

UNITED STATES DISTRICT COURT

for the Northern District of New York

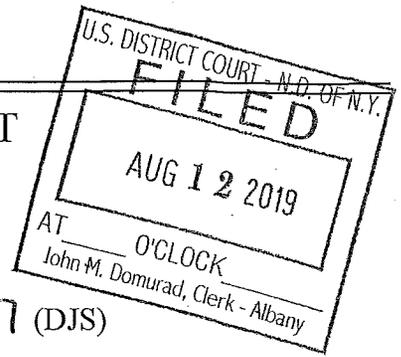
UNITED STATES OF AMERICA

v.

GERWIN SCHALK,

Defendant

Case No. 1:19-MJ- 507 (DJS)



CRIMINAL COMPLAINT

I, the complainant in this case, state that the following is true to the best of my knowledge and belief. On or about the dates of March 10, 2017 and April 25, 2018, in the county of Albany in the Northern District of New York, the defendant violated:

Code Section 18 U.S.C. § 1001(a)

Offense Description Making false statements in a matter within the jurisdiction of the executive branch of the Government of the United States

This criminal complaint is based on these facts: Please see attached affidavit.

[X] Continued on the attached sheet.

Attested to by the Applicant in Accordance with the Requirements of Rule 4.1 of the Federal Rules of Criminal Procedure.

[Handwritten signature of Duane A. Susi]

DHHS-OIG Special Agent Duane A. Susi

Printed name and title

Sworn to before me and signed in my presence.

Date: August 12, 2019

[Handwritten signature of Daniel J. Stewart]

Hon. Daniel J. Stewart, U.S. Magistrate Judge

Printed name and title

City and State: Albany, New York

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK**

Affidavit in Support of a Criminal Complaint

Special Agent **DUANE A. SUSI**, of the United States Department of Health and Human Services, Office of the Inspector General, deposes and states as follows:

Introduction

1. I respectfully submit this affidavit in support of a criminal complaint charging GERWIN SCHALK (“Schalk”) with making false statements in a matter within the jurisdiction of the executive branch of the Government of the United States, in violation of 18 U.S.C. § 1001(a), for materially false conflict of interest certifications he submitted on or about March 10, 2017 and April 25, 2018, in relation to National Institutes of Health grant P41-EB018783.

2. I have been a Special Agent with the United States Department of Health and Human Services (“DHHS”), Office of Inspector General, Office of Investigations, for approximately 17 years, and I am assigned to the Albany Field Office, where I have worked mostly on financial crime investigations.

3. I am familiar with the facts of this case based on my personal involvement in this investigation and my conversations with law enforcement officers and agencies, and my review of various reports and evidence in connection with this matter. This investigation was started by and is now being jointly conducted with the New York State Office of the Inspector General (“NYS OIG”), which investigates certain activities occurring within state agencies and entities including, as relevant here, the New York State Department of Health (“DOH”).

4. The information contained in this affidavit is not an exhaustive account of everything I know about Schalk and this investigation. Rather, it contains only the facts that I believe are necessary to establish probable cause in support of a criminal complaint.

Statute

5. Section 1001(a) of Title 18 reads as follows:

Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—

- (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
- (2) makes any materially false, fictitious, or fraudulent statement or representation; or
- (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry[, is guilty of a crime.]

Basis for a Finding of Probable Cause

6. Schalk is a DOH Research Scientist and has been a DOH employee since 1999.

He is assigned to the Wadsworth Center, a research laboratory. Schalk is the deputy director of the National Center for Adaptive Neurotechnologies, a part of the Wadsworth Center.

7. Schalk is the investigator or principal investigator (“PI”) on several grants that are federally funded, by either the National Institutes of Health (NIH), an agency of DHHS, or the United States Army Research Office, part of the Department of the Army. (“Principal Investigator,” as used in this affidavit, refers to the lead applicant for a federally funded grant; “investigator” is formally defined at 42 CFR § 50.603.) Schalk works, or has recently worked, on the following federal grants, among others:

Grant	Role	Approximate Time Period for Grant
NIH P50-MH109429	Co-Investigator	4/1/17 to 3/31/22
NIH/NBIB1 P41-EB018783 (hereinafter the "P41 Grant")	Deputy Director and Project Leader	7/1/14 to 6/30/19
NIH R25-HD088157	Joint and Contact Principal Investigator	3/1/16 to 2/28/19
U.S. Army Research W911NF-14-1-0440	Principal Investigator	8/1/14 to 12/31/18
NIH/NBIB R01-EB00856	Joint Principal Investigator	9/1/02 to 6/30/15

8. Institutions applying for and receiving DHHS research funding (including NIH funding), as well as investigators participating in the research, must comply with federal regulations that “promote[] objectivity in research by establishing standards that provide a reasonable expectation that the design, conduct, and reporting of research funded under ... grants or cooperative agreements will be free from bias resulting from Investigator financial conflicts of interest.” 42 CFR §§ 50.601, 50.602. Under these regulations, an institution must require each investigator to disclose financial conflicts of interest; and, upon the disclosure of such a conflict, each institution must adequately address it. *See* 42 CFR §§ 50.604(f)-(h).

