

A P P E A R A N C E S

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

On behalf of the Plaintiff:

DAVID ARNOLD
PRO SE
94 Pierce Road
Watertown, MA 02472
(617) 335-4113
david-arnold@earthlink.net

On behalf of the Defendant:

UNITED STATES ATTORNEY'S OFFICE
BY: RAYFORD A . FARQUHAR
One Courthouse Way
Suite 9200
Boston, MA 02210
(617) 748-3100
rayford.farquhar@usdoj.gov

1 Government's motions before the Court -- as the Court stated,
2 a motion to substitute and also a motion to dismiss.

3 The motion to substitute was based on the
4 declaration of Dr. Pearlman's immediate supervisor,
5 Mr. Charles Alcock, who described the work that Dr. Pearlman
6 undertook during the course of the allegations of this
7 complaint being within the scope of his employment for the
8 Government.

9 Based upon the information that was provided to the
10 Government, the United States attorney for the District of
11 Massachusetts, through designation of the attorney general,
12 moved to substitute the United States for Dr. Pearlman. Once
13 that substitution was made, the case, of course, was removed
14 here to federal court, and the United States then moved to
15 dismiss based upon the motion that's before Your Honor.

16 Your Honor, I think the Government's submissions
17 were fairly clear in the position that it took. I would like
18 to also just argue one other aspect of the motion. It's
19 really derivative of what -- derivative to what is before the
20 Court, and that's the statute of limitations as well.

21 One of the issues that the Government's motion to
22 dismiss also brings into play is the fact that the Government
23 has stated that the plaintiff failed to meet the two-year
24 presentment statute of limitations under the FDCA before the
25 Government --

1 THE COURT: But aren't those related? I mean, if I
2 agree with your positions as to the substitution being proper
3 and this being within the scope of employment, then the case
4 is dismissed. If I disagree, then is this the correct
5 statute of limitations to be using? I mean, don't I sort of
6 not get there one way -- either I rule for or against you on
7 the threshold issues.

8 MR. FARQUHAR: No, Your Honor; and, actually,
9 that's the discussion I would like to bring before the Court
10 on this point.

11 If you look at what's docket number -- and
12 Your Honor doesn't have to look at it, but I'll describe to
13 you what I'm referring to -- Docket Number 13, which is a
14 copy of the plaintiff's state court complaint, page 7 of 64.
15 I am only referring Your Honor to the cover page of the
16 complaint; but at that page, it was -- the complete was filed
17 in the County of Middlesex on March 8, 2021, and is a
18 complaint against Michael Pearlman as the defendant.

19 If you look at paragraph 13 of that March 8, 2021,
20 complaint, plaintiff states: "When the contract was due for
21 renewal in November of 2017, Mr. Arnold told Dr. Pearlman
22 that the workload was beyond available funding. His response
23 was, 'As far as funding goes, I had to fight hard to get what
24 we got, see Exhibit G.'

25 "This came as a surprise to Mr. Arnold, who

1 expected to be paid retroactively once funding could be
2 arranged for the extra work on the new design. The design
3 had to be completed quickly. The only option was to continue
4 working without proper pay and deal with the funding problems
5 later." And it ends with, "See Exhibit H."

6 And, again, that was paragraph 13 of the complaint,
7 which was dated March 8, 2021.

8 THE COURT: Okay. I'm just -- I'm sorry -- I'm --

9 MR. FARQUHAR: Sure. So --

10 THE COURT: I'm looking at -- hold on. I just want
11 to be where you are. I'm on -- the copy of the complaint I
12 have was docketed at 1-1.

13 MR. FARQUHAR: Yeah. I'm referring to -- if you go
14 to Docket Number 13, it's the same complaint; the only
15 difference is that, at Docket 13, that complaint actually has
16 the state court date stamp as to when it was filed.

17 THE COURT: Okay. So I'll take your word for it on
18 the state -- on the date of it, but now I'm just looking at
19 paragraph 13.

