

IN THE DISTRICT COURT OF THE UNITED STATES
for the Western District of New York

MAY 2004 GRAND JURY
(Impaneled 5/07/04)

THE UNITED STATES OF AMERICA

INDICTMENT

v.

STEVEN KURTZ and
ROBERT FERRELL,

Defendants.

O~-CR-155E

Violations:

Title 18, United States Code,
Sections 1341 and 1343
[4 Counts]

The Grand Jury Charges:

That all times material to this Indictment:

INTRODUCTION

A. The Policy and Procedure of American Type Culture Collection.

1. American Type Culture Collection ("ATCC") was a not-for-profit corporation incorporated in the District of Columbia, with a place of business in Manassas, Virginia. The principal business

of ATCC was to supply biological materials and related products to registered customers.

2. Biological materials provided by ATCC to registered customers consisted of organisms developed by ATCC, as well as organisms supplied by contributors to ATCC. At all times relevant to this Indictment, ATCC retained a property interest in its biological materials, including those biological materials supplied to registered customers.

3. According to ATCC policy, only approved businesses and institutions with a demonstrated need for the biological materials could become registered customers of ATCC. Pursuant to ATCC policy, ATCC did not permit customer accounts for individual purchasers.

4. Businesses and organizations seeking to become registered customers of ATCC completed an ATCC New Account Application. Among other items of information, the ATCC New Account Application required detailed information consisting of organizational profile, description of laboratory facilities, identification of the laboratory's biosafety officer and biosafety containment level, information as to the intended use of ATCC's products, and

information as to the researcher/end user of ATCC's biological materials.

5. The ATCC New Account Application provided further that orders received from ATCC were subject to an ATCC Material Transfer Agreement, and that by signing the Application, the customer has "read the ATCC Material Transfer Agreement and agree [s] to abide by it."

6. At all times relevant to this Indictment, the ATCC Material Transfer Agreement provided, in relevant part, that:

a. You [registered customer] may make and use the material ("material") provided to you by ATCC and all replicates and derivatives *for research purposes in your laboratory only.*

b. The Purchaser [registered customer] shall not distribute, sell, lend or otherwise transfer the Material or Replicates for any reason.

c. ATCC and/or its contributors shall retain ownership of all right, title and interest in the Material and Replicates.

7. The ATCC Material Transfer Agreement was specifically referenced when a biological material was ordered, and was specifically included by ATCC in every shipment of biological materials.

8. The biological organism *serratia marcescens* was a product supplied by ATCC to registered customers, and under some circumstances is pathogenic to humans.

9. The biological organism *bacillus atrophaeus*, previously known as *bacillus globigii*, was a product supplied by ATCC to registered customers.

10. All biological materials sent by ATCC to registered customers contained a Product Information Sheet describing the particular material. Among other items, the Product Information Sheets for *serratia marcescens* and *bacillus atrophaeus* stated as follows:

a. "This product is intended for laboratory research purposes only. It is not intended for use in humans.";

b. "This product is sent with the condition that you are responsible for its safe storage, handling, and **use.**";

c. "Please see the enclosed Material Transfer Agreement (MTA) for further details regarding the use of this product."

B. The Policy and Procedure of the University of Pittsburgh Human Genetics Laboratory.

11. The University of Pittsburgh Human Genetics Laboratory was located at the University of Pittsburgh, in Pittsburgh, Pennsylvania. At all times material to this indictment, the University of Pittsburgh was a registered customer of ATCC, which status permitted authorized staff of the University of Pittsburgh Human Genetics Laboratory to order biological materials from ATCC using the University of Pittsburgh account.

12. To further its **mission**, the University of Pittsburgh Human Genetics Laboratory employed a person designated as the

"principal investigator." Among other duties and responsibilities, the principal investigator was directly and primarily responsible for the safe operation of the Human Genetics Laboratory, and was responsible for knowing and applying the principles and procedures contained within the University of Pittsburgh Biosafety Manual.