9. Health Research, Inc. (“HRI”) is a nonprofit corporation, founded in 1953, that assists DOH in acquiring and administering research grants, including federal grants. One of HRI’s duties, consistent with the federal regulations summarized above, is to ensure that

¹ NBIB refers to the National Institute of Biomedical Imaging and Bioengineering, part of NIH.

investigators periodically disclose conflicts of interest or certify that they do not have such conflicts.

10. I understand that for each federal grant, HRI requires investigators to sign a form in which they are asked to report, among other things “[r]emuneration (including any payment) received from an entity or its affiliate whose product or process is involved in the Investigator’s research or competes with such a product or process, during the twelve months preceding disclosure; or any equity interest in such entity or affiliate in excess of \$5,000.”² Schalk signed at least 15 conflict of interest certifications since 2013; never once did he report a payment from Company A.

11. Company A is a neurotechnology products company based in Austria, with a U.S. affiliate based in Albany. Based on my review of open-source materials and other documents, and others’ interviews with witnesses, I know Company A’s founder to be a longtime collaborator of Schalk. Schalk knowingly uses Company A’s products in his research. Company A billed HRI approximately \$260,000 for sales of neurotechnology equipment, from 2012 through January 23, 2018; Company A was principally paid from federal grant money.

12. To date, our investigation has established that Company A has paid approximately \$69,856 to Schalk, from July 2013 to April 10, 2019 (Schalk last received a payment from Company A on or about April 10, 2019, in the amount of \$4,367.40). Additionally, in July 2017, Company A purchased a car that Schalk registered in his name.

² Schalk also completed NIH Financial Conflict of Interest Trainings on August 10, 2012, December 12, 2013, and June 21, 2016. He submitted the completion certificates to DOH.

13. At certain instances in which Schalk was receiving these payments, he was the principal investigator or investigator on federal grants in which Company A products were being purchased and used as part of research he was overseeing.

14. NYS OIG's analysis demonstrates that from 2013 through 2018, Schalk periodically received payments from Company A (or its founder) while falsely affirming that he had no conflicts of interest – i.e., that he had received no payments from, and had no interest in, any entity or its affiliate whose products or processes were involved in his research. At the same time, Company A was being paid under federal grants for which Schalk was a principal or other investigator. The following are examples of this pattern:

- 2017: On January 18, 2017, Schalk received a \$4,719.60 payment from Company A, via Paypal; on January 24, 2017, he received a \$4,743.58 payment from Company A, via Paypal; and on February 10, 2017, he received a \$2,969.63 payment from Company A, via Paypal. Schalk then signed two (2) certifications on March 10, 2017, disclosing no conflicts in relation to the P41 Grant – for which Company A products were used – and grant W911NF-14-1-0440.
- 2017-18: Schalk received a \$955.70 payment from Company A on December 21, 2017. Schalk then received a \$6,636.44 payment from Company A on January 9, 2018. HRI paid \$27,285 to Company A, for an equipment purchase, on January 23, 2018, in relation to the P41 Grant. On April 25, 2018, Schalk then signed another certification, disclosing no conflicts for the P41 Grant.

15. Additionally, on or about July 20, 2017, Schalk purchased a used Toyota Scion for \$14,840.60, using a check in that amount, payable to the car seller and drawn on a Company A bank account. Schalk registered and titled the car in his name, though based on my investigation I believe the car may have been driven primarily or exclusively by Company A's employees. (On or about August 1, 2018, Schalk transferred ownership of the car to a Company A employee, according to Department of Motor Vehicles records.)

16. Acting pursuant to federal warrants, DHHS and NYS OIG Investigators have searched Schalk's personal office at the Center for Medical Science Building on New Scotland Avenue in Albany. Within the office, investigators discovered a lockbox inside of a locked filing cabinet; the key to each was located within the office, and the cabinet and then the lockbox were opened. Items of note within the lockbox included:

- approximately \$1,000 in cash;
- multiple opened envelopes, bearing the Company A logo, containing handwritten numeric amounts, appearing to be monetary amounts;
- a printed e-mail communication, in German, between Company A's founder and Schalk, containing the number "38121";
- a handwritten ledger, appearing to show dated payments made in euros during 2016 and 2017, totaling 38,120 euros;
- a printed invoice from Schalk to Company A, in German, appearing to request that Company A pay Schalk for an "equipment rental" – these two words were in English – for 5,000 euros; and
- multiple invoices from Schalk to Company A, in German, appearing to request that Company A pay Schalk for services rendered.

17. NYS OIG investigators have also discovered a Microsoft Excel file titled “taxes.xlsx” on Schalk’s laptop. The “taxes.xlsx” file appears to be an electronic ledger for 2018, showing multiple payments to Schalk from Company A on specific dates. According to the spreadsheet, the payments to Schalk from Company A totaled \$48,099.98 for the period of January 9, 2018 to December 4, 2018.

