Court Exhibit 1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X
UNITED STATES OF AMERICA,

**JURY CHARGE**

-against-

**16-CR-441 (NGG)**

FABIO GASPERINI

Defendant.
----------X
NICHOLAS G. GARAUFIS, United States District Judge.

Now that the evidence in this case has been presented and the attorneys for the Government and the Defendant have concluded their closing arguments, it is my responsibility to instruct you as to the law that governs this case. My instructions will be in three parts:

First: I will instruct you regarding the general rules that define and govern the duties of a jury in a criminal case;

Second: I will instruct you regarding the legal elements of the crimes charged in the Indictment—that is, the specific elements that the Government must prove beyond a reasonable doubt to warrant a finding of guilt as to each crime; and

Third: I will give you some general rules regarding your deliberations.

## PART I

### The Role of the Court

Members of the jury, you now have heard all of the evidence in the case as well as the final arguments of the lawyers for the Government and the Defendant.

My duty at this point is to instruct you as to the law. It is your duty to accept these instructions of law and apply them to the facts as you determine them, just as it has been my duty to preside over the trial and decide what testimony and evidence is relevant under the law for your consideration.

On these legal matters, you must take the law as I give it to you. If any attorney has stated a legal principle different from any that I state to you in my instructions, it is my instructions that you must follow.

You should not single out any instruction as stating the law on its own. Instead, you should consider my instructions as a whole when you retire to deliberate in the jury room.

You should not be concerned about the wisdom of any rule that I state. Regardless of any opinion that you may have as to what the law may be or ought to be, it would violate your sworn duty to base your verdict upon any view of the law other than that which I give you.

### The Duties of the Jury

To begin with, it is your duty to find the facts from all the evidence in this case. You are the sole judges of the facts. Therefore, it is for you and you alone to decide the weight of the evidence, to resolve such conflicts that may have appeared in the evidence, and to draw such inferences that you deem to be reasonable and warranted from the evidence or lack of evidence in this case.

With respect to any question concerning the facts, it is your recollection of the evidence that controls.

You must apply the law in accordance with my instructions to the facts as you find them. While the lawyers may have commented on some of the legal rules, you must be guided only by my instructions about the rules. You must follow all of the rules as I explain them to you. You may not follow some of the rules and ignore the others. Even if you disagree with the rules or do not understand the reasons for them, you are bound to follow the legal rules that I describe.

**Parties are Equal Before the Court**

The fact that this prosecution is brought in the name of the United States Government does not entitle the United States to any greater consideration than the Defendant. By the same token, it is entitled to no less consideration. The parties, the United States Government and the Defendant, are equal before this court, and they are entitled to equal consideration. Neither the Government nor the Defendant is entitled to any sympathy or favor.

At times during the trial, I may have found it necessary to admonish the lawyers. You should not, however, let that prejudice you toward a lawyer or that lawyer's client because I have found it necessary to correct him or her. To the contrary, each attorney in this trial has professionally and competently served his or her client, and the court has great respect for all the attorneys in this courtroom.

**Presumption of Innocence**

The Indictment that was filed against the Defendant is the means by which the Government gave him notice of the charges against him and brought him before the court. It is

nothing more. The Indictment is only an accusation. The Indictment is not evidence and you are to give it no weight in arriving at your verdict.

The Defendant pleaded "not guilty" in response to the Indictment. He is presumed to be innocent unless and until his guilt has been proven beyond a reasonable doubt. I therefore instruct you that the Defendant is to be presumed by you to be innocent throughout your deliberations on each count in which he is charged until such time, if ever, that you as a jury are satisfied that the Government has proved him guilty beyond a reasonable doubt on that count. The presumption of innocence alone, unless overcome, is sufficient to acquit him. The Defendant is on trial only for the crimes charged in the Indictment, and not for anything else.

**Burden of Proof on Government**

Since the law presumes the Defendant to be innocent, the burden of proving his guilt beyond a reasonable doubt is on the Government throughout the trial. The Defendant is presumed to be innocent of every crime with which he has been charged, and he never has the burden of proving his innocence or of producing any evidence at all. As a result, the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses, including any expert witnesses, to produce any evidence, or to testify in his own defense.

**Proof Beyond a Reasonable Doubt**

For each crime with which the Defendant is charged, the Government must prove each element of the crime beyond a reasonable doubt. I will explain the elements of the crimes that the Indictment charges later on, but now I will address the phrase "reasonable doubt."

Proof beyond a reasonable doubt does not mean proof beyond all possible doubt. The Government is not required to prove the Defendant's guilt to a mathematical certainty. Rather, the test is one of reasonable doubt.

A reasonable doubt is a doubt based on reason and on common sense. Therefore, proof beyond a reasonable doubt is proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his or her own affairs.

This means that after you have considered all of the evidence in this case, if you have a doubt that is based on your own experience, judgment, and common sense, you must find the Defendant not guilty of the crime in question. A reasonable doubt, however, is not a doubt that arises out of whim or speculation. Nor is a reasonable doubt an excuse to avoid performing an unpleasant duty.

You should consider all of the proof presented at trial, or any lack of proof, in determining whether you have a reasonable doubt. In considering each count in the Indictment, unless the Government proves beyond a reasonable doubt that the Defendant has committed each and every element of the offense charged in the count, you must find the Defendant not guilty of that offense.

You should consider each count of the Indictment separately. It is thus possible for you to find the Defendant guilty on one count and not guilty on another count. Conversely, you might find the Defendant guilty of each crime charged in the Indictment, or you might find him not guilty of all of the crimes charged in the Indictment.

On any count of the Indictment, if, after fair and impartial consideration of all the evidence, you honestly conclude that you have such a doubt that would cause a prudent person to hesitate to act in matters of importance in his or her own life, then you have a reasonable doubt.

In that event, it is your duty to acquit the Defendant on that count. For the same reason, if you view the evidence in the case as reasonably permitting a finding of either guilt or innocence as to a particular count, you must acquit the Defendant on that count.

If, on the other hand, after fair and impartial consideration of all the evidence, you do not have such a doubt, then you have no reasonable doubt and, in that circumstance, you should convict the Defendant on that count.

**Dates Approximate**

The Indictment charges "in or about" and "on or about" and "between" certain dates. The proof need not establish with certainty the exact date of an alleged offense. It is sufficient if the evidence establishes beyond a reasonable doubt that an offense was committed on a date reasonably near the dates alleged.

**The Evidence**

What is Evidence

I now wish to instruct you as to what is evidence and how you should consider it. The evidence you will use to decide what the facts are comes in three forms:

(1) sworn testimony of witnesses, both on direct and cross-examination;

(2) exhibits that have been received by the court in evidence; and

(3) stipulations that have been entered into by the parties.

If evidence was received for a limited purpose, you must consider that evidence for that limited purpose only.

What is Not Evidence

In deciding the facts, you must disregard the following things, which are not evidence:

(1) Arguments or statements by lawyers are not evidence.

(2) Questions put to the witnesses are not evidence.

(3) The Indictment is not evidence. The Indictment is merely a statement of charges and not itself evidence.

(4) Objections to the questions or to offered exhibits are not evidence.

In this regard, the attorneys for both the Government and the Defendant have a duty to their clients to object when they believe certain evidence should not be received. You should not be influenced by the objections or by the court's rulings on the objections. If an objection was sustained, ignore the question and the answer, if an answer was given. If an objection was overruled, treat the answer like any other answer.

(5) Charts and summaries.

The parties have presented exhibits in the form of charts and summaries. These charts and summaries were shown to you in order to make other evidence more meaningful and to aid you in considering the evidence. They are no better than the testimony or the documents upon which they are based, and they are not themselves independent evidence. Therefore, you are to give no greater consideration to these schedules or summaries than you would give to the evidence upon which they are based.

It is for you to decide whether the charts, schedules, or summaries correctly present the information contained in the testimony and in the exhibits on which they are based. You are entitled to consider the charts, schedules, and summaries if you find that they are of assistance to you in analyzing and understanding the evidence.

(6) Anything you may have seen or heard outside the courtroom is not evidence.

Your verdict must be based solely upon the evidence or lack of evidence developed at trial. You are not to engage in speculation or guesswork.

In reaching your decision as to whether the Government has sustained its burden of proof, it would be improper for you to consider any personal feelings you may have about the Defendant's race, national origin, ethnic background, sex, or age. All persons are entitled to the presumption of innocence and the Government has the same burden of proof in all criminal cases.

In addition, it would be equally improper for you to allow any feelings you might have about the nature of the crimes charged to interfere with your decision-making process.

It would also be improper for you to draw any conclusions about the Defendant's guilt or innocence from anything you may or may not have observed about the spectators inside or outside the courtroom. As I have said, your verdict must be based solely upon the evidence presented at trial.