13. Pursuant to the University of Pittsburgh Biosafety Manual, the principal investigator was charged with protecting the health and well-being of staff, students, and the general public against undesirable consequences of experimental work conducted under the auspices of the University of Pittsburgh. The Biosafety Manual additionally required the principal investigator to register all biohazardous materials with the University of Pittsburgh's Biosafety Officer, post appropriate warning signs, and follow other procedures and precautions developed by the University of Pittsburgh.

14. The principal investigator for the University of Pittsburgh Human Genetics Laboratory was further obligated to follow guidelines set forth in the University of Pittsburgh Education and Certification Program in Research & Practice Fundamentals. Pursuant to these guidelines, the principal investigator was to be familiar with material transfer agreements

executed by the University of Pittsburgh, and was obligated, among other things:

- a. To obtain assurance of the availability of the facilities needed to conduct research;
- b. To ensure that research is conducted in compliance with University and Government regulations.

15. Pursuant to the University of Pittsburgh Biosafety Manual, the biological organism *serratia marcescens* was a biohazardous material to be handled at Biosafety Level One. The same manual provided that the biological organism *bacillus atrophaeus* was a biohazardous material to be handled at Biosafety Level One.

16. At all times relevant to this Indictment, biological material purchased by or through the University of Pittsburgh was deemed University property. In order to protect intellectual property rights of the University and third party vendors such as ATCC, the University of Pittsburgh's Office of Research issued certain regulations governing the acquisition and transfer of biological agents. Pursuant to these regulations:

a. the acquisition of biological materials must be registered with the Office of Research;

b. prior to shipment of biological materials to a third party, a material transfer agreement recording the shipment must be filed with the University's Office of Research.

C. The Defendants.

17. At all times relevant to this Indictment, defendant ROBERT FERRELL was the principal investigator for the University of Pittsburgh Human Genetics Laboratory, and Chairman of the University's Department of Human Genetics. As such, defendant ROBERT FERRELL was directly and primarily responsible for knowing of, and applying the principles and procedures contained within, the University of Pittsburgh Biosafety Manual. These responsibilities included the registration of all biohazardous materials with the University's Biosafety Officer, including the biological materials *serratia marcescens* and *bacillus atrophaeus*.

18. Also in his capacity as principal investigator for the University of Pittsburgh Human Genetics Laboratory, defendant ROBERT FERRELL was required to follow the guidelines set forth in the University of Pittsburgh Education and Certification Program in

Research & Practice Fundamentals, including ensuring that research was conducted in compliance with University and government regulations, registering with appropriate University of Pittsburgh personnel any biological materials obtained by the Human Genetics Laboratory, and recording and filing necessary material transfer agreements prior to shipment of biological materials to any third party.

19. At all times material to this Indictment, defendant STEVEN KURTZ was a faculty member of the art department of the State University of New York at Buffalo. In this capacity, defendant STEVEN KURTZ was obligated to follow the procedures set forth in that University's biosafety requirements, including notification to the University's Biosafety Officer whenever potentially hazardous materials were to be used. The defendant's employer, the State University of New York at Buffalo, was a registered customer of ATCC.

D. The Defendants' Scheme to Defraud ATCC and the University of Pittsburgh.

20. From at least in or about December, 2003, up to and including May 13, 2004, the exact dates being to the Grand Jury unknown, the defendants, ROBERT FERRELL and STEVEN KURTZ, sought to defraud and defrauded ATCC and the University of Pittsburgh by

