IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

HILL INTERNATIONAL, INC.,	)	
	)	
Plaintiff,	)	
v.	)	
	)	**CASE NO. 3:24-cv-00049**
VIRGIN ISLANDS PUBLIC FINANCE AUTHORITY, OFFICE OF DISASTER RECOVERY,	)	
	)	
Defendant.	)	

REPORT AND RECOMMENDATION

Before the Court *sua sponte* is the question as to whether this Court has subject matter jurisdiction. Plaintiff Hill International, Inc. ("Hill") initially mounted a facial challenge to the Court's subject matter jurisdiction, arguing that Defendant's notice of removal failed to identify the parties' citizenship. *See* [ECF 21] at 5. Hill subsequently withdrew its remand motion [ECF 63] after Defendant amended its notice of removal [ECF 53] to plead jurisdiction more specifically. Because subject matter jurisdiction is non-waivable, however, this Court has "an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006); *see Nesbit v. Gears Unlimited, Inc.*, 347 F.3d 72, 76–77 (3d Cir. 2003). For the reasons set forth below, the Court recommends subject matter jurisdiction be found to exist, that Plaintiff's notice of withdrawal be accepted, and that the motion to remand be denied.[1]

[1] The District Court referred Plaintiff's motion to the undersigned for a Report and Recommendation. [ECF 78].

I. BACKGROUND[2]

Hill, a project and construction management firm, sued the Virgin Islands Public Finance Authority, Office of Disaster Recovery (collectively "PFA" or "Defendant") after PFA selected another bidder for a government contract. *See* Compl. [ECF 1-2]. In March 2024, the Office of Disaster Recovery ("ODR")[3] issued a request for proposals ("RFP") to solicit proposals for project management and construction management services for federally funded recovery projects. [ECF 48-2]. The RFP stated that the "evaluation process will include separate technical and price evaluations," and set forth evaluation criteria guidelines with associated weighting. *Id.* at 22; [ECF 48-3] at 67. Hill submitted its proposal on May 23, 2024, seeking to provide both project management and construction management services, and Defendant interviewed Hill on June 21, 2024. [ECF 1-2] ⁋⁋ 12–13; *see* [ECF 49-2]. In a letter dated August 15, 2024, PFA notified Hill that CH2M Hill, Inc. ("CH2M") had been awarded the contract. [ECF 50-4]. Hill then sought a debriefing meeting to determine why Defendant rejected its proposal. *See* [ECF 1-2] at 7–9. Finding Defendant's response unsatisfactory, Hill decided to file suit. *Id.* ⁋⁋ 26–27.

Hill filed its complaint in Virgin Islands Superior Court on September 10, 2024, alleging the award to CH2M was arbitrary and capricious, and tainted by a conflict of interest. [ECF 1-2] ⁋ 31. In Count I, Hill asserts it is entitled to a declaration that PFA's decision violated federal and Virgin Islands procurement law, and that "in a properly conducted procurement, [Hill] was entitled

[2] The Court writes for the parties and thus provides only a brief overview of the factual and procedural background, taking the facts from Hill's complaint and attached exhibits.

[3] The complaint and amended notice of removal describe ODR as a subsidiary division of PFA. [ECF 1-2] ⁋ 3; [ECF 53] ⁋ 8. As stated by Governor Bryan, PFA, via Resolution 19-06, established ODR on February 13, 2019, and ODR "stands as a subsidiary division within the VIPFA." Exec. Order No. 487-2019 (June 17, 2019). ODR refers to itself as "within the Virgin Islands Public Finance Authority." Office of Disaster Recovery, https://www.usviodr.com/about-odr/ (last visited Dec. 6, 2024). The Court therefore agrees that ODR is a subsidiary division of PFA and thus is not a separate entity for jurisdictional purposes.

to be selected as the awardee." *Id.* at 12–13. Count II asserts Hill is entitled to immediate injunctive relief. *Id.* at 13–14. Count III asserts a taxpayer suit under 5 V.I.C. § 80 for "the wrongful disbursement of territorial funds." *Id.* at 14–15. Hill seeks a temporary restraining order, preliminary and permanent injunctive relief, and a declaratory judgment. *Id.* at 15–16.[4]

PFA removed the action to this Court on September 12, 2024, based on diversity jurisdiction. [ECF 1]. Hill moved to remand [ECF 21], and PFA sought leave to amend its notice of removal [ECF 27]. The Court granted PFA's motion [ECF 51], and on September 30, 2024, PFA filed its amended notice of removal, asserting both diversity and federal question jurisdiction [ECF 53]. Hill thereafter filed a notice of withdrawal of its motion to remand. [ECF 63].