Under your oath as jurors, you are not to be swayed by sympathy for one side or the other. You are to be guided solely by the evidence in this case. The crucial, central question that you must ask yourselves as you sift through the evidence is: Has the Government proven the guilt of the Defendant beyond a reasonable doubt?

It is for you alone to decide whether the Government has proven that the Defendant is guilty of the crimes charged solely on the basis of the evidence and subject to the law as I charge you. It must be clear to you that once you let fear, or prejudice, or bias, or sympathy interfere with your thinking, there is a risk that you will not arrive at a true and just verdict.

If you have a reasonable doubt as to the Defendant's guilt as to a particular charged crime, you must render a verdict of not guilty. But on the other hand, if you should find that the Government has met its burden of proving the Defendant's guilt beyond a reasonable doubt, you should not hesitate to render a verdict of guilty because of sympathy or any other reason.

To repeat, your verdict must be based exclusively upon the evidence or the lack of evidence in this case.

Direct and Circumstantial Evidence:

I have already told you that evidence comes in various forms, such as the sworn testimony of witnesses, exhibits, and stipulations.

This evidence may take two different forms: direct evidence and circumstantial evidence.

*Direct Evidence*

Direct evidence is the communication of a fact by a witness who testifies to the knowledge of that fact as having been obtained through one of the five senses.

So, for example, a witness who testifies to knowledge of a fact because he saw it, heard it, smelled it, tasted it, or touched it, is providing direct evidence. As I explained to you in my opening instruction, if you went outside and saw that it was raining, you would have observed direct evidence of rain. For testimony providing direct evidence, what remains is your responsibility to pass upon the credibility of the witnesses providing it.

*Circumstantial Evidence*

Circumstantial evidence is evidence that tends to prove a fact at issue by proof of other facts from which the fact at issue may be inferred.

The word "infer," or the expression "to draw an inference," means to find that a fact exists from proof of another fact. For example, if a fact at issue is whether it is raining at the moment, none of us can testify directly to that fact, since we are sitting in this courtroom with the shades drawn. Assume, however, that as we sit here, a person walks into the courtroom wearing a raincoat that is wet, and that person is also carrying an umbrella dripping water. We may infer that it is raining outside. In other words, the fact of rain is an inference that could be drawn from the wet raincoat and the dripping umbrella. An inference is to be drawn only if it is logical and reasonable to do so. In deciding whether to draw an inference, you must look at and consider all the facts in light of reason, common sense, and experience. Whether a given inference is or is not to be drawn is entirely a matter for you, the jury, to decide. Please bear in mind, however, that an inference is not to be drawn by guesswork, suspicion, or speculation.

I remind you once again that you may not convict the Defendant unless you are satisfied of his guilt beyond a reasonable doubt, whether based on direct evidence, circumstantial evidence, or the logical inferences to be drawn from such evidence. Circumstantial evidence does not necessarily prove less than direct evidence, nor does it necessarily prove more. In determining what the facts are, and in arriving at your verdict, you are to consider all of the evidence in this case—direct and circumstantial.

Deciding What to Believe

In deciding what the facts are, you must decide which testimony to believe, which testimony not to believe, and how much weight to give to the testimony of each witness. In making those decisions, there are a number of factors you may take into account, including the following:

(1) Did the witness seem honest?

(2) Did the witness have any particular reason not to tell the truth?

(3) Did the witness have a personal interest in the outcome of the case?

(4) Did the witness seem to have a good memory?

(5) Did the witness have the opportunity and ability to observe accurately the things he or she testified about?

(6) Did the witness show resentment or anger towards a party?

(7) Did the witness appear to understand the questions clearly and answer them directly?

(8) Was what the witness said supported by other evidence?

(9) Did the witness's testimony differ from the testimony of other witnesses?

People sometimes forget things. A contradiction may be an innocent lapse of memory or it may be an intentional falsehood. Consider, therefore, whether the contradiction has to do with an important fact or only a small detail. In addition, different people observing an event may remember it differently and therefore testify about it differently.

Ultimately, you may consider the factors I have just discussed as well as other relevant factors in deciding how much weight to give to testimony.

Finally, if you find that a witness has lied to you about any matter, however insignificant, you may choose to disregard that witness's testimony in part or in whole.

Discrepancies in Testimony

You have heard evidence of discrepancies in the testimony of certain witnesses, and counsel have argued that such discrepancies are a reason for you to reject the testimony of those witnesses.

Evidence of discrepancies may be a basis to disbelieve a witness's testimony. On the other hand, discrepancies in a witness's testimony or between his or her testimony and that of others do not necessarily mean that the witness's entire testimony should be discredited.

People sometimes forget things, and even a truthful witness may be nervous and contradict him- or herself. It is also the case that two people witnessing an event may see or hear it differently. Whether a discrepancy pertains to a fact of importance or only to a trivial detail should be considered in weighing its significance. A willful falsehood always is a matter of importance and should be considered seriously.

It is for you to decide, based on your total impression of a witness, how to weigh the discrepancies in his or her testimony. You should, as always, use common sense and your own good judgment.

Interest in Outcome

In evaluating the credibility of a witness, you should take into account any evidence that the witness may benefit in some way from the outcome of the case. Such an interest in the outcome creates a motive to testify falsely and may sway the witness to testify in a way that advances his or her own interests. Therefore, if you find that any witness whose testimony you

are considering may have an interest in the outcome of this trial, then you should bear that factor in mind when evaluating the credibility of his or her testimony and accept it with great care.

This is not to suggest that every witness who has an interest in the outcome of the case will testify falsely. It is for you to decide to what extent, if at all, the witness's interest has affected his or her testimony.

## Interviews of Witnesses

There was testimony at trial that the attorneys for the Government and the defense interviewed witnesses when preparing for and during the course of the trial. The attorneys for both sides were obliged to prepare this case as thoroughly as possible, and might have been derelict in the performance of their duties if they failed to interview witnesses before this trial began, and again as necessary throughout the course of the trial.

## Expert Witnesses

In this case, I have permitted certain witnesses to express their opinions about matters that are at issue. A witness may be permitted to testify to an opinion on those matters about which he or she has special knowledge, skill, experience, and training. Such testimony is presented to you on the theory that someone who is experienced and knowledgeable in the field can assist you in understanding the evidence or in reaching an independent decision on the facts.

In weighing this opinion testimony, you may consider the witness's qualifications, his or her opinions, the reasons for testifying, as well as all of the other considerations that ordinarily apply when you are deciding whether or not to believe a witness's testimony. You may give the opinion testimony whatever weight, if any, you find it deserves in light of all of the evidence in

this case. You should not, however, accept opinion testimony merely because I allowed the witness to testify concerning his or her opinion. Nor should you substitute it for your own reason, judgment, and common sense. The determination of the facts in this case rests solely with you.

Testimony of Government Agents and Law Enforcement Witnesses

During this trial you heard testimony from Government employees and law enforcement witnesses. That a witness works in law enforcement or is a Government employee does not mean that his or her testimony is entitled to any greater weight by reason of his or her employment. By the same token, his or her testimony is not entitled to less consideration simply because he or she works in law enforcement or is a Government employee. You should consider the testimony of Government agents and law enforcement officers just as you would consider any other evidence in the case, and evaluate their credibility just as you would that of any other witness. After reviewing all the evidence, you will decide whether to accept the testimony of law enforcement and Government employee witnesses, and what weight, if any, that testimony deserves.

Acts and Declarations of Co-Conspirators

Evidence has been received in this case that certain persons, who are alleged in Counts Three and Five of the Indictment to be co-conspirators of the Defendant , have done or said things during the existence or life of the alleged conspiracy in order to further or advance its goals.

Such acts and statements of these other individuals may be considered by you in determining whether or not the government has proven the charges in Counts Three and Five of the Indictment against Defendant. Before you may consider the statements or acts of a co-conspirator in deciding the issue of the defendant's guilt, you must first determine that the acts and statements were made during the existence, and in furtherance, of the unlawful scheme. If the acts were done or the statements made by someone whom you do not find to have been a member of the conspiracy, or if they were not done or said in furtherance of the conspiracy, they may not be considered by you as evidence against the defendant.

Since these acts may have been performed and these statements may have been made outside the presence of Defendant and even done or said without the defendant's knowledge, these acts or statements should be examined with particular care by you before considering them against the defendant who did not do the particular act or make the particular statement.

*Translations*

Translations of documents have been admitted into evidence in this trial. Whether the translations are accurate translations of the non-English portions of the documents in whole or part is for you to decide based on evidence presented to you. In considering whether a translation accurately describes the meaning of the document, you should consider any testimony presented to you regarding how and by whom the translation was made, as well as any testimony disputing the translation of any words in the translation. You may consider the knowledge, training, and experience of the translator if called as a witness. Although some of you may speak the foreign language that is being translated, it is important that all jurors consider the same evidence.

Therefore, you should not consider your own understanding of the foreign language in evaluating the accuracy of the translations admitted into evidence.