planning to and thereafter acquiring the biological materials *serratia marcescens* and *bacillus atrophaeus*, as well as all of the rights, titles and interests in such materials, using the registered account of the University of Pittsburgh with ATCC. To effectuate this scheme to defraud, the defendants, ROBERT FERRELL and STEVEN KURTZ, ordered and caused to be ordered both biological materials from ATCC by misrepresenting, and by using false and fraudulent pretenses and representations, that the biological materials were to be used in accordance with all regulations and guidelines of ATCC and the University of Pittsburgh, including (but not limited to) using the materials by and at the University of Pittsburgh Human Genetics Laboratory. In point of fact and as the defendants ROBERT FERRELL and STEVEN KURTZ then and there well knew, the biological materials were to be provided to defendant STEVEN KURTZ in Buffalo, New York. At the time the defendants ROBERT FERRELL and STEVEN KURTZ acquired the biological materials from ATCC using the University of Pittsburgh account, the defendants knew that the defendant STEVEN KURTZ was not able to legally obtain the biological materials from ATCC. The defendants employed the mails and interstate wire communications in furtherance of their scheme and artifice to defraud.

E. Manner and Means of the Scheme to Defraud.

21. The defendants ROBERT FERRELL and STEVEN KURTZ effectuated their said scheme and artifice to defraud using the following manner and means, as well as others.

22. Sometime prior to December 19, 2003, the exact date being to the Grand Jury unknown, defendant STEVEN KURTZ asked defendant ROBERT FERRELL to obtain for defendant STEVEN KURTZ a quantity of biological material.

23. On or about December 19, 2003, defendant STEVEN KURTZ sent defendant ROBERT FERRELL an electronic message which stated, among other things, "Hi Bob, Well it looks like my bacteria is not as harmless as I previously thought. While not wildly dangerous, it is associated with pneumonia and urinary tract infections, and seems to be around other infections as well. Seems to be hardest on kids and people with compromised immune systems. Do you know what kind of strain we are getting, and how toxic **it is?**" The defendant STEVEN KURTZ also stated in the same message, "[a]ny other ideas on another bacteria that can travel by air and be easily identified on a pertri [sic] dish, and-most importantly, is unequivocally classified as nonpathogenic? Best, **Steve.**"

24. On or about January 5, 2004, defendant ROBERT FERRELL directed and caused a person whose identity is known to the Grand Jury to order a quantity of *serratia marcescens* from ATCC using the University of Pittsburgh account.

25. On or about January 6, 2004, ATCC mailed a quantity of *serratia marcescens* to the University of Pittsburgh Human Genetics Laboratory, and thereafter, defendant ROBERT FERRELL mailed and caused to be mailed this same biological material to defendant STEVEN KURTZ at 60 College Street, Buffalo, New York.

26. On or about January 12, 2004, defendant STEVEN KURTZ sent defendant ROBERT FERRELL an electronic message which stated, among other things, "Hi Bob, I got the package you sent today. Many thanks."

27. On or about January 18, 2004, defendant ROBERT FERRELL sent defendant STEVEN KURTZ an electronic message which stated, among other things, "[t]he bugs, in suspension or streaked out on an agar plate, should last for some time in the refrigerator." In the same message, FERRELL further told KURTZ, in relation to handling the biological material, "[t]his is best done under a hood. I don't know what is available to you for this. If this seems complicated, we can do it on a weekend in Pittsburgh. In

that case, I would need you to send the bugs and the broth back to me."

28. On or about February 16, 2004, defendant STEVEN KURTZ contacted ATCC for the purpose of becoming a customer. In response to this telephone call, ATCC sent defendant STEVEN KURTZ via facsimile transmittal an ATCC New Account Application form.

29. On or about February 17, 2004, defendant STEVEN KURTZ told a person whose identity is known to the Grand Jury that, among other things, "I can't order bacteria yet. I have to fill out an application, and then wait two weeks for a background check."

30. On or about February 19, 2004, defendant STEVEN KURTZ told a person whose identity is known to the Grand Jury that, among other things, "[t]he bad news is, that I can't get anything from ATCC. I need a lab, a biosafety report, and scientists for references. I don't know how to get around that."