II. LEGAL STANDARDS

A. Federal Court Jurisdiction

"Federal courts are courts of limited jurisdiction . . . [and] it is to be presumed that a cause lies outside this limited jurisdiction . . . ." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). "The requirement that jurisdiction be established as a threshold matter . . . is inflexible and without exception, for . . . [w]ithout jurisdiction the court cannot proceed at all in any cause." *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 577 (1999) (internal quotations and citations omitted); *see also GBForefront, L.P. v. Forefront Mgmt. Grp., LLC*, 888 F.3d 29, 34 (3d Cir. 2018) ("It is fundamental that federal courts must have subject matter jurisdiction before reaching the merits of a case . . . ."). Federal courts thus have an absolute duty to verify subject matter jurisdiction if it is in doubt, and must dismiss an action where jurisdiction is lacking. Fed. R. Civ. P. 12(h)(3); *Arbaugh*, 546 U.S. at 514; *Ruhrgas AG*, 526 U.S. at 577; *Nesbit*, 347 F.3d at

[4] Hill also filed an Application for a Temporary Restraining Order, Preliminary Injunction, Permanent Injunction, and Declaratory Relief, which largely mirrors the complaint. *See* [ECF 1-3].

76–77; *see also* 28 U.S.C. § 1447(c) (for cases removed from state court, "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded").

Federal district courts have jurisdiction only in matters involving a federal question, diversity of citizenship, or other limited statutorily provided areas. *See* 28 U.S.C. § 1331 *et seq.* As such, "[a] defendant may only remove a civil action to federal court if the plaintiff could have originally filed the action in federal court." *Rowland v. Bissell Homecare, Inc.*, 73 F.4th 177, 180 (3d Cir. 2023); 28 U.S.C. § 1441(a). The defendant's right to remove must exist at the time of removal, *Houston & T.C. Ry. Co. v. Shirley*, 111 U.S. 358, 361 (1884) ("the requisite citizenship [must] exist[] both when the suit was begun and when the petition for removal was filed"), and "[d]efendants, as the parties seeking to remove the case to federal court, bear the burden of establishing federal jurisdiction." *Rowland*, 73 F.4th at 180; *see McCann v. Newman Irrevocable Tr.*, 458 F.3d 281, 286 (3d Cir. 2006) (a party "meets this burden by proving diversity of citizenship by a preponderance of the evidence"); *see also Packard v. Provident Nat'l Bank*, 994 F.2d 1039, 1045 (3d Cir. 1993) ("The person asserting jurisdiction bears the burden of showing that the case is properly before the court at all stages of the litigation."). "The removal statutes 'are to be strictly construed against removal and all doubts should be resolved in favor of remand.'" *Boyer v. Snap-on Tools Corp.*, 913 F.2d 108, 111 (3d Cir. 1990) (citation omitted); *see Glenmede Tr. Co. v. Dow Chem. Co.*, 384 F. Supp. 423, 433–34 (E.D. Pa. 1974) ("It is well settled that district courts should remand close or doubtful cases for two reasons. First, remand will avoid the possibility of a later determination that the district court lacked jurisdiction and, secondly, remand is normally to a state court which clearly has jurisdiction to decide the case.").