20 MR. FARQUHAR: Yes.

21 THE COURT: And 13 says --

22 MR. FARQUHAR: I'm at the -- probably the bottom
23 third, where it starts off with -- on -- towards the
24 right-hand side, "When the contract was due for renewal" --

25 THE COURT: Got it.

1 MR. FARQUHAR: -- "in November 2017."

2 THE COURT: So your position would be that, even
3 under state law --

4 MR. FARQUHAR: It would be --

5 THE COURT: -- it would be untimely.

6 MR. FARQUHAR: That is correct, Your Honor.

7 THE COURT: Okay.

8 MR. FARQUHAR: Because the Government's position
9 would be, as of that time, plaintiff has made it clear that
10 he knew or should have known about the improper, as he
11 alleged, pay dispute, but determined that he would deal with
12 the funding problems later.

13 THE COURT: Okay. I think I understand that
14 argument. Let me -- I'm sorry; did you have more --

15 MR. FARQUHAR: No, Your Honor, I did not.

16 THE COURT: Okay. So, Mr. Arnold, let me turn to
17 you.

18 And I have -- I actually have sort of a substantive
19 question that I think is answered from the papers, but do I
20 understand correctly that, within the work that you performed
21 that you did get paid for, does that -- hold on -- that that
22 work included -- for the work that you got paid, that
23 included work on this project for which there was other work
24 you didn't get paid? But some of the work on this project
25 did get paid through it, and some didn't? Is that a fair

1 statement, the Lares-2?

2 MR. ARNOLD: None of the Lares-2 was paid for
3 because there was no money.

4 THE COURT: So the Government submitted the
5 declaration of Michael Pearlman, and attached to the
6 declaration of Michael Pearlman, as an exhibit -- I guess
7 it's part of Exhibit A -- was the original purchase order and
8 the various changes and so forth.

9 And then it also included an invoice, a
10 November 11th invoice, and it says, "For services, 300 hours
11 at \$50 an hour." And then it describes, on the next page,
12 "List of projects, work completed," and says, "The primary
13 work has been on the design of the Lares-2 retroreflector
14 array."

15 So doesn't that mean that you got paid for some of
16 that work, not all of it, but some of it?

17 MR. ARNOLD: No. What happened was there was an
18 ongoing contract, which has a lot of different duties under
19 it, and that took up, actually, at least as much funding as
20 there was there. So there was nothing left.

21 I didn't discover until a year after that that, in
22 fact, Dr. Pearlman had no legal authority to pay me for any
23 of the Lares-2 work. And that had to do with the --
24 Exhibit D by Dr. Merkowicz, which says that NASA funds cannot
25 be used to support the work of a foreign agency unless

1 there's a partnership agreement between the foreign agency
2 and NASA.

3 And he was not aware of any such arrangement, and
4 Dr. Pearlman has not produced any such arrangement, although
5 he claimed at one point that we -- I don't know who "we"
6 was -- we agreed that, because of the importance of this
7 project, that you could charge money to the contract. But,
8 again, there's nothing to substantiate the fact that there is
9 any such agreement. That was also one of the exhibits.

10 THE COURT: Well, so it may be that he shouldn't
11 have paid you, and it may be that you did -- for the 15- --
12 he shouldn't have paid you anything for Lares, and it may be
13 that you did more than enough work on other things that
14 weren't Lares.

15 MR. ARNOLD: That's correct.

16 THE COURT: But it is correct, though, that you
17 essentially sent in a bill for an invoice for \$15,000 that
18 included in it work you did on Lares?

19 MR. ARNOLD: Well, he asked me to put that in, and
20 not knowing any better, I did.

21 THE COURT: Yeah, no, I understand that now, that
22 sort of legally it sort of doesn't make that much sense, but
23 it -- if -- to you.

24 But if I understand what happened here, there was a
25 project. You were asked to do some work on the project.

1 There's the e-mail that you quote as the misrepresentation
2 that says, at least initially, the work can be challenged.
3 And you're saying now he shouldn't have said that because he
4 shouldn't have had -- he didn't have any authority to do
5 that. But that's what he did. He said, at least initially,
6 the work can be charged. And, in fact, it was; and it was,
7 in fact, paid for.