31. On or about February 24, 2004, defendant STEVEN KURTZ sent defendant ROBERT FERRELL an electronic message which stated, among other things, "Hi Bob, I think I have everything figured out. My one problem is that I can't [word missing] an account at ATCC. I don't have a biosafety report for my lab; nor do i [sic] have three recommenders. I still need a sample of Bacillus atrophaeus

ATCC19372 . Can you help me out?" In the same message, KURTZ also told FERRELL, "[s]orry to bother you, but I don't know how else to get it, unless you know of an umbrella for me."

32. On or about March 16, 2004, defendant ROBERT FERRELL directed and caused a person whose identity is known to the Grand Jury to order a quantity of *bacillus atrophaeus* from ATCC using the University of Pittsburgh account.

33. On or about March 17, 2004, ATCC mailed a quantity of *bacillus atrophaeus* to the University of Pittsburgh Human Genetics Laboratory, and thereafter, on March 23, 2004, defendant ROBERT FERRELL mailed and caused to be mailed this same biological material to defendant STEVEN KURTZ at 60 College Street, Buffalo, New York.

34. On or about May 17, 2004, defendant ROBERT FERRELL told a person whose identity is known to the Grand Jury that STEVEN KURTZ asked for assistance in acquiring bacteria to be used in showing the spread of bacteria in the environment.

35. Defendant STEVEN KURTZ maintained the ATCC Material Transfer Agreement at his residence located at 60 College Street, Buffalo, New York.

36. Defendant STEVEN KURTZ maintained the ATCC Product Information Sheet for *serratia marcescens* at his residence located at 60 College Street, Buffalo, New York.

37. Defendant STEVEN KURTZ maintained the ATCC Product Information Sheet for *bacillus atrophaeus* at his residence located at 60 College Street, Buffalo, New York.

38. Defendant STEVEN KURTZ maintained the ATCC New Account Application at his residence located at 60 College Street, Buffalo, New York.

39. Defendant STEVEN KURTZ maintained ATCC invoices stating that *serratia marcescens* and *bacillus atrophaeus* had been billed to the University of Pittsburgh and sent to the University of Pittsburgh Human Genetics Laboratory.

40. Defendant STEVEN KURTZ possessed *serratia marcescens* and *bacillus atrophaeus* at his residence located at 60 College Street, Buffalo, New York.

COUNT 1

(MAIL FRAUD)

The Grand Jury further Charges:

41. The factual allegations contained in Paragraphs 1 through 40 of this Indictment are re-alleged and incorporated herein as if fully set forth.

42. From in or about December, 2003, up to and including on or about May 13, 2004, the exact dates being to the Grand Jury unknown, in the Western District of New York and elsewhere, the defendants, STEVEN KURTZ and ROBERT FERRELL, having devised a scheme and artifice to defraud, and for obtaining property by means of false and fraudulent pretenses, representations, and promises, did for the purpose of executing such scheme and artifice and attempting so to do, deposit and cause to be deposited a matter and thing to be sent and delivered by commercial interstate carrier, and did take and receive therefrom, such matter and thing, and did knowingly cause to be delivered by such carrier according to the direction thereon, and at the place at which it was directed to be delivered by the person to whom it was addressed; that is, in the time period set forth above, the defendants, STEVEN KURTZ and ROBERT FERRELL, did obtain by said scheme and artifice, and by means of false and fraudulent pretenses, representations, and

promises, property from ATCC and the University of Pittsburgh consisting of the biological agent *serratia marcescens*, and the rights, ownership and interest in such biological agent, by depositing and causing to be deposited a package containing such biological agent with a commercial interstate carrier, where such package was delivered by such carrier according to the direction thereon to 60 College Street, Buffalo, New York.

All in violation of Title 18, United States Code, Section 1341.

COUNT 2

(MAIL FRAUD)

The Grand Jury further Charges:

43. The factual allegations contained in Paragraphs 1 through 42 of this Indictment are re-alleged and incorporated herein as if fully set forth.