**Specific Investigative Techniques Not Required**

Although the Government bears the burden of proof beyond a reasonable doubt, and although a reasonable doubt can arise from lack of evidence, I instruct you that there is no legal requirement that the Government use any specific investigative techniques to prove its case. Law enforcement techniques are not your concern. Your concern is to determine whether or not, based upon all of the evidence in this case, the Government has proven that the Defendant is guilty beyond a reasonable doubt as to each count charged against him.

**Number of Witnesses and Uncontradicted Testimony**

The fact that one party called more witnesses and introduced more evidence than another party does not mean that you should find the facts in favor of the side offering the most witnesses. By the same token, you do not have to accept the testimony of any witness, even if that witness has not been contradicted or impeached, if you find the witness not to be credible. You do have to decide which witnesses to believe and which facts are true. To do this, you must look at all of the evidence, drawing upon your own common sense and personal experience.

**Interviews of Witnesses**

There was testimony at trial that the attorneys for the Government and the defense interviewed witnesses when preparing for and during the course of the trial. You should not draw any unfavorable inference from that testimony. To the contrary, the attorneys for both

sides were obliged to prepare this case as thoroughly as possible and might have been derelict in the performance of their duties if they failed to interview witnesses before this trial began and as necessary throughout the course of the trial.

**All Available Witnesses Need Not Be Produced**

The law does not require the Government to produce all available evidence or call as witnesses all persons involved in the case who may have been present at any relevant time or place, or who may appear to have some knowledge of a matter at issue in this trial. Nor does the law require any party to produce as exhibits all papers and objects mentioned during the course of the trial. You are always entitled, however, to consider any lack of evidence in determining whether the Government has met its burden of proof beyond a reasonable doubt.

**Uncalled Witness Equally Available to Both Sides**

Both the government and the defense have the same power to (1) subpoena witnesses to testify on their behalf; or (2) depose witnesses located abroad, who would be otherwise unavailable to testify at a trial in the United States, for the purpose of using their recorded deposition testimony at trial. If a potential witness could have been called by the Government or by the Defendant, and neither party called the witness, then you may draw the conclusion that the testimony of the absent witness might have been unfavorable to the Government or to the Defendant or to both.

On the other hand, it is equally within your province to draw no inference at all from the failure of either side to call a witness. You should remember that there is no duty on

either side to call a witness whose testimony would be merely cumulative of testimony already in evidence, or who would merely provide additional testimony to facts already in evidence.

I remind you, however, that because the law presumes the Defendant to be innocent, the burden of proving his guilt beyond a reasonable doubt is on the Government throughout the trial. The Defendant never has the burden of proving his innocence or of producing any evidence or calling any witnesses at all.

**Other Persons Not on Trial**

You are about to be asked to decide whether or not the Government has proven beyond a reasonable doubt the guilt of this Defendant. You are not being asked whether any other person has been proven guilty. Your verdict should be based solely upon the evidence or lack of evidence as to this Defendant in accordance with my instructions and without regard to whether the guilt of other people has or has not been proven.

You have heard evidence about the involvement of certain other people in the events referred to in the indictment. You may not draw any inference, favorable or unfavorable, towards the Government or the Defendant from the fact that certain persons are not on trial before you, or that persons were named as co-conspirators but not indicted. That these individuals are not on trial before you, or are not named as defendants, is not your concern. You also should not speculate as to the reason these people are not on trial before you, or are not named as defendants, nor should you allow their absence as parties to influence in any way your deliberations in this case. Your concern is solely the Defendant on trial before you.

**The Defendant's Right Not to Testify**

The Defendant did not testify in this case. Under our Constitution, he has no obligation to testify or to present any other evidence, because it is the Government's burden to prove their guilt beyond a reasonable doubt. You may not attach any significance to the fact that the Defendant did not testify. Nor may you draw any adverse inference against the Defendant because he did not take the witness stand. In your deliberations in the jury room, you may not consider this decision against the Defendant in any way.

**Stipulations**

The attorneys for the Government and for the Defendant have entered into stipulations concerning facts that are relevant to this case. When the attorneys on both sides stipulate and agree as to the existence of a fact, you must—unless otherwise instructed—accept the stipulation as evidence and regard that fact as proved.

**Multiple Counts**

The Indictment contains a total of five counts or charges against the Defendant. Each count charges the Defendant with a different crime. You must consider each count separately and return a separate verdict of guilty or not guilty for each count. Whether you find the Defendant guilty or not guilty as to one count should not affect your verdict as to the other charged counts.

**Punishment**

The question of the possible punishment of the Defendant is of no concern to the jury and should not, in any sense, enter into or influence your deliberations. Your function is to weigh the

evidence in the case, and to determine whether or not the Defendant is guilty beyond a reasonable doubt solely upon the basis of the evidence. Under your oath as jurors, you cannot allow a consideration of the punishment that may be imposed upon the Defendant, if he is convicted, to influence your verdict in any way or to enter your deliberations in any sense.

**Crimes Defined by Statute Only**

In our system, we only have crimes that are defined by statute. The fact that something may be repugnant to you, or may be something that you think is morally wrong, is irrelevant. Statutes define our crimes, and I will talk to you about the individual statutes and how they break down into elements so that you can consider the elements that the Government must prove. Some vague feeling that something wrong has been done is insufficient to convict anyone of any charge whatsoever. You must break the crime down to its elements, see if there is proof beyond a reasonable doubt as to each of those elements, and then, with that determination made, you can render a verdict.

## PART II – SUBSTANTIVE CHARGES

I will now turn to the second part of this jury charge, in which I instruct you on the legal elements of the crimes charged. I will review the Indictment with you and instruct you as to the legal elements of the crimes with which the Defendant is charged. As I instructed you earlier and at the outset of this case, an Indictment is a charge or accusation. The Indictment in this case has five counts. You will be called upon to render a separate verdict as to each count.

## KNOWLEDGE AND INTENT

Before discussing the elements of the separate counts, I will discuss the concepts of knowledge and intent.

### Knowingly

Certain allegations in the Indictment require that in order to sustain its burden of proof, the Government must prove beyond a reasonable doubt that a defendant acted "knowingly." A defendant acts knowingly if he acts purposely and voluntarily, and not because of ignorance, mistake, accident, carelessness, or other innocent reason. Whether a defendant acted knowingly may be proven by his conduct and by all of the facts and circumstances surrounding the case.

### Intentionally

Certain allegations in the Indictment require that in order to sustain its burden of proof, the Government must prove that a defendant acted "intentionally." Before you can find that a defendant acted intentionally, you must be satisfied beyond a reasonable doubt that the defendant acted deliberately and purposefully. That is, a defendant's acts must have been the product of his

conscious, objective decision, rather than the product of mistake or accident. A defendant need not have been aware of the specific law or rule that his conduct may have violated.

These issues of knowledge and intent require you to make a determination about the Defendant's state of mind, something that rarely can be proved directly. A wise and careful consideration of all the circumstances of the case may, however, permit you to make such a determination as to the Defendant's state of mind. Indeed, in your everyday affairs, you are frequently called upon to determine a person's state of mind from his or her words and actions in a particular circumstance. You are asked to do the same here.

## SUBSTANTIVE CHARGES

COUNT ONE: COMPUTER INTRUSION IN FURTHERANCE OF FRAUD

Count One of the indictment charges the Defendant with Computer Intrusion under Section 1030(a)(4). The indictment charges that the Defendant obtained unauthorized access to protected computers and thereby furthered the intended fraud and obtained something of value. Count One reads, in relevant part, as follows:

> In or about and between February 2011 and June 2016, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendant FABIO GASPERINI, together with others, did knowingly and with intent to defraud access, and attempt to access, one or more protected computers without authorization, and exceed authorized access, and by means of such conduct did further the intended fraud and obtain something of value, to wit: the use of a computer, information, and United States and foreign currency.

The statute relevant to Count One is Section 1030(a)(4) of Title 18, United States Code, which provides in relevant part:

> Whoever . . . knowingly and with intent to defraud, accesses a protected computer without authorization, or exceeds authorized access, and by means of such conduct furthers the intended fraud and obtains anything of value, unless the object of the fraud and the thing obtained consists only of the use of the computer and the value of such use is not more than $5,000 in any 1-year period . . . shall be punished as provided in subsection (c) of this section.

*Elements of Count One*

I will now review the elements of Count 1. To prove a violation of Section 1030(a)(4), the Government must establish each of the following elements beyond a reasonable doubt:

First, that the Defendant knowingly accessed a protected computer without authorization;

Second, that the Defendant acted with the intent to defraud; and

Third, that in furtherance of the scheme to defraud, the Defendant obtained something of value as described in the Indictment.

*First Element: Unauthorized Access of a Protected Computer*

The first element that the Government must prove beyond a reasonable doubt is that the Defendant knowingly accessed a protected computer without authorization.

"Computer" in this element means an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device. It does not include automated typewriters or typesetters, portable hand held calculators, or other similar devices.