18. Investigators have located dozens of German-language documents of interest. More than 50 of these documents have been translated by a professional translator contracted through the United States Department of Justice. The translated documents include:

- An agreement between and signed by Schalk and Company A, dated December 20, 2016 and titled “ECOG Brain Mapping Contract,” which states that “[Company A] will work with Gerwin Schalk to develop an ECOG brain mapping system and [Company A] will sell the system on the international market. Gerwin will receive 10% for negotiations of sales price minus sales discount and 5% for [product] sales. Development documents, code, plans will be kept confidential. The product will be jointly actively advertised in order to guarantee the greatest possible success. Gerwin will not sell the system to other companies or do any consulting in this area or develop competitive products. Contract is valid for one year and extends automatically by one year.”
- Five (5) separate invoices, dated in the year 2010, by which Schalk sought payment from Company A; the total amount invoiced was 12,631 euros.
- Two (2) separate invoices, dated in the year 2013, by which Schalk sought payment from Company A; the total amount invoiced was 9,989 euros.

- Ten (10) separate invoices, dated in the year 2014, by which Schalk sought payment from Company A; the total amount invoiced was 38,121 euros.
- Two (2) invoices, dated in the year 2016, by which Schalk sought payment from Company A; the total amount invoiced was 12,500 euros.
- Three (3) separate invoices, dated in the year 2017, by which Schalk sought payment from Company A; the total amount invoiced was 17,500 euros.
- Six (6) separate invoices, dated in the year 2018, by which Schalk sought payment from Company A; the total amount invoiced was 31,000 euros.

19. Aside from the conflict of interest certifications, Schalk did not disclose Company A's payment in other ways.

- As a DOH employee, Schalk is required to submit a yearly financial disclosure statement to the state Joint Commission on Public Ethics (JCOPE), which I understand requires disclosure of more than \$5,000 in annual, outside income from any one source. In these yearly statements, Schalk has never disclosed to JCOPE any outside income from Company A.
- DOH has a process through which employees can apply for authorization to accept outside employment. Between August 2008 and August 2013, Schalk sought and received approval to accept outside employment from at least six (6) companies. Each request for approval required Schalk to answer a series of questions about possible conflicts of interest, and each written approval that Schalk received from DOH informed him that he could not engage in any activities in the course of his outside employment that could be construed as a conflict, and that he would need to recuse himself from any DOH matter

involving his outside employer. It appears that Schalk has never sought approval for outside employment with Company A. HRI has also separately confirmed that it was never made aware that Schalk was performing work for, or receiving compensation from, Company A.

20. On June 11, 2019, NYS OIG Investigator John Jurs and I interviewed Schalk at his office; the interview was recorded and I have listened to the recording. Schalk said he was familiar with DOH's conflict of interest policy, and that he signed a conflict of interest certification whenever he applied for a federal grant. He said he used Company A's equipment in his research, and that either he or a colleague made the decision to purchase it. He verified his signature on the March 10, 2017 and April 25, 2018 certifications.

21. In the interview, Schalk initially denied receiving income from Company A. He later acknowledged that he did some paid consulting work for the company "in the past," and that he also advertised some of its products to others. He acknowledged the December 20, 2016 agreement between him and Company A, and claimed it lasted only 1 year.

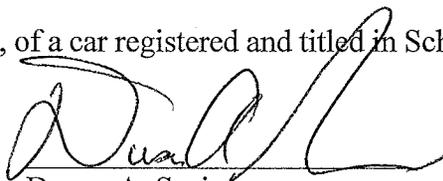
Conclusion

22. I respectfully submit that this affidavit supports probable cause for a criminal complaint charging GERWIN SCHALK with making false statements in a matter within the jurisdiction of the executive branch of the Government of the United States, in violation of 18 U.S.C. § 1001(a). Specifically, Schalk knowingly made the following false statements on federally mandated conflict of interest forms, in connection with NIH funding administered through the New York State Department of Health, and Health Research, Inc.:

- a. Schalk's March 10, 2017 certification was false because, among other things, it failed to disclose the joint venture agreement between Schalk and Company A,

dated December 20, 2016, and the following payments to Schalk from Company A: a January 18, 2017 payment in the amount of \$4,719.60; a January 24, 2017 payment in the amount of \$4,743.58; and a February 10, 2017 payment in the amount of \$2,969.63.

- b. Schalk's April 25, 2018 certification was false because, among other things, it failed to disclose the joint venture agreement between Schalk and Company A, dated December 20, 2016; the following payments to Schalk from Company A: a December 21, 2017 payment in the amount of \$955.70, and a January 9, 2018 payment in the amount of \$6,636.44; and Schalk and Company A's \$14,840.60 purchase, on or about July 20, 2017, of a car registered and titled in Schalk's name.



Duane A. Susi
DHHS-OIG Special Agent

Sworn to before me this
12th day of August, 2019



Hon. Daniel J. Stewart
United States Magistrate Judge