8 So to then say, well, but he was breaking the
9 rules, and, therefore, it isn't covered, therefore you can
10 survive the motion to dismiss, I think -- I think the problem
11 is that's not how the analysis works. It isn't --

12 You know, I mean, let's say you have a postman
13 driving a postal truck, and while he's delivering in the
14 postal truck, he drives badly. And he starts speeding. You
15 can say, well, that's outside of the scope. He's told he
16 shouldn't ever go faster than 25 in a residential
17 neighborhood, but he's going 45. So you could -- sort of
18 common sense to say he was acting beyond the way he's
19 supposed to have acted.

20 But from the point of view here, it isn't did you
21 do your job wrong? It's were you doing this in the course of
22 what you thought was -- you were doing within your job? I
23 think that's the difficulty here. This is the -- the analogy
24 is that the postman drives too fast and runs over a kid.

25 MR. ARNOLD: Well, first of all, this was basically

1 a proposal, this work. There was no funding to do this, and
2 we all knew that. But the situation was such that the work
3 either had to be done now or not at all. In other words, if
4 I had stopped working after the \$15,000, there would have
5 been no project.

6 THE COURT: Okay.

7 MR. ARNOLD: And I had to decide, well, which is
8 more important? Whether I get paid for a year's work or
9 whether we ruin a \$50 million project?

10 Now, I realize that's not a legal argument, but it
11 certainly is something that I had to consider from an ethical
12 point of view.

13 THE COURT: Uh-huh.

14 MR. ARNOLD: And, also, the contract should have
15 been written as a proposal. In other words, I knew that this
16 design would work, and I was willing to go ahead and do it,
17 even though I knew I wasn't getting paid, because I knew in
18 the end that the Government would see that it worked and they
19 would pay me for my -- basically, a proposal.

20 The problem is that the legal documents are not
21 written as a proposal. If it had been done under the SAO
22 contract, SAO would have owned the commercial rights to it.
23 But the work was done outside the SAO contract, so that was
24 no protection, and I didn't have a separate contract.

25 What we probably should have done was set this up

1 as a proposal which is proprietary with the proper documents,
2 statements in there, NDAs, whatever, so that I would have
3 some leverage to get paid. But, in fact, I ended up working
4 under something where there was no protection of my
5 intellectual property rights and not enough money to pay me.

6 And I discovered a year later that, in fact, it
7 would have been -- there was no way that he ever could have
8 gotten the money because there was no agreement with the
9 agency, and that's required to use NASA funds.

10 Another aspect of it was that the way I was getting
11 paid, although stated as an hourly wage, in fact, right from
12 the beginning in 2003, it was more like a retainer where I
13 was just being paid a thousand dollars a month. And that's
14 the way I always billed it for the 15 years. I never
15 itemized my hours. So what I was doing was just billing what
16 was supposed to be sort of an average rate of pay for me
17 under normal circumstances and had been for 15 years.

18 But this year was an exception. I was asked to do
19 work that was basically full-time under a contract
20 arrangement. He was paying me an average of, you know, a
21 thousand dollars a month. This work ended up being ten times
22 what I would have normally done during that year.

23 But, you know, not being a lawyer and having to be
24 responsible for whether this design got done on time, I just
25 went ahead and did the work. If we missed a launch date, the

1 whole project would have gone down the tubes. So what was I
2 supposed to do? I mean, morally, I couldn't not do the work
3 even though I knew I wasn't getting paid. Do you see what I
4 mean?

5 THE COURT: Well, I'm very sympathetic to the
6 equities of the argument. I think the difficulty here is the
7 intersect between what the law requires, which is all I can
8 follow, which is not the same as sort of the necessarily
9 common sense of how people might deal with this project.

10 And the -- the situation should not have happened
11 as it did, right? You work -- you do work, you should be
12 paid for the work that you do. And my guess is there's
13 nobody who disagrees with that.

14 I think the difficulty is, the way the law is set
15 up, it sort of ends up to protect the tax dollar, that even
16 if someone goes and does these kinds of things, it ends up
17 being a legal constraint that you can't collect for it. And
18 that's -- there's really no -- there's no wiggle room here
19 that I can say, "Well, I see it sort of differently, and let
20 me figure out what's the fair answer."

21 It's sort of -- it's kind of a cut-and-dry
22 circumstance here where your point that this isn't what he
23 should have been doing is maybe well taken, but that isn't
24 the test for what gets it out of whether it was within the
25 scope of his employment or not.