The computer accessed must be a "protected computer." A protected computer means any computer that is used in or affecting interstate or foreign commerce or communication, including a computer located outside the United States that is used in a manner that affects interstate or foreign commerce or communication of the United States. Interstate or foreign commerce or communication means the movement of goods and services, including on-line computer services, or communications between states or between the United States and other countries. However, there is no requirement that the Defendant's transmission itself crossed a

state line. As long as the computer is used in or affects interstate commerce or communication, that is sufficient. This definition of "protected computer" includes any computer that is connected to the internet.

"Accessing" a computer includes both obtaining information from a computer and making use of a computer and its capabilities.

A person acts "without authorization" under this element where he accesses a computer without any right or permission to do so.

Finally, satisfaction of this element requires the Government to prove that the Defendant acted knowingly. I have already told you the meaning of the term "knowingly," and the Government must show that the Defendant acted knowingly with respect to each of the requirements set forth above.

*Second Element: Intent to Defraud*

The second element that the Government must prove beyond a reasonable doubt is that the Defendant accessed the protected computer with intent to defraud.

I have previously defined "intent" for you. Acting with intent to defraud means to act willfully and with the intent to deceive, for the purpose of causing some loss to another. To act willfully means to act knowingly and purposely, with an intent to do something the law forbids, that is to say, with a bad purpose either to disobey or disregard the law.

The question of whether a person acted with the intent to defraud is a question of fact for you to determine, like any other fact question. The question involves one's state of mind. Direct proof of fraudulent intent is almost never available. It would be a rare case when it could be shown that a person wrote or stated that as of a given time in the past he committed an act with

fraudulent intent. Such proof is not required. The ultimate fact of intent, though subjective, may be established by circumstantial evidence, based upon a person's outward manifestations, his words, his conduct, his acts and all the surrounding circumstances disclosed by the evidence and the rational or logical inferences that may be drawn from them.

Circumstantial evidence, if believed, is of no less value than direct evidence. In either case, the essential elements of the crime charged must be established beyond a reasonable doubt.

Since an essential element of the crime charged is intent to defraud, it follows that good faith on the part of the Defendant is a complete defense to a charge of computer fraud. If the Defendant actually believed that he was authorized to access the computer, and took reasonable steps to investigate that belief, then the Defendant acted in good faith. The Defendant, however, has no burden to establish a defense of good faith. The burden is on the government to prove fraudulent intent and the consequent lack of good faith beyond a reasonable doubt.

In considering whether or not the Defendant acted in good faith, you are instructed that a belief by the Defendant, if such belief existed, that ultimately everything would work out so that no one would lose any money does not require a finding by you that he acted in good faith. No amount of honest belief on the part of the Defendant that the scheme will somehow work out in the end will excuse fraudulent actions or false representations with intent to defraud.

As a practical matter, then, in order to sustain the charge against the Defendant, the government must establish beyond a reasonable doubt that he knew that his conduct was calculated to deceive and nonetheless, he undertook the activity for the purpose of causing some loss to another.

*Third Element: Obtaining Something of Value*

The third element the government must prove beyond a reasonable doubt is that the Defendant used the computer to further the fraud, and as a result obtained something of value as described in the indictment. Here, the government alleges that Defendant obtained the use of a computer, information, and United States and foreign currency. If you find that the Defendant obtained information or United States or foreign currency and that these items constitute things of value, then I instruct you that this element is satisfied.

If, however, you find that the Defendant only obtained the use of a computer through his actions, then satisfaction of this element requires you to find that that the Government has shown beyond a reasonable doubt that either

(1) The object of the fraud—its goal—included something other than the use of a computer; or

(2) The value of the use of that computer was more than $5,000 in any one year period.

If you find that the object of the fraud was only the use of the computer, that all the Defendant obtained was the use of the computer, and that the value of that use was not more than $5,000 in any one-year period, then this element is not satisfied and you must find him not guilty.

COUNT TWO: COMPUTER INTRUSION AND OBTAINING INFORMATION

Count Two of the indictment charges the Defendant with Computer Intrusion under Section 1030(a)(2). The indictment charges that the Defendant obtained unauthorized access to computers and thereby obtained information from protected computers. Count Two reads, in relevant part, as follows:

> In or about and between February 2011 and June 2016, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendant FABIO GASPERINI, together with others, did knowingly and intentionally access, and attempt to access, one or more computers without authorization and exceed authorized access, and thereby did obtain information from one or more protected computers for the purpose of commercial advantage and private financial gain, and in furtherance of criminal and tortious acts in violation of the laws of the United States and any State, and the value of the information obtained exceeded $5,000.

The relevant statutes on this subject are sections 1030(a)(2) and 1030(c)(2) of Title 18 of the United States Code. They provide, in pertinent part:

> [Whoever] intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains . . . information from any protected computer . . . [and] (i) the offense was committed for purposes of commercial advantage or private financial gain; (ii) the offense was committed in furtherance of any criminal or tortious act in violation of the Constitution or laws of the United States or of any State; or (iii) the value of the information obtained exceeds $5,000 [shall be guilty of a crime].

*Elements of Count Two*

In order to prove the Defendant guilty of Count Two, the Government must establish each of the following elements beyond a reasonable doubt:

First, that the Defendant accessed a computer without authorization;

Second, that the Defendant acted intentionally in accessing a computer without authorization;

Third, that the Defendant thereby obtained information from any protected computer; and

Fourth, that one of the following is true:

(a) the Defendant acted for the purpose of commercial advantage or private financial gain; or

(b) the offense was committed in furtherance of any criminal or tortious act; or

(c) the value of the information obtained was greater than $5,000.

Additionally, this count involves a "lesser included offense"—a separate violation of the law which requires proof of some but not all of these elements. Here, this lesser included offense requires proof of only the first three elements listed above. I will instruct you on that offense after I describe these elements.

*First Element: Accessing a Computer without Authorization*

The first element that the government must prove beyond a reasonable doubt is that the Defendant accessed a computer without authorization. I have already instructed you on the meaning of the terms "access," "computer," and "without authorization."

*Second Element: Intentional Conduct*

The second element that the government must prove beyond a reasonable doubt is that the Defendant acted intentionally in accessing a computer without authorization.

I have already described the meaning of intent. The question of whether a person acted intentionally is a question of fact for you to determine, like any other fact question. Direct proof of intent is almost never available. The ultimate fact of intent, though subjective, may be established by circumstantial evidence, based upon a person's outward manifestations, his words, his conduct, his acts and all the surrounding circumstances disclosed by the evidence and the rational or logical inferences that may be drawn from them.

As a practical matter, then, in order to sustain the charges against the Defendant, the government must establish beyond a reasonable doubt that he knew that his accessing of a computer was unauthorized, but did so anyway.

To conclude on this element, if you find that the Defendant did not know he was acting without authority, or if he did not intentionally access the computer, then you should find the Defendant not guilty on this count.

*Third Element: Obtaining Information from a Protected Computer*

The third element that the government must prove beyond a reasonable doubt is that the Defendant obtained information from a "protected computer." I have already told you the meaning of "protected computer" under Count One, and its meaning is the same here.

Obtaining information includes obtaining control over data. It is not necessary for the government to prove that the Defendant copied or physically removed data from its original location, although copying or transporting data would be examples of obtaining information.

*Fourth Element: Prohibited Purpose or Minimum Value*

As its final element, the Government must prove beyond a reasonable doubt that the Defendant acted for the purpose of commercial advantage or private financial gain **or** the offense was committed in furtherance of any criminal or tortious act **or** the value of the information obtained was greater than $5,000. Here, the government alleges that this element is satisfied in all three of these ways. You may find that this element is satisfied under any one of these three theories. However, you must be unanimous as a jury as to at least one of the theories.

The phrase "commercial advantage or private financial gain" should be given its ordinary and natural meaning. "Commercial advantage" is a profit or gain in money or property obtained through business activity. "Private financial gain" is profit or gain in money or property specifically for a particular person or group. The government is not required to prove that the Defendant actually received some financial gain, although, of course, you may consider evidence that the Defendant did or did not receive financial gain in deciding whether he acted for the purpose of achieving financial gain. I instruct you that this element is satisfied if you unanimously find that the Defendant acted for the purpose of commercial advantage or private financial gain.

Second, the government alleges that the offense was committed in furtherance of a criminal or tortious act in violation of the laws of the United States or any State, specifically: computer intrusion as charged in Count One of the indictment; wire fraud conspiracy as charged in Count Three of the indictment,; and wire fraud as charged in Count Four of the indictment. I instruct you that this element is satisfied if you unanimously find that the offense was committed in furtherance of one of the foregoing criminal acts.

Third, the government alleges that the value of the information obtained was greater than $5,000. I instruct you that this element is satisfied if you unanimously find that the value of the information obtained was greater than $5,000.