B. Diversity Jurisdiction

Relevant to the instant case, "for diversity jurisdiction to exist, 'no plaintiff [may] be a citizen of the same state as any defendant[,]' and the amount in controversy must exceed $75,000." *GBForefront*, 888 F.3d at 34 (alterations in original) (citation omitted). Section 1332(a) requires "complete diversity," meaning all plaintiffs in an action must be diverse from all defendants. *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 68 (1996); *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 553 (2005) ("In a case with multiple plaintiffs and multiple defendants, the presence in the action of a single plaintiff from the same State as a single defendant deprives the district court of original diversity jurisdiction over the entire action."). Thus, "unless there is some other basis for jurisdiction," mutual citizenship of any plaintiff and defendant will result in dismissal of the case. *Lincoln Ben. Life Co. v. AEI Life, LLC*, 800 F.3d 99, 104 (3d Cir. 2015). Further, "the absence of sufficient averments or of facts in the record showing such required diversity of citizenship is fatal and cannot be overlooked by the court, even if the parties fail to call attention to the defect, or consent that it may be waived." *Thomas v. Bd. of Trustees of Ohio State Univ.*, 195 U.S. 207, 211 (1904); *see also Brown v. Francis*, 75 F.3d 860, 866 (3d Cir. 1996) (parties cannot by agreement "cure a case's jurisdictional infirmities").

C. Citizenship of States and State Entities

Longstanding Supreme Court law holds that "[a] state is not a citizen." *Postal Tel. Cable Co. v. Alabama*, 155 U.S. 482, 487 (1894). Thus, "under the judiciary acts of the United States it is well settled that a suit between a state and a citizen or a corporation of another state is not between citizens of different states," and the federal courts have no diversity jurisdiction over such actions. *Id.* The District Court of the Virgin Islands reiterated this principle in *Pickering-George*, observing that "[t]he rule holds true whether the state is a party *de jure*, in its own name, or

becomes a party *de facto*, because an alter ego—say, a department of state government or an official-capacity state actor—is made a party." *Pickering-George v. Off. of Vital Stat., V.I. Dep't of Health*, 2012 WL 12986188, at *1 (D.V.I. Dec. 6, 2012) (citation omitted), *aff'd sub nom. Daley v. Dowdye*, 571 F. App'x 128, 129 (3d Cir. 2014) ("It is immaterial whether the state engages in activities in its own name or through an 'arm' or 'alter ego.' For the purpose of diversity jurisdiction, the determinative factor is whether the state is the real party in interest."). Accordingly, diversity cannot exist "where suit is brought against an agency or instrumentality that is the alter ego of the state." *Gibson-Homans Co. v. N.J. Transit Corp.*, 560 F. Supp. 110, 111 (D.N.J. 1982).

"An entity is properly characterized as 'an arm of the state' when a judgment against it would have essentially the same practical consequences as a judgment against the State itself." *McCauley v. Univ. of V.I.*, 52 V.I. 816, 834–35 (D.V.I. 2009) (internal quotations and citation omitted), *aff'd in part, rev'd in part*, 618 F.3d 232 (3d Cir. 2010). Thus, "'the relationship between the State and the entity in question' is critical to this inquiry." *Patterson v. Pa. Liquor Control Bd.*, 915 F.3d 945, 950 (3d Cir. 2019) (quoting *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429 (1997)). To determine whether a particular entity has alter ego status for purposes of diversity jurisdiction, "a court must perform the same analysis as is required to determine Eleventh Amendment immunity." *Doolin v. Kasin*, 424 F. App'x 106, 109 (3d Cir. 2011). A court must consider three factors: "(1) Whether the money that would pay the judgment would come from the state . . . ; (2) The status of the agency under state law . . . ; and (3) What degree of autonomy the agency has." *Fitchik v. N.J. Transit Rail Operations, Inc.*, 873 F.2d 655, 659 (3d Cir. 1989). These are commonly known as: (1) the "funding factor," (2) the "status factor," and (3) the "autonomy factor." *Jones v. Pi Kappa Alpha Int'l Fraternity, Inc.*, 765 F. App'x 802, 806 (3d Cir. 2019)