1 MR. ARNOLD: Well, another issue here is that he
2 assigned me to work for a foreign agency, and that was way
3 beyond -- no authority to be asking me to do this, in the
4 first place.

5 And the general counsel of the Smithsonian
6 observatory has agreed with that. She said Mr. Arnold's work
7 in no way, nor ever, should have included the complete design
8 of a foreign satellite. And Dr. Pearlman in his declaration
9 has also admitted that, once I started working on this, I was
10 outside the scope of the contract.

11 But the point is, he's the one that asked me to do
12 it, and I've got the e-mails to prove it, and he asked me to
13 go well beyond the statement of work.

14 THE COURT: Well, I don't think that you have the
15 e-mails to prove that he agreed that you should be paid for
16 it, it -- beyond the initial payment. What his -- what you
17 have is a contract that, I agree with you, it says that you
18 can do this under the -- at least initially, under the funds
19 he has.

20 And, again, he maybe didn't properly have
21 authority. That maybe wasn't what he should have been doing
22 with his contract money, but that doesn't --

23 MR. ARNOLD: Well, there were --

24 THE COURT: -- get you around the scope of
25 employment problem.

1 MR. ARNOLD: There were two stages to the work.
2 First of all, there was going to be just a simple design,
3 which I could have done within the available funding,
4 basically, just to modify the spacecraft to fit the new
5 launch vehicle.

6 What happened was I told people, which was my
7 professional responsibility, that this satellite could be
8 redesigned to achieve a goal that has been elusive for almost
9 20 years now, which is to get an accuracy of one millimeter
10 on this array.

11 Now, how I -- the work -- the issue did arise as to
12 just what my contractual status was. And I had objected to
13 going on with the work because the Italian contractor was
14 hiding some of the work I was doing from Dr. Pearlman. I
15 said, "Well, you can't do that. You know, he has to know
16 what's going on and has to approve it, or I can't get an
17 approval for this work from NASA."

18 At that point, in order to make sure that I kept
19 working -- because we both knew I could not stop working --
20 he said, "Go ahead. Do whatever you can to support this
21 project." And my argument would be that's an implied
22 contract. He told me to do the work, both of us knowing that
23 it was beyond the available funding.

24 THE COURT: But --

25 MR. ARNOLD: And he also --

1 THE COURT: -- you understood -- you're not
2 suggesting that it was your understanding that he was going
3 to pay you personally, right?

4 MR. ARNOLD: No. I expected that he was going to
5 be able to get funding from NASA. Now, the misrepresentation
6 comes in that, in fact, he knew that that was not possible
7 because he knew -- although I did not -- that the money could
8 not legally be used that way.

9 And he should have -- at the time we were
10 discussing this, the terms and conditions of my work, he
11 should have been honest with me and told me there's no way
12 that we can pay you even retroactively. But he failed to do
13 that. So because he failed to state the correct terms and
14 conditions, you know, he was -- he was misrepresenting his
15 ability to pay me.

16 See, he's the head of the Global Geodetic Observing
17 System, which is an organization that has nothing to do with
18 Smithsonian, per se. It's an international organization.
19 It's not an employer.

20 THE COURT: He's not paid by them. He's not --

21 MR. ARNOLD: That's right.

22 THE COURT: -- an employee of that organization,
23 correct?

24 MR. ARNOLD: That's correct.

25 THE COURT: And when he appears at that

1 organization, he includes in his name and his title his
2 Smithsonian title, correct?

3 MR. ARNOLD: That's the place where he works and he
4 works as a manager.

5 THE COURT: Right.

6 MR. ARNOLD: But the letter in which he justified
7 accepting the design was the GGOS, the Global Geodetic
8 Observing System. And I've got the letter right here. So in
9 other words, when he was asking me to do this work, he was
10 not doing it as an SAO employee; he was doing it as the head
11 of an international organization which does not pay him.

12 THE COURT: Except he's head of an international
13 organization in his same employment role. He's not outside
14 of that position. He's still getting paid when he's doing
15 that work, and he's probably getting travel funds on his
16 grants and so forth.