*Lesser Included Offense in Count Two*

I have just explained what the Government must prove for you to find the Defendant guilty of the offense charged in Count Two. Your first task is to decide whether the government has proved, beyond a reasonable doubt, that the Defendant committed that crime. But if you unanimously find that the Defendant is not guilty the offense charged in Count Two, or if after all reasonable efforts, you are unable to reach a verdict on that Count, you must determine whether Defendant is guilty of a "lesser included offense." A lesser included offense is a crime that shares all of its elements with a charged count but which isn't as serious as the charged offense. In other words, all of the elements of a lesser included offense are also elements of the greater offense, and the lesser offense simply has fewer elements. The law also permits you, the jury, to decide whether the Government has proven beyond a reasonable doubt that the Defendant committed another, lesser criminal act.

The offense of computer intrusion, charged in Count Two of the indictment, necessarily includes a lesser offense. In order to find Defendant guilty of this lesser included offense, the Government must prove each of the following elements beyond a reasonable doubt:

First, that the Defendant accessed a computer without authorization;

Second, that the Defendant acted intentionally; and

Third, that the Defendant thereby obtained information from any protected computer.

These elements are the same as previously explained above.

The difference between the offense charged in Count Two of the indictment and this lesser included offense is that, for the offense charged in Count Two, the government must prove beyond a reasonable doubt that the Defendant acted for the purpose of commercial advantage or private financial gain **or** the offense was committed in furtherance of any criminal or tortious act **or** the value of the information obtained was greater than $5,000.

If you find unanimously that the government has proved beyond a reasonable doubt each of the elements of the offense of computer intrusion charged in Count Two of the indictment, then you should find the Defendant guilty of that offense and your foreperson should select "guilty" in the space provided on the verdict form for that offense. In that case, you do not need to separately consider the lesser included offense.

If, however, you find unanimously that the Government has not proved beyond a reasonable doubt each element of the computer intrusion offense charged in Count Two of the Indictment, then you must find the Defendant not guilty of that offense. You should then consider whether the Government has proved beyond a reasonable doubt all the elements of the lesser offense as I have described them to you.

If you find unanimously that the Government has proven beyond a reasonable doubt each of the elements of the lesser included offense, then you should find the Defendant guilty of that offense. However, if you find unanimously that the Government has not proved beyond a reasonable doubt each element of this lesser included offense, then you must find the Defendant not guilty of the lesser included offense.

You must remember that the burden is always on the government to prove, beyond a reasonable doubt, each and every element of the offense charged in the Indictment or of any lesser included offense.

COUNT FOUR: WIRE FRAUD

In Counts Three and Four, Defendant is charged, respectively with Conspiracy to Commit Wire Fraud and Wire Fraud. I will instruct you on these charges in reverse order, starting with Count Four, the wire fraud count. The indictment charges that the Defendant devised a scheme to defraud, and that, in furtherance of that scheme, he knowingly caused the interstate wires to be used to send a request from a compromised server for the transfer of a user agent string. I will explain what each of these terms means. Count Four reads, in relevant part, as follows:

> In or about and between February 2011 and June 2016, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendant FABIO GASPERINI, together with others, did knowingly and intentionally devise a scheme and artifice to defraud, and to obtain money and property by means of materially false and fraudulent pretenses, representations and promises.
>
> On December 8, 2014, for the purpose of executing such scheme and artifice, and attempting to do so, the defendant FABIO GASPERINI did transmit and cause to be transmitted by means of wire communications in interstate and foreign commerce, writings, signs, signals, pictures and sounds, to wit: a request from a compromised server located in Queens, New York, to a server located outside of New York State, for the transfer of a user agent string.

The relevant statute on this subject is section 1343 of Title 18 of the United States Code, which states

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice shall be [guilty of a crime].

*Elements of Count Four*

In order to prove the Defendant guilty of wire fraud, the government must prove each of the following elements beyond a reasonable doubt:

First, that there was a scheme or artifice to defraud or to obtain money or property by materially false and fraudulent pretenses, representations or promises, as alleged in the Indictment;

Second, that the Defendant knowingly and willfully participated in the scheme or artifice to defraud, with knowledge of its fraudulent nature and with specific intent to defraud, or that he knowingly and intentionally aided and abetted others in the scheme;

Third, that in execution of that scheme, the Defendant used or caused the use of interstate wires as specified in the Indictment; and

Fourth, that the Defendant or one of his coconspirators engaged in substantial conduct in the United States that was integral to the fraudulent scheme and that there was at least some use of U.S. wires in furtherance of that scheme.

*First Element: Existence of a Scheme or Artifice to Defraud*

The first element that the government must prove beyond a reasonable doubt is that there was a scheme or artifice to defraud advertising companies and businesses of money or property by means of false or fraudulent pretenses, representations or promises.

A "scheme or artifice" is merely a plan for the accomplishment of an object. A scheme to defraud is any plan, device, or course of action to obtain money or property by means of false or fraudulent pretenses, representations or promises reasonably calculated to deceive persons of average prudence.

"Fraud" is a general term which embraces all the various means which human ingenuity can devise and which are resorted to by an individual to gain an advantage over another by false representations, suggestions or suppression of the truth, or deliberate disregard for the truth.

So, putting this all together, a "scheme to defraud" is merely a plan to deprive another of money or property by trick, deceit, deception or swindle.

The scheme to defraud is alleged to have been carried out by making false or fraudulent statements and representations.

A statement or representation is false if it is untrue when made and was then known to be untrue by the person making it or causing it to be made.

A representation or statement is fraudulent if it was falsely made with the intention to deceive.

Deceitful statements of half-truths or the concealment of material facts, and the expression of an opinion not honestly entertained may also constitute false or fraudulent statements under the statute.

The deception need not be premised upon spoken or written words alone. The arrangement of the words, or the circumstances in which they are used may convey the false and deceptive appearance. If there is deception, the manner in which it is accomplished is immaterial.

The failure to disclose information may also constitute a fraudulent representation if the Defendant was under a legal, professional or contractual duty to make such a disclosure, the Defendant actually knew such disclosure was required to be made, and the Defendant failed to make such disclosure with the intent to defraud.

The false or fraudulent representation or failure to disclose must relate to a material fact or matter. A material fact is one which would reasonably be expected to be of concern to a reasonable and prudent person in relying upon the representation or statement in making a decision (e.g., with respect to a proposed investment). This means that if you find a particular statement of fact to have been false, you must determine whether that statement was one that a reasonable person might have considered important in making his or her decision. The same principle applies to fraudulent half-truths or omissions of material facts.

However, the Government is not required to prove that the Defendant personally originated the scheme to defraud. Likewise, the Government need not prove that the Defendant personally made a misrepresentation or that he personally omitted a material fact. It is sufficient if the Government establishes that the Defendant caused the statement to be made or the fact to be omitted. Furthermore, it is not necessary that the government prove that the Defendant actually realized any gain from the scheme or that the intended victim actually suffered any loss. Although whether or not the scheme actually succeeded is really not the question, you may consider whether it succeeded in determining whether the scheme existed.

*Second Element: Participation in the Scheme with Intent*

The second element that the government must prove beyond a reasonable doubt is that the Defendant participated in the scheme to defraud knowingly, willfully and with specific intent to defraud.

I have already described to you the meaning of "knowingly," "willfully," and "intent to defraud." These are questions of fact that go to the Defendant's state of mind.

As I previously instructed you, good faith on the part of the Defendant is a complete defense to a charge of fraud. That instruction is equally applicable here.

As a practical matter, then, in order to sustain the charge against the Defendant, the Government must establish beyond a reasonable doubt that he knew that his conduct as a participant in the scheme was calculated to deceive and, nonetheless, he associated himself with the scheme for the purpose of causing some loss to another.

*Third Element: Use of the Wires*

The third element that the government must establish beyond a reasonable doubt is the use of an interstate or international wire communication in furtherance of the scheme to defraud.

The wire communication must pass between two or more states as, for example, an email between New York and New Jersey; or it must pass between the United States and a foreign country, such as an email between New York and London. A wire communication also includes a wire transfer of funds between banks in different states or between a bank in the United States and a bank in a foreign country.

The use of the wires need not itself be a fraudulent representation. It must, however, further or assist in the carrying out of the scheme to defraud.

It is not necessary for the Defendant to be directly or personally involved in the wire communication, as long as the communication was reasonably foreseeable in the execution of the alleged scheme to defraud in which the Defendant is accused of participating.

In this regard, it is sufficient to establish this element of the crime if the evidence justifies a finding that the Defendant caused the wires to be used by others. This does not mean that the Defendant must specifically have authorized others to make the call or transfer the funds. When one does an act with knowledge that the use of the wires will follow in the ordinary course of

business or where such use of the wires can reasonably be foreseen, even though not actually intended, then he causes the wires to be used.