(citation omitted). In conducting this analysis, "courts should not simply engage in a formulaic or mechanical counting up of the factors." *Karns v. Shanahan*, 879 F.3d 504, 513–14 (3d Cir. 2018). "Rather, each case must be considered on its own terms, with courts determining and then weighing the qualitative strength of each individual factor in the unique factual circumstances at issue." *Id.* at 514; *see Maliandi v. Montclair State Univ.*, 845 F.3d 77, 84 (3d Cir. 2016) (a court's application of the *Fitchik* test "is a 'fact-intensive' undertaking that requires a fresh analysis and 'individualized determinations'" at each step (citation omitted)).[5]

III. DISCUSSION

"Where jurisdiction depends on diversity of citizenship, [the Court must] look to see whether the parties are in fact diverse, not simply whether they are arguably so." *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 581 U.S. 170, 184 (2017).[6] The

[5] While older cases instructed that "the most important [factor] is whether any judgment would be paid from the state treasury," *Fitchik*, 873 F.2d at 659, the Third Circuit later recognized that, following the Supreme Court's decision in *Doe*, "we can no longer ascribe primacy to the first factor." *Benn v. First Jud. Dist. of Pa.*, 426 F.3d 233, 239 (3d Cir. 2005). In *Doe*, the Supreme Court made clear "that an Eleventh Amendment inquiry should not be a 'formalistic question of ultimate financial liability.'" *Maliandi*, 845 F.3d at 84 (quoting *Doe*, 519 U.S. at 431). Rather, the relevant inquiry in determining whether Eleventh Amendment immunity extends to a government entity is "the entity's potential legal liability, rather than its ability or inability to require a third party to reimburse it, or to discharge the liability in the first instance." *Benn*, 426 F.3d at 239 (quoting *Doe*, 519 U.S. at 431). "Under this evolved approach, none of the three *Fitchik* factors is 'predominant.'" *Karns*, 879 F.3d at 513 (citation omitted). "[E]ach of the factors is considered 'co-equal,' and 'on the same terms,'" *id.* (citations omitted), "with the funding factor breaking the tie in a close case." *Maliandi*, 845 F.3d at 84.

[6] Defendant's amended notice of removal asserts that jurisdiction also exists under 28 U.S.C. § 1331 because Count I of the complaint alleges violations of federal regulations and "thus necessarily arises under federal law." [ECF 53] ¶ 25. Plaintiff did not respond to Defendant's assertion of federal question jurisdiction. The Court is not persuaded that such jurisdiction exists here, given that Hill asserts no cause of action arising under the Constitution or laws of the United States, and the C.F.R. provisions it cites do not create a private right of action. *See Phillips Petroleum Co. v. Texaco, Inc.*, 415 U.S. 125, 127 (1974) (for a claim to arise under the Constitution, laws, or treaties of the United States, a right or immunity created by the Constitution or laws of the United States must be an essential element of the plaintiff's cause of action); *Wisniewski v. Rodale, Inc.*, 510 F.3d 294, 301 (3d Cir. 2007) ("After *Sandoval*, the relevant inquiry for determining whether a private right of action exists appears to have two steps: (1) Did Congress intend to create a personal right?; and (2) Did Congress intend to create a private remedy? Only if the answer to both of these questions is 'yes' may a court hold that an implied private right of action exists under a federal statute."); *Weathers v. Sch. Dist. of Phila.*, 2019 WL 1259496, at *6–7 (E.D. Pa. Mar. 19, 2019) (finding no federal question jurisdiction because (1) complaint did not invoke federal law affording plaintiff right to declaratory or injunctive relief, and (2) alleged violation of federal procurement regulations was not a necessary element of claim, where state regulations imposed same requirements and court could grant relief sought without finding violation of federal law); *Brooks v. Barrett*, 2018 WL 6004682, at *7–8 (M.D. Ala. Nov. 15, 2018) (finding 2 C.F.R. § 200.319 does not create