17 It's not -- I understand that there's -- we -- you
18 know, it's a difficult -- it's a difficult situation when you
19 try to mirror what happens in the scientific community where
20 there is real international collaboration about things with
21 how our domestic rules about funding and contracts work, but
22 that is -- that is what we have.

23 MR. ARNOLD: In principle, the Italian Space Agency
24 should have paid me because it's their satellite and they
25 couldn't do this design without me, and they should have paid

1 me.

2 THE COURT: Correct. That may well be correct, but
3 that doesn't give you a claim against Dr. Pearlman.

4 MR. ARNOLD: Well, it does in the sense that, if I
5 had known that, if I had known he couldn't pay me, I wouldn't
6 have done the work. In other words, the way he got the work
7 out of me was by pretending that he could pay me. If I had
8 known that it was not legal for him to pay me using NASA
9 funds, I would have said, "Hey, look, we've got to stop right
10 here and decide how I'm going to get paid. Either you" --

11 THE COURT: Well, regardless of whether it was
12 legal or not, he did pay you --

13 MR. ARNOLD: No.

14 THE COURT: -- based on invoices that you submitted
15 that included this work.

16 MR. ARNOLD: I included that work, but he asked me
17 to put it there, not because I expected -- not because that
18 was pay for what I did. He never paid me enough to cover
19 this work.

20 THE COURT: He didn't pay you enough -- no one is
21 saying he paid you enough to cover the work. I'm saying he
22 paid you under the contract including for some of this work.
23 And so when you say he didn't have authority to pay you for
24 this work, be that as it may be, he said to you, at least
25 initially, it would be under the contract. It was -- up to

1 the contract price, it was under the contract.

2 There's no -- I have no lack of sympathy for you on
3 how this unfolded, and I hear what you're saying about this
4 being something that was an important matter on a scientific
5 level. But what we're dealing with here are the domestic
6 rules about what the Government ends up -- how their
7 contracts work and how their employees work. And it's
8 really -- it's a legal question, not an equitable question.
9 So I don't -- I don't think there's a gray area here.

10 So I am going to grant the Government's motion. It
11 is a purely legal question. I don't think there are any
12 facts in dispute that are important for this decision. I
13 mean, there are some facts in dispute, probably, but the
14 decision is just based on this factual record as it is here,
15 which means that you can appeal it. It is a legal question.

16 But I'm -- unfortunately, it's a circumstance where
17 it really isn't a question of sort of what -- you know, you
18 did the work; you should get paid for the work. That isn't
19 the question, unfortunately, here. It's whether Dr. Pearlman
20 is obligated to pay it here and whether the United States is
21 obligated to pay it here. So --

22 MR. ARNOLD: Well, I'd like to point out that how
23 this happened has cost the Government far more than what they
24 save by not paying me because I ended up stopping working on
25 projects which could have revolutionized all of laser

1 tracking and --

2 THE COURT: There are many -- there's no question
3 that this -- there's nobody here -- you know, counsel for the
4 Government isn't going to -- doesn't have the information one
5 way or another. I don't think he's going to take a position
6 to disagree with what you're saying. This may not have been
7 a cost-effective move. But that isn't an answer that any of
8 us can address here.

9 I mean, the only -- you know, there's a process for
10 obtaining funds and releasing funds; and there isn't really a
11 way to go back and say, well, really, we should have paid you
12 more before and so forth. That's sort of -- you're stuck
13 with what the law will allow at this point.

14 MR. ARNOLD: Now, another thing is that I had the
15 opportunity to work for the other competitor on this project,
16 and he would have paid me; but because Dr. Pearlman had
17 already agreed to pay me, falsely, because he knew he
18 couldn't, I turned down the other one. Now, again, the issue
19 is his misrepresentation. If he had told me the truth, I
20 would have worked for somebody who could pay me.

21 But the claim I'm making -- I'll go back to
22 misrepresentation. The decisions that people make depend on
23 the information available to them. And when he lies to me
24 about his ability to pay me because he wants me to work for
25 this contractor instead of another contractor, you know, it's

1 just -- to get money out of them, that's misrepresentation.
2 He told me to do the work.

3 Now, he told me to work for this Italian
4 contractor. I did all the work he asked me to do. He was
5 under the impression that Dr. Pearlman was paying me. He
6 didn't know until the end that he didn't and couldn't pay me.