44. From in or about February, 2004, up to and including on or about May 13, 2004, the exact dates being to the Grand Jury unknown, in the Western District of New York and elsewhere, the defendants, STEVEN KURTZ and ROBERT FERRELL, having devised a scheme and artifice to defraud, and for obtaining property by means

of false and fraudulent pretenses, representations, and promises, did for the purpose of executing such scheme and artifice and attempting so to do, deposit and cause to be deposited a matter and thing to be sent and delivered by commercial interstate carrier, and did take and receive therefrom, such matter and thing, and did knowingly cause to be delivered by such carrier according to the direction thereon, and at the place at which it was directed to be delivered by the person to whom it was addressed; that is, in the time period set forth above, the defendants, STEVEN KURTZ and ROBERT FERRELL, did obtain by said scheme and artifice, =d ~ means of false and fraudulent pretenses, representations, and promises, property from ATCC and the University of Pittsburgh consisting of the biological agent *Bacillus anthracis*, and the rights, ownership and interest in such biological agent, by depositing and causing to be deposited a package containing such biological agent with a commercial interstate carrier, where such package was delivered by such carrier according to the direction thereon to 60 College Street, Buffalo, New York.

All in violation of Title 18, United States Code, Section 1341.

COUNT 3

(WIRE FRAUD)

The Grand Jury further Charges:

45. The factual allegations contained in Paragraphs 1 through 44 of this Indictment are re-alleged and incorporated herein as if fully set forth.

46. From in or about December, 2003, up to and including on or about May 13, 2004, the exact dates being to the Grand Jury unknown, in the Western District of New York and elsewhere, the defendants, STEVEN KURTZ and ROBERT FERRELL, having devised a scheme and artifice to defraud, and for obtaining property by means of false and fraudulent pretenses, representations, and promises, did for the purpose of executing such scheme and artifice transmit and cause to be transmitted by means of wire communications in interstate **commerce**, writings for the purpose of executing such scheme and artifice; that is, in the time period set forth above, the defendants, STEVEN KURTZ and ROBERT FERRELL, did transmit via interstate electronic computer communications certain electronic writings for the purpose of executing said scheme and artifice, to wit, to obtain by means of false and fraudulent pretenses, representations, and promises, property from ATCC and the University of Pittsburgh consisting of the biological agent

serratia marcescens, and the rights, ownership and interest in such biological agent.

All in violation of Title 18, United States Code, Section 1343.

COUNT 4

(WIRE FRAUD)

The Grand Jury further Charges:

47. The factual allegations contained in Paragraphs 1 through 46 of this Indictment are re-alleged and incorporated herein as if fully set forth.

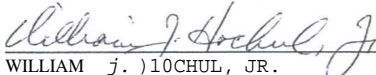
48. From in or about February, 2004, up to and including on or about May 13, 2004, the exact dates being to the Grand Jury **unknown**, in the Western District of New York and elsewhere, the defendants, STEVEN KURTZ and ROBERT FERRELL, having devised a scheme and artifice to defraud, and for obtaining property by means of false and fraudulent pretenses, representations, and promises, did for the purpose of executing such scheme and artifice transmit and cause to be transmitted by means of wire communications in interstate **commerce**, writings for the purpose of executing such scheme and artifice; that is, in the time period set forth above,

the defendants, STEVEN KURTZ and ROBERT FERRELL, did transmit via interstate electronic computer communications certain electronic writings for the purpose of executing said scheme and artifice, to wit, to obtain by means of false and fraudulent pretenses, representations, and promises, property from ATCC and the University of Pittsburgh consisting of the biological agent bacillus atrophaeus, and the rights, ownership and interest in such biological agent.


All in violation of Title 18, United States Code, Section 1343.

DATED: Buffalo, New York, June 23, 2004.

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A TRUE BILL:


FOREPERSON