With respect to the use of the wires, the Government must establish beyond a reasonable doubt the particular use charged in the indictment. However, the government does not have to prove that the wires were used on the exact date charged in the indictment. It is sufficient if the evidence establishes beyond a reasonable doubt that the wires were used on a date substantially similar to the dates charged in the indictment.

*Fourth Element: Domestic Conduct*

The fourth element that the Government must prove beyond a reasonable doubt is that the wire fraud involved some domestic conduct. I instruct you that the wire fraud statute only applies where conduct relevant to the charged "scheme to defraud" occurred within the United States. This requires the Government to show beyond a reasonable doubt that:

First, the Defendant or one of his coconspirator committed a substantial amount of conduct in the United States,

Second, that domestic conduct is integral to the commission of the scheme to defraud, and

Third, at least some of the conduct involves the use of U.S. wires in furtherance of the scheme to defraud.

If you find that the Government has proven all three of the requirements of this element beyond a reasonable doubt, you must find that conduct relevant to the scheme to defraud occurred within the United States. However, if you conclude that any one of these three points is

not satisfied, then you must find the Defendant not guilty on this count. This is so even if you find that the first three elements of this count are met.

COUNT THREE: CONSPIRACY TO COMMIT WIRE FRAUD

Count Three of the indictment charges the Defendant with Wire Fraud Conspiracy. The indictment charges that the Defendant conspired to devise a scheme to defraud that used the interstate wires. Count Three reads, in relevant part, as follows:

> In or about and between February 2011 and June 2016, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendant FABIO GASPERINI, together with others, did knowingly and intentionally conspire to devise a scheme and artifice to defraud advertising companies and businesses, and to obtain money and property by means of materially false and fraudulent pretenses, representations and promises, and for the purpose of executing such scheme and artifice, to transmit and cause to be transmitted by means of wire communication in interstate and foreign commerce, writings, signs, signals, pictures and sounds, to wit: remote access of computers and servers in the United States and elsewhere, online payments, credit and debit card transactions, and emails, contrary to Title 18, United States Code, Section 1343.

The relevant statute on this subject is section 1349 of Title 18 of the United States Code. It provides:

> Any person who attempts or conspires to commit any offense under this chapter [including the wire fraud statute that I discussed earlier] shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

I have already instructed you on the substantive offense of wire fraud, and I will now direct you on the law of conspiracy.

*Elements of Conspiracy*

A conspiracy is a criminal partnership: an agreement by two or more persons to join together to violate the law. In order to prove the crime of conspiracy, the government must establish the following two elements beyond a reasonable doubt:

First, that two or more persons entered into the particular unlawful agreement charged in the Indictment; and

Second, that the Defendant knowingly and intentionally became a member of the conspiracy.

A conspiracy to commit a crime is an offense distinct from the underlying crime that the conspirators agree to commit. That is because the existence of a conspiracy or partnership for criminal purposes is in and of itself a crime.

The essence of the crime of conspiracy is the agreement or understanding among two or more persons that they will act together to violate the law. Thus, if a wire fraud conspiracy exists, the conspiracy is punishable as a crime, even if the wire fraud was never actually committed. Congress has deemed it appropriate to make conspiracy, standing alone, a separate crime even if the conspiracy is not successful. This is because collective criminal activity poses a greater threat to the public's safety and welfare than individual conduct, and increases the likelihood that criminal ventures will succeed.

*First Element: Unlawful Agreement*

The first element which the government must prove beyond a reasonable doubt to establish the offense of conspiracy is that two or more persons entered the particular unlawful agreement charged in the Indictment.

In order for the government to satisfy this element, you need not find that the alleged members of the conspiracy met together and entered into any express or formal agreement to commit wire fraud. Similarly, you need not find that the alleged conspirators stated, in words or writing, what the wire fraud scheme was, its object or purpose, or every precise detail of the scheme or the means by which its object or purpose was to be accomplished. What the government must prove is that two or more people intentionally came to a mutual understanding, either spoken or unspoken, to cooperate with each other to accomplish an unlawful act, specifically wire fraud.

You may, of course, find that the existence of an agreement to engage in criminal conduct has been established by direct proof. However, since conspiracy is, by its very nature, characterized by secrecy, direct proof may not be available. You may therefore infer the existence of the agreement from the circumstances of this case and the conduct of the parties involved. In a very real sense, then, in the context of conspiracy cases, actions often speak louder than words. In this regard, you may, in determining whether an agreement existed here, consider the actions and statements of all of those you find to be conspirators as proof that a common design existed on the part of those persons to act together to accomplish the unlawful purpose stated in the Indictment.

*Second Element: Knowing Membership in the Conspiracy*

The second element that the government must prove beyond a reasonable doubt to establish the offense of conspiracy is that the Defendant became a member of the charged conspiracy with knowledge of its goal or goals and intending by his actions to help it succeed. If you are satisfied that the conspiracy charged in the Indictment existed, you must next ask

yourselves who the members of that conspiracy were. In deciding whether the Defendant was, in fact, a member of the conspiracy, you should consider whether the Defendant knowingly and willfully joined the conspiracy. Did he participate in it with the knowledge of its unlawful purpose and with the specific intention of furthering its business or objective as an associate?

The key question is whether the Defendant joined the conspiracy with an awareness of at least some of the basic aims and purposes of the unlawful agreement. Whether the Defendant acted knowingly and willfully may be proven by the Defendant's conduct and by all of the facts and circumstances surrounding the case.

You are instructed that, while proof of a financial interest in the outcome of a scheme is not essential, if you find that the Defendant had such an interest, that is a factor which you may properly consider in determining whether or not the Defendant was a member of the conspiracy charged in the indictment.

It is important for you to note that a defendant's participation in the conspiracy may be established by independent evidence of his or her own acts or statements, as well as those of the other alleged co-conspirators, and the reasonable inferences which may be drawn from them.

The Defendant's knowledge is a matter of inference from the facts proved. In that connection, I instruct you that to become a member of the conspiracy, the Defendant need not have known the identities of each and every other member of the conspiracy, nor need he have been apprised of all of their activities. Moreover, the Defendant does not need to have been informed of all of the details, or the scope, of the conspiracy in order to justify an inference of knowledge on his part. Furthermore, the Defendant need not have joined in all of the conspiracy's unlawful objectives.

The extent of a defendant's participation has no bearing on the issue of a defendant's guilt. A conspirator's liability is not measured by the extent or duration of his or her participation. Indeed, each member may perform separate and distinct acts and may perform them at different times. Some conspirators play major roles, while others play minor parts in the scheme. An equal role is not what the law requires. In fact, even a single act may be sufficient to draw the Defendant within the ambit of the conspiracy.

However, mere association with one or more members of the conspiracy does not automatically make the Defendant a member of the conspiracy. A person may know, or be friendly with, a criminal, without being a criminal himself or herself. Likewise, a defendant's mere presence at a place where criminal conduct is underway does not, by itself, make a person a member of a conspiracy to engage in that criminal act.

I also want to caution you that mere knowledge or acquiescence, without participation, in the unlawful plan is not sufficient. The fact that the acts of a defendant, without knowledge, merely happen to further the purposes or objectives of the conspiracy, does not make that defendant a member of the conspiracy. More is required under the law. What is necessary is that the Defendant must have participated with knowledge of at least some of the purposes or objectives of the conspiracy and with the intention of aiding in the accomplishment of those unlawful end.

In sum, the Defendant must have had an understanding of the unlawful character of the conspiracy and must have intentionally engaged, advised or assisted in it for the purpose of furthering the illegal undertaking.

COUNT FIVE: MONEY LAUNDERING CONSPIRACY

Count Five charges the Defendant with entering into a conspiracy to commit the substantive offense of money laundering. Count Five reads, in relevant part, as follows:

> In or about and between February 2011 and June 2016, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendant FABIO GASPERINI, together with others, did knowingly and intentionally conspire to conduct one or more financial transactions in and affecting interstate and foreign commerce, which transactions in fact involved the proceeds of specified unlawful activity, to wit: computer intrusion, wire fraud and wire fraud conspiracy, in violation of Title 18, United States Code, Sections 1030(a)(2), 1030(a)(4), 1343 and 1349, knowing that the property involved in the transactions represented the proceeds of some form of unlawful activity, and knowing that the transactions were designed in whole and in part to conceal and disguise the nature, the location, the source, the ownership and the control of the proceeds of the specified unlawful activity, contrary to Title 18, United States Code, Section 1956(a)(l)(B)(i).

The relevant statute on this subject is section 1956(h) of Title 18 of the United States Code. It provides, in relevant part:

> Any person who conspires to commit any offense defined in this section . . . shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

Section 1956 of Title 18, United States Code, defines one form of money laundering as participation in a financial transaction that involves property constituting the proceeds of specified unlawful activity. Specifically, section 1956(a)(1)(B)(i) provides:

> Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity—
>
> (B) knowing that the transaction is designed in whole or in part—

> (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity [is guilty of a crime].