complaint here asserts the following: (1) "Plaintiff is a corporation organized under the laws of the state of Delaware and is licensed to do business in the Virgin Islands"; and (2) PFA "is a public corporation and autonomous instrumentality of the Government of the Virgin Islands." [ECF 1-2] at 1. The complaint does not, however, indicate Hill's principal place of business,[7] nor does it make any representations as to the citizenship of PFA. Defendant alleges that, "upon information and belief," Hill is headquartered in Mount Laurel, New Jersey. [ECF 1] ⁋ 5; [ECF 53] ⁋ 7. While neither party offers any evidence explaining the location of activities of Hill,[8] Hill does not dispute that its principal place of business is New Jersey. The parties do not allege, and the Court does not find, any basis to suggest that Hill is incorporated in or has its principal place of business in the Virgin Islands. As such, the Court will assume for purposes of this action that Hill is not a citizen of the Virgin Islands. *See Toliver*, 2022 WL 16961442, at *7 n.6 ("[d]espite the fact that the citizenship of [a party] is undisputed, it is incumbent upon the Court to determine for itself that complete diversity has been established").[9]

---

a legal basis for a disappointed bidder to sue under § 1983 because it does not confer a federal right); *e.g. Toliver*, 2022 WL 16961442, at *19 (finding "this matter does not involve a substantial federal issue sufficient to confer federal question jurisdiction").

[7] For purposes of diversity jurisdiction, "[t]he citizenship of a corporation is both its state of incorporation and the state of its principal place of business." *GBForefront*, 888 F.3d at 34. The term "principal place of business" refers to the corporation's "nerve center"—"the place where a corporation's officers direct, control, and coordinate the corporation's activities." *Hertz*, 559 U.S. at 92–93. This is normally "the place where the corporation maintains its headquarters—provided that the headquarters is the actual center of direction, control, and coordination, . . . and not simply an office where the corporation holds its board meetings." *Id.* at 93. It is a single place within a state, and "[t]he public often (though not always) considers it the corporation's main place of business." *Id.*

[8] "Unsupported statements by counsel as to a defendant's citizenship 'are not enough'" to establish principal place of business, *Baxter v. KFC Nat. Mgmt. Co.*, 1998 WL 634898, at *2 (E.D. Pa. Sept. 16, 1998) (citation omitted), nor is "the mere filing of a form . . . listing a corporation's 'principal executive offices' [], without more, [] sufficient proof to establish a corporation's nerve 'center.'" *Hertz*, 559 U.S. at 97; *see Pack v. Super Fresh Food Markets, Inc.*, 1989 WL 70713, at *1 (E.D. Pa. June 26, 1989) (remand required where defendant failed to meet burden for removal; defendant "entirely failed to produce any facts in support of its bare allegation that [its] 'nerve center or place of operations [was the same as] its corporate headquarters'").

[9] Although Hill filed a disclosure statement [ECF 12] pursuant to Federal Rule of Civil Procedure 7.1, it failed to disclose the information required for a diversity case in accordance with Rule 7.1(a)(2).

In the original notice of removal, Defendant describes itself as "a public corporation and autonomous instrumentality of the Government of the Virgin Islands, and is authorized under 29 V.I.C. § 918 to operate in the Virgin Islands," but does not specifically identify its citizenship. [ECF 1] ⁋ 6. Defendant's amended notice only marginally cures this failure: After repeating the assertion that it operates as an autonomous instrumentality of the Government of the Virgin Islands ("GVI"), Defendant summarily concludes that it is a citizen of the Virgin Islands and thus complete diversity exists here. [ECF 53] ⁋ 8. Such conclusory allegations are wholly insufficient to show by a preponderance of the evidence that federal jurisdiction is proper. *S. Freedman & Co. v. Raab*, 180 F. App'x 316, 320 (3d Cir. 2006) ("the basis upon which jurisdiction depends must be alleged affirmatively and distinctly and cannot 'be established argumentatively or by mere inference'" (citation omitted)). While the Court would be well within its discretion to remand on this basis alone, the Court will take this opportunity to *sua sponte* consider PFA's citizenship.[10] Accordingly, the Court will apply *Fitchik's* three-part balancing test to determine whether PFA is an alter ego of the GVI and thus not a citizen for purposes of diversity jurisdiction.[11]

[10] The Court acknowledges Hill's efforts, in its notice of withdrawal, to analyze PFA's status under *Fitchik*. *See* [ECF 63] at 5–8. But it is Defendant's burden, not Hill's, to establish federal jurisdiction.

