing
11 worse than ten phones going off in chambers. We'll take five
12 minutes and let the attorneys set up and we'll proceed.
13 Alright.

14 (Jury excused)

15 THE COURT: Alright, everyone can have a seat.
16 Counsel, on behalf of the Government, any issues with the
17 instructions as read to the jury?

18 MR. MARTINEZ: No, your Honor.

19 THE COURT: Alright. And on behalf of the defense,
20 understanding obviously the objections that were set forth on
21 the record during the course of the jury charge conference as
22 well as today, are there any other objections as relates to the
23 reading of the instructions?

24 MR. JAFFEE: Only those that have already been stated
25 for the record, your Honor.

1 THE COURT: Very well. Thank you. Alright, so we'll
2 take five minutes and then we will reconvene.

3 (Recess)

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