*Elements of Count Five*

In order to prove the Defendant guilty of money laundering conspiracy, the government must establish each of the following elements beyond a reasonable doubt:

First, that two or more persons entered into a particular unlawful agreement to commit the federal offense of money laundering; and

Second, that the Defendant knowingly and intentionally became a member of that conspiracy.

I have already instructed you on the elements of conspiracy in connection with Count Three. Those instructions apply equally here, and I will not repeat them.

In order for you to determine whether the Government has proven the charged conspiracy in Count Five, I must also explain the federal offense of money laundering. To prove that crime, the Government must establish each of the following elements beyond a reasonable doubt:

First, that the Defendant conducted a financial transaction involving property constituting the proceeds of specified unlawful activity, here, computer intrusion, wire fraud conspiracy and wire fraud;

Second, that the Defendant knew that the property involved in the financial transaction was the proceeds of some form of unlawful activity;

Third, that the Defendant knew that the transaction was designed in whole or in part either to conceal or disguise the nature, location, source, ownership or control of the proceeds of the specified unlawful activity; and

Fourth, either that the laundering transaction occurred into the United States or that the relevant conduct occurred in part in the United States and that the transaction or series of transactions involved funds or monetary instruments with a value of more than $10,000.

*First Element of Money Laundering: Transaction Involving Proceeds of Unlawful Activity*

The first element that the Government must prove beyond a reasonable doubt is that the Defendant conducted or attempted to conduct a financial transaction involving property constituting the proceeds of specified unlawful activity, here, computer intrusion, wire fraud conspiracy and wire fraud. A number of these terms required definition.

The term "conducts" includes initiating, concluding, or participating in initiating or concluding a transaction.

A "transaction" includes a purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition of property.

The term "financial transaction" means a transaction involving a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree. It also includes transactions which in any way or degree affect interstate or foreign commerce and involve the movement of funds by wire or other means, or which involve one or more monetary instruments or the transfer of title to any real property, vehicle, vessel or aircraft.

A "transaction involving a financial institution" includes a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument, the use of a safe deposit box, or any other payment or delivery by, through or to a financial institution by whatever means.

The term "interstate or foreign commerce" means commerce between any combination of states, territory or possessions of the United States, or between the United States and a foreign country.

The term "monetary instrument" includes, among other things, money, coins or currency of the United States or any other country.

The term "proceeds" means any property derived from or obtained or retained, directly or indirectly, through some form of unlawful activity, including the gross receipts of such activity. Proceeds can be any kind of property, not just money. However, in order to be considered proceeds of specified unlawful activity, the property has to represent the profits of the underlying crime, not just its gross revenue. In other words, proceeds means net proceeds derived from a crime and not simply all the money that may have been received during the course of a commission of a crime. If a person uses the money derived from a crime to defray the expenses of the same crime, you cannot find that person was using proceeds to do so. Until a person pays the expenses of his or her crime, there are no profits. The Government has the burden of proving beyond a reasonable doubt that the funds involved in each of the financial transactions alleged in the indictment constituted the "proceeds of specified unlawful activity" as opposed to being funds derived from some other source.

The term "specified unlawful activity" means one of a variety of offenses that are defined in the statute. In this particular case, the government has alleged that the funds in question were the proceeds of computer intrusion, wire fraud conspiracy and wire fraud. I instruct you that as a matter of law, computer intrusion, wire fraud conspiracy and wire fraud each fall within the definition of specified unlawful activity; however, it is for you to determine whether the funds

were, in fact, the proceeds of any one of those unlawful activities. The funds need only be proceeds of one of those unlawful activities, not all three.

*Second Element of Money Laundering: Knowledge of Origin of Proceeds*

The second element that the government must prove beyond a reasonable doubt is that the Defendant knew that the property involved in the financial transaction was the proceeds of some form of unlawful activity.

To satisfy this element, the Government must prove that the Defendant knew that the property involved in the transaction represented proceeds from some form, though not necessarily which form, of activity that constitutes a felony under state, federal, or foreign law. Thus, the Government does not have to prove that the Defendant specifically knew that the property involved in the transaction represented the proceeds of computer intrusion, wire fraud conspiracy, wire fraud, or any other specific offense. The Government is only required to show that the Defendant knew it represented the proceeds of some illegal activity which was a felony.

I instruct you as a matter of law that computer intrusion, wire fraud and wire fraud conspiracy are felonies.

*Third Element of Money Laundering: Knowledge of Purpose to Conceal*

The third element that the government must prove beyond a reasonable doubt is that the Defendant acted with knowledge that the transaction was designed to conceal or disguise the nature, location, source, ownership, or control of the proceeds of specified unlawful activity, namely, computer intrusion, wire fraud conspiracy and wire fraud.

If you find that the evidence establishes beyond a reasonable doubt that the Defendant knew of the purpose of the particular transaction in issue, and that he knew that the transaction was either designed to conceal or disguise the true origin of the property in question, then this element is satisfied.

However, if you find that the Defendant knew of the transaction but did not know that it was either designed to conceal or disguise the true origin of the property in question and instead thought that the transaction was intended to further an innocent transaction, you must find that this element has not been satisfied and find the Defendant not guilty.

I remind you that Count Five does not allege that the federal offense of money laundering was actually committed, and the government does not need to prove that money laundering was committed or attempted for you to find the defendant guilty of this count. Rather, Count Five charges the Defendant with conspiring to commit the federal offense of money laundering.

*Fourth Element: Domestic Contact and Value of Funds*

Finally, the government must prove beyond a reasonable doubt that the laundering occurred in the United States or, in the alternative, that some part of the relevant conduct occurred in the United States and the transaction or series of related transactions involved funds or other monetary instruments with a value of more than $10,000.

A transaction occurs within the United States when it is initiated and completed within the territory of the country. This element is satisfied if you determine the conspiracy contemplated a transaction involving the proceeds that would be both sent and received in the United States.

Alternatively, the Government may show that some part of the relevant conduct occurred in the United States. You need not find that the transaction was both initiated or completed in the United States, but only that some conduct relevant to the laundering transaction or transactions intended by the conspiracy occurred domestically. However, in order to satisfy this element through other conduct that occurred in the United States, you must also find that the transaction or series of transactions contemplated by the alleged money laundering conspiracy involved a value of more than $10,000.

**Aiding and Abetting**

For Counts One, Two, and Four, the government can meet its burden of proof either by proving that the Defendant did the acts charged himself or by proving that he aided and abetted another person in doing so. The definition of aiding and abetting is contained in Section 2(a) of Title 18 of the United States Code, which provides:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

Under the aiding and abetting statute, it is not necessary for the government to show that a defendant himself physically committed the crime with which he is charged in order for the government to sustain its burden of proof. A person who aids or abets another to commit an offense is just as guilty of that offense as if he committed it himself. The essence of aiding and abetting is the intentional and knowing participation in the unlawful act by furthering it in some way.

Accordingly, you may find a defendant guilty of the offense charged if you find beyond a reasonable doubt that the government has proven that another person actually committed the

offense with which the defendant is charged, and that the defendant aided or abetted that person in the commission of the offense.

As you can see, the first requirement is that you find that another person has committed the crime charged. Obviously, no one can be convicted of aiding or abetting the criminal acts of another if no crime was committed by the other person in the first place. But if you do find that a crime was committed, then you must consider whether the defendant aided or abetted the commission of that crime.

In order to aid or abet another to commit a crime, it is necessary that a defendant willfully and knowingly associate himself in some way with the crime and that he participate in it out of a desire to make the crime succeed. That is, a defendant must have the specific intent of furthering the criminal offense through some action on his part. An aider and abettor must have some interest in the criminal venture. That interest need not be a financial one, but you may consider the presence or absence of a financial interest in making your determination.

To establish that defendant knowingly associated himself with the crime, the Government must establish beyond a reasonable doubt that the defendant had the mental state required for the substantive offense. I have already described to you in detail the mental states—knowledge, intent, and willfulness—required for the offenses charged in Counts One, Two, and Four.

To establish that the defendant participated in the commission of the crime, the government must prove beyond a reasonable doubt that defendant engaged in some affirmative conduct or overt act for the specific purpose of bringing about that crime.

The mere presence of a defendant where a crime is being committed, even coupled with knowledge by the defendant that a crime is being committed, or merely associating with others who were committing a crime is not sufficient to establish aiding and abetting. One who has no

knowledge that a crime is being committed or is about to be committed but inadvertently does something that aids in the commission of that crime is not an aider and abettor. An aider and abettor must know that the crime is being committed and act in a way which is intended to bring about the success of the criminal venture.

To determine whether a defendant aided or abetted the commission of the crime with which he is charged, ask yourself these questions:

Did he participate in the crime charged as something he wished to bring about?

Did he knowingly associate himself with the criminal venture?

Did he seek by his actions to make the criminal venture succeed?