[11] The District Court of the Virgin Islands has applied the *Fitchik* factors to find that the Virgin Islands Port Authority ("VIPA") is not an arm of the Territory. *See Ballentine*, 955 F. Supp. at 483–84 (finding VIPA was proper defendant in 1983 suit alleging wrongful termination, reasoning that VIPA is a distinct entity that retains perpetual existence as a separate corporation, and any judgment against VIPA would not attach to funds in the state treasury), and *V.I. Port Auth. v. Balfour Beatty, Inc.*, 30 V.I. 289, 294–95 (D.V.I. 1994) (explaining that courts apply the Eleventh Amendment immunity analysis to determine whether an agency is an alter ego of the state for diversity purposes, and finding that, on challenge to removal to federal court, VIPA was not an alter ego of the GVI); *see also Williams v. V.I. Hous. Auth.*, 2007 WL 6027814, at *7 (D.V.I. Oct. 25, 2007) (applying the court's reasoning in *Ballantine* and finding that the Virgin Islands Housing Authority ("VIHA") should not be considered an arm of the state and is therefore susceptible to suit under 1983). Although *Ballentine* and *Williams* cited the outdated principle that the most important consideration in the *Fitchik* analysis is the source of money to pay a judgment, both decisions also analyzed and relied on the status of the entity under Virgin Islands law as weighing against alter ego status. *See Ballentine*, 955 F. Supp. at 483–84; *Williams*, 2007 WL 6027814 at *7. Similarly, in two recent decisions, the court determined that neither the Virgin Islands Housing Finance Authority ("VIHFA") nor the West Indian Company Limited ("WICO") should be treated as the Territory's alter ego for diversity purposes. *Gov't of V.I. v. Toliver*, 2022 WL 16961442, at *16 (D.V.I. Nov. 16, 2022); *W. Indian Co. Ltd. v. Yacht Haven USVI, LLC* (*WICO*), 2022 WL 704029, at *12 (D.V.I. Mar. 9, 2022). On the other hand, the court found that the University of the Virgin Islands was an "arm of the state" entitled

A. Whether PFA is an Arm of the Territory

i. The Funding Factor

The first *Fitchik* factor asks "[w]hether the money that would pay the judgment would come from the state." 873 F.2d at 659. "Accordingly, the thrust of this first category is whether the Virgin Islands is obligated as a matter of law to contribute to any judgment entered against [PFA]." *V.I. Port Auth.*, 30 V.I. at 295 n.2. This inquiry includes three subfactors: "(1) a state's legal obligation to pay a money judgment entered against the entity; (2) whether the agency has money to satisfy the judgment; and (3) whether there are specific statutory provisions that immunize the state from liability for money judgments." *Patterson*, 915 F.3d at 951.

a. Whether the Territory is obligated to pay a judgment against PFA

"The first funding subfactor focuses on 'whether the state treasury is *legally* responsible for the payment of a judgment.'" *Patterson*, 915 F.3d at 951 (citation omitted). Stated another way, "the operative question [i]s 'whether a money judgment . . . would be enforceable against the State.'" *Maliandi*, 845 F.3d at 87 (quoting *Doe*, 519 U.S. at 430). Where the State indemnifies an entity voluntarily, this factor weighs against alter ago status. *Id.*; *V.I. Port Auth*, 30 V.I. at 295 n.2 ("That a state may *voluntarily* contribute to a judgment is insufficient to confer immunity on a state agency and thus is irrelevant to the alter ego question."). As such, "practical or indirect financial effects of a judgment may enter a court's calculus, but rarely have significant bearing on a determination of an entity's status as an arm of the state." *Maliandi*, 845 F.3d at 87 (citation

to sovereign immunity and thus not subject to liability under § 1983, despite the funding factor weighing slightly against this conclusion. *McCauley*, 52 V.I. at 839, *aff'd in part by McCauley*, 618 F.3d at 240 (declining to place additional weight on the funding factor and affirming district court's "exhaustive analysis"). Though these decisions offer guidance in addressing the instant matter, whether a particular entity is an alter ego of the Territory is a fact-intensive inquiry, and "each case must be considered on its own terms, with courts determining and then weighing the qualitative strength of each individual [*Fitchik*] factor in the unique factual circumstances at issue." *Karns*, 879 F.3d at 514.

omitted).