7 But he did a lot of things illegally. It seems to
8 me that that should invalidate the whole argument that he was
9 acting within the law. He did a lot of things illegally to
10 get me to do this work.

11 THE COURT: Yeah, the question is -- we don't -- I
12 don't get to get as far as deciding whether your arguments
13 are right or wrong about whether he was -- whether he did
14 something wrong or didn't do something wrong. The
15 question -- the threshold question is, whatever he was doing,
16 was he doing it, essentially, while he was working there for
17 the Smithsonian astrophysical observatory? Answer, yes; and
18 in the context of that, yes. That's the problem.

19 And you understood it as such. You may have been
20 misled to understand it as such, but that's what you
21 understood it as. You weren't expecting a paycheck from him
22 personally. You were expecting a paycheck from SAO.

23 MR. ARNOLD: Another issue is that, in fact, I did
24 file a lot of complaints, and I'd like to contest the -- you
25 know, the time limit business here, if I could just read to

1 you --

2 THE COURT: I'm not -- I'm not going to need to
3 reach the time limit, because we don't get there on the time
4 limit, because the -- because the claim isn't allowed to
5 proceed if it's against him in the scope of his employment.
6 So I'm not going to opine on the -- I'm not going to reach
7 the time-limit question.

8 MR. ARNOLD: Well, but before, I would like to
9 repeat, the general counsel said that this work was not
10 within his scope of employment -- general counsel for the
11 Smithsonian. Now, Dr. Alcock signed a declaration saying
12 that it was within the scope of his employment; however,
13 what -- his statement was incorrect.

14 What he said was that Dr. Pearlman asked me to
15 assess and evaluate the Lares-2 satellite for inclusion in
16 the International Laser Ranging Service. Now, that's what
17 Dr. Pearlman told him, but it's not true. I never -- I was
18 never instructed to do that task. I was instructed to work
19 on the design, which is outside the initiative SAO.
20 Dr. Pearlman was not operating under his SAO.

21 THE COURT: So this is, again, the difficulty,
22 which is what you're saying is he wasn't authorized to do
23 that, he wasn't allowed to do that; therefore, he couldn't
24 have been doing it while he was wearing his employee hat.

25 And I think the way the law is designed is that

1 these kind of claims against federal employees could happen
2 all the time. Anybody who was unhappy with how things went,
3 whether they're right or wrong about it, could say, "Well,
4 this person -- you know, the person who told me when to file
5 my taxes, the person who -- you know, all of these Government
6 people and Government positions made a misrepresentation to
7 me."

8 And so Congress has said no, we're not going to
9 allow those kind of claims; and that's sort of where we are
10 here, is that he's making the claim while he's there as the
11 employee. It had to do with his -- your roles as employee.

12 He may have done something wrong. He may have. He
13 may not have. But I don't get to get to that question
14 because I don't get to test whether you're right about a
15 misrepresentation because I can't -- you can't bring a
16 misrepresentation claim when he's making his statements as a
17 federal employee. That's the difficulty here.

18 So I'm -- I think we're out of time. I am -- I'll
19 get something, hopefully, out this week. It's been sitting
20 here a bit, and I -- it's unfortunate that it took that long,
21 but we are here now. I will get this out.

22 And as I said, it's a legal question. If you think
23 that I've got it wrong, you are -- it's not a -- it's not a
24 fact where I'm deciding who's lying or who's telling the
25 truth. I'm -- based on these papers, as a matter of law, I

1 think this is -- I do need to grant the Government's motion
2 here. So I will get something out this week.

3 And I thank you both, and I think we are in recess.

4 MR. ARNOLD: Thank you for your time.

5 MR. FARQUHAR: Thank you, Your Honor.

6 (Court in recess at 3:01 p.m.)
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATE OF OFFICIAL REPORTER

I, Robert W. Paschal, Registered Merit Reporter and Certified Realtime Reporter, in and for the United States District Court for the District of Massachusetts, do hereby certify that pursuant to Section 753, Title 28, United States Code, the foregoing pages are a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 14th day of January, 2022.

/s/ Robert W. Paschal

ROBERT W. PASCHAL, RMR, CRR
Official Court Reporter