If he did, then the defendant is an aider and abettor, and therefore guilty of the offense. If, on the other hand, your answer to any one of these questions is "no," then the defendant is not an aider and abettor, and you must find him not guilty.

**Attempt**

Also as to Counts One, Two, and Four, attempt is a lesser included offense, meaning that the Government can meet its burden of proof either by proving that the Defendant completed the charged offenses or that he attempted to do so. This means that even if you do not find that the Defendant completed the charged offense, you may find that he attempted the charged offense.

In order to prove an attempt to commit a crime, the government must prove the following two elements beyond a reasonable doubt:

First, that the Defendant intended to commit the charged crime; and

Second, that the Defendant did some act that was a substantial step in an effort to bring about or accomplish the crime.

Mere intention to commit a specific crime does not amount to an attempt. In order to convict the Defendant of an attempt, you must find beyond a reasonable doubt that the Defendant intended to commit the crime charged, and that he took some action which was a substantial step toward the commission of that crime.

In determining whether the Defendant's actions amounted to a substantial step toward the commission of the crime, it is necessary to distinguish between mere preparations on the one hand, and the actual doing of the criminal deed on the other. Mere preparation, which may consist of planning the offense, or of devising, obtaining or arranging a means for its commission, is not an attempt, although some preparations may amount to an attempt. The acts of a person who intends to commit a crime will constitute an attempt when the acts themselves clearly indicate an intent to commit the crime, and the acts are a substantial step in a course of conduct planned to culminate in the commission of the crime.

It is no defense to the charge of attempt that it was factually or legally impossible for the Defendant to commit the crime as long as the crime could have been committed if the facts and law had been as the Defendant believed them to be. In other words, a person is guilty of an attempt to commit a crime if he satisfies the elements I previously described to you and he intentionally engaged in conduct which would constitute the crime if the relevant factual and legal circumstances were as he believed them to be.

**Pinkerton Conspiracy Liability**

For Counts One, Two, and Four, if you do not find that the government has satisfied its burden of proving that a defendant is guilty as an aider and abettor or as a principal, there is another method by which you may evaluate the Defendant's possible guilt on these counts. If you find, beyond a reasonable doubt, that the Defendant was a member of a conspiracy to commit wire fraud and thus guilty of the crime charged in Count Three, then you may—but are not required to—find the Defendant guilty of the crimes related to that conspiracy, as charged in Counts One, Two, and Four, provided you find, beyond a reasonable doubt, each of the following elements for the particular count you are considering:

First, that the substantive crime charged in the count you are considering was committed;

Second, that the person or persons who committed that substantive crime were members of the corresponding conspiracy, as charged in Count Three;

Third, that the substantive crime charged in the count you are considering was committed pursuant to a common plan and understanding you found to exist among the conspirators;

Fourth, that the Defendant was a member of that conspiracy at the time the substantive crime was committed; and

Fifth, that the Defendant could reasonably have foreseen that the substantive crime you are considering might be committed by his co-conspirators. An offense by a co-conspirator is deemed to be reasonably foreseeable if it is a necessary or natural consequence of the unlawful agreement.

If the government has proven all five of these elements beyond a reasonable doubt for the specific count you are considering, then you may find the Defendant guilty of the crime charged in that count, even though he did not personally participate in the acts constituting the crime or

did not have actual knowledge of it. Recall that you must consider the application of these elements separately as to each of the enumerated counts. Finding that any one of the offenses charged in Counts One, Two, and Four satisfies the five criteria I have just listed does not necessarily mean that those criteria are also satisfied as to the other counts.

The reason for this rule is simply that a co-conspirator who commits a substantive crime pursuant to a conspiracy is deemed to be the agent of the other conspirators. Therefore, all of the co-conspirators must bear criminal responsibility for the commission of the foreseeable substantive crimes committed by its members.

If, however, you are not satisfied as to the existence of any of these five elements, then you may not find the Defendant guilty of the substantive crime charged in the count you are considering, unless the government proves, beyond a reasonable doubt, that the Defendant personally committed, or aided and abetted the commission of, that crime. I again remind you that this instruction relates only to Counts One, Two, and Four of the indictment.

**Venue**

I will now give you a venue instruction. This instruction relates to all the counts. In addition to the foregoing elements of the offenses, for each offense you must consider whether any act in furtherance of the crime occurred within the Eastern District of New York.

You are instructed that the Eastern District of New York encompasses the boroughs of Brooklyn, Queens, and Staten Island, as well as Nassau and Suffolk Counties on Long Island.

The government need not prove that the crimes themselves were committed in this District or that the Defendant himself was present here. This element is satisfied if any act in furtherance of the crimes occurred within this district. Venue for the conspiracy charges—Counts Three and Five—may be properly found in any district where the unlawful agreement was formed or where an overt act was committed in furtherance of the conspiracy. If you find that the government has failed to prove that any act in furtherance of a crime occurred within this district, then you must acquit on the count you are considering.

Unlike the other elements we have discussed, the government must prove that venue is proper by a preponderance of the evidence. That means that the evidence must show with respect to each count that it is more likely than not that venue is properly in the Eastern District of New York. I want to emphasize that this standard, the preponderance of the evidence, only applies to the issue of venue. The Government must show every other fact in this case beyond a reasonable doubt.

## PART III: GENERAL RULES REGARDING DELIBERATIONS

I will now give you some general rules regarding your deliberations.

Keep in mind that nothing I have said in these instructions is intended to suggest to you in any way what I think your verdict should be. That is entirely for you to decide. By way of reminder, I charge you once again that it is your responsibility to judge the facts in this case from the evidence presented during the trial, and to apply the law as I have given it to you to the facts as you find them from the evidence. Each of you will be provided with a copy of these instructions and a Verdict Sheet for your use during deliberations. You will receive most of the evidence for your review in the jury room. If you require any other items of evidence or any testimony, please advise me.

When you retire, your first duty is to elect a foreperson. Traditionally, Juror Number One acts as a foreperson. Of course, the foreperson's vote is entitled to no greater weight than that of any other juror.

Then, it is your duty to discuss the case for the purpose of reaching a verdict. Each of you must decide the case for yourself. You should make your decision only after considering all of the evidence, listening to the views of your fellow jurors, and discussing it fully. It is important that you reach a verdict if you can do so conscientiously. You should not hesitate to reconsider your opinions from time to time and to change them if you are convinced that they are wrong. However, do not surrender your honest belief as to the weight and effect of the evidence simply to arrive at a unanimous verdict.

Remember also that your verdict must be based solely on the evidence or lack of evidence in this case, and on the law as the court has given it to you, not on anything else. Opening statements, closing arguments, and other statements or arguments of counsel are not

evidence. If your recollection of the facts differs from the way counsel has stated the facts, then your recollection controls.

Finally, bear in mind that the Government has the burden of proof and that you must be convinced of the Defendant's guilt beyond a reasonable doubt in order to return a guilty verdict. If you find that this burden has not been met, you must return a verdict of not guilty. By contrast, if you find that the Government's burden has been met, then you must return a verdict of guilty.

You cannot allow consideration of the punishment that may be imposed upon the Defendant, if convicted, to influence your verdict in any way or to enter into your deliberations. The duty of imposing sentences rests exclusively with me. Your duty is to weigh the evidence in this case and to determine guilt or non-guilt solely upon such evidence or lack of evidence and upon the law, without being influenced by any assumptions, conjectures, sympathy, or inference not warranted by the facts.

It is very important that you not communicate with anyone outside the jury room about your deliberations or about anything related to this case. There is only one exception to this rule. If it becomes necessary during your deliberations to communicate with me, you may send a note, through the Marshal, signed by your foreperson or by one or more members of the jury. No member of the jury should ever attempt to communicate with me except by a signed writing, and I will never communicate with any member of the jury on any subject touching the merits of the case other than in writing or orally here in open court. If you do send any notes to the court, do not disclose anything about your deliberations. Specifically, do not disclose to anyone—not even to me—how the jury stands, numerically or otherwise, on the question of the guilt or non-

guilt of the Defendant, until after you have reached a unanimous verdict or have been discharged.

You have a right to see exhibits or review testimony during your deliberations. If you would like to review a witness's testimony during your deliberations, you may send a signed note to me requesting the specific portion of the testimony and we will provide it to you. Please be patient, as it may take some time to locate the relevant portion of the transcript. Please make your requests as specific as possible so that we may more promptly assist you.

Any verdict you reach must be unanimous. When you have reached a decision, the foreperson should sign the verdict form, indicate the date on it, and notify the Marshal by note that you have reached a verdict.

Your oath sums up your duty, and that is: without fear or favor to any person, you will well and truly try the issues in this case according to the evidence given to you in court and the laws of the United States. I thank you for performing this critical duty in support of our system of justice.

Now, members of the jury, we are almost done. Please remain seated for a moment while I confer with the attorneys to see if there are any additional instructions they would like me to deliver prior to your deliberations.