Here, this Court's review of the Virgin Islands Code "confirm[s] the absence of an overarching legal obligation" requiring the Territory to pay judgments entered against PFA. *Maliandi*, 845 F.3d at 87. Indeed, PFA's enabling legislation specifically states that "[t]he debts, obligations, contracts, bonds, receipts, expenditures, accounts, funds, facilities and property of the Authority shall be deemed to be those of the Authority and not to be those of the [GVI]." 29 V.I.C. § 918. As it is the Territory's legal liability (or lack thereof) for PFA's debts that is "the key factor" in assessing the funding factor, the Court finds that the first subfactor weighs against alter ago status. *See Maliandi*, 845 F.3d at 87; *Patterson*, 915 F.3d at 951.

b. Whether PFA has money to satisfy an adverse judgment

This subfactor asks whether PFA has "alternative sources of funding (*i.e.*, monies not appropriated by the [Territory]) from which [it] could pay [a] judgment[]." *Maliandi*, 845 F.3d at 86. While the Third Circuit has stated that "[t]his necessarily involves a review of the percentage of funds a given entity receives from the State, [] there is no hard-and-fast rule about how much funding . . . is enough to trigger immunity, and . . . the question of *legal liability* . . . remains paramount." *Id.* at 88. In addition, courts "consider the degree of control the state maintains over any funds it appropriates to the entity." *Patterson*, 915 F.3d at 952.

Here, the parties have not provided any information indicating what percentage, if any, of PFA's budget comes from the Territory.[12] However, PFA's charter indicates that it has multiple

[12] Publicly available documents indicate that the Territory proposed providing $5 million in funding to PFA in each of FY2023 and FY2024. *See* USVI Proposed Executive Budget FY 2023 & 2024, at 766; USVI Proposed Executive Budget FY 2024 & 2025, at 851. Additionally, PFA states that its "proposed FY2024 annual Budget of $20.074 million is funded with $5 million from Gross Receipts Taxes, $9 million in General Fund Appropriations requested through the Office of Management and Budget, and $6.074 million from federal reimbursements." *Testimony on the Fiscal Year 2024 Budget Before the Comm. on Fin.*, 35th Leg. (June 13, 2023) (statement of Nathan Simmons, Director of Finance and Administration, Virgin Islands Public Finance Authority).

sources of funding, including borrowing money, issuing bonds, receiving federal grants and loans, lending mortgages, leasing and selling property, charging fees for its services, and investing. 29 V.I.C. § 919; *see Maliandi*, 845 F.3d at 88 ("alternative sources of funding—even where only a small part of the entity's overall budget—counsel against immunity"). Further, to the extent that the Territory does allocate funds to PFA, there is no indication that the Territory retains control of any such funds. *See* 29 V.I.C. § 918; *Febres v. Camden Bd. of Educ.*, 445 F.3d 227, 234 (3d Cir. 2006) (it is of no legal consequence whether the funds an entity uses to satisfy a judgment were initially provided by the state, where the state does not retain ownership or control of the funds; once deposited into the entity's account, the funds belong to the entity); *see also WICO*, 2022 WL 704029, at *6 ("Although WICO must comply with certain revenue reporting requirements and is subject to audit by the Virgin Islands Legislature . . . these requirements do not show proof of government control.").

The Court therefore finds that this subfactor weighs against alter ego status. *See Patterson*, 915 F.3d at 952 (an entity's "ability to satisfy a judgment with its own source of revenue and to raise additional funds without significant state involvement . . . demonstrates a level of financial independence not characteristic of an entity considered an arm of the state"); *e.g. Toliver*, 2022 WL 16961442, at *11 (concluding that because VIHFA receives no substantial government funds and has numerous sources of revenue, government does not retain ownership of funds allocated to VIHFA, and government would not be legally responsible for adverse judgment, this "subfactor weighs heavily against VIHFA being an arm of the Government").

c. Whether Virgin Islands statutes immunize the Territory from liability for money judgments

"The third subfactor stands for the simple proposition that where the State has expressly immunized itself from the entity's liabilities, it thereby indicates the entity is not an arm of the

State and hence not entitled to protection under the Eleventh Amendment." *Maliandi*, 845 F.3d at 90. As noted above, PFA's enabling legislation provides that its debts and obligations "shall be deemed to be those of the Authority and not to be those of the [GVI]." 29 V.I.C. § 918. Thus, this factor weighs against alter ego status.

In sum, because all three subfactors weigh against treating PFA as an arm of the Territory, the Court finds that the funding factor weighs heavily against alter ego status. *See, e.g.*, *Karns*, 879 F.3d at 516 (funding factor weighed against immunity, where state had no obligation to pay NJ Transit's debts or reimburse it for judgments paid, and entity was funded by multiple sources).

ii. The Status Factor

Under the second *Fitchik* factor, the Court must "examine whether state law treats [PFA] as an arm of the state." *Patterson*, 915 F.3d at 952–53. This includes consideration of "(1) how the law treats the agency generally; (2) whether the agency is separately incorporated; (3) whether the agency can sue and be sued in its own right; (4) and whether it is immune from state taxation." *Id.* at 953; *accord McCauley*, 52 V.I. at 835. In addition to the subfactors listed in *Fitchik*, courts may also consider "the entity's authority to exercise the power of eminent domain, application of state administrative procedure and civil service laws to the entity, the entity's ability to enter contracts and make purchases on its own behalf, and whether the entity owns its own real estate." *Maliandi*, 845 F.3d at 91.

a. <u>How Virgin Islands law treats PFA generally</u>

In analyzing the first subfactor, courts "look to (1) explicit statutory indications about how an entity should be regarded; (2) case law from the state courts—especially the state supreme court—regarding an entity's immunity or status as an arm of the State; and (3) whether the entity is subject to laws for which the State itself has waived its own immunity (such as state tort claims

acts)." *Maliandi*, 845 F.3d at 91. Where these indicators point both ways, the entity's general treatment under state law is inconclusive. *Id.*

First, there are no explicit statutory indications as to whether PFA should be regarded as an arm of the Territory. The enabling legislation confusingly refers to PFA as a "public corporation and autonomous governmental instrumentality of the Government of the Virgin Islands." 29 V.I.C. § 918; *see Petersen*, 2009 WL 8391635, at *1 (description of entity "as an 'autonomous government instrumentality' is rather paradoxical"). Several provisions refer to PFA's creation to aid the Government in "raising capital for essential public projects," and describe such purpose as a "public purpose . . . for the benefit of the Virgin Islands." 29 V.I.C. §§ 916, 918, 921. On the other hand, the Government has immunized itself from liability for the PFA's debts and obligations. *Id.* §§ 918, 925(b).

Second, the Court is unable to locate any Virgin Islands caselaw specifically determining PFA's status for purposes of diversity jurisdiction.[13]

Lastly, the GVI has waived its sovereign immunity for certain tort claims. 33 V.I.C. § 3408(a). For purposes of the Virgin Islands Tort Claims Act ("VITCA"), "Government of the Virgin Islands" is defined to include "agencies and instrumentalities of the Government of the Virgin Islands." *Id.* § 3401. However, the Superior Court has held that this definition does not include independent instrumentalities, and thus the VITCA does not apply to independent

[13] *See, e.g.*, *H&O Food Warehouse, Inc. v. V.I. Pub. Fin. Auth.*, 70 F. App'x 611, 612 (3d Cir. 2003) ("The [PFA] is an instrumentality of the [GVI] created to assist the Government in public projects by securing financing through the issuance of bonds and notes."); *V.I. Taxi Ass'n v. W. Indian Co., Ltd.*, 66 V.I. 473, 479 (2017) (describing PFA as "a public corporation and governmental instrumentality created by the [GVI]"); *Sprauve v. W. Indian Co.*, 799 F.3d 226, 227 (3d Cir. 2015) ("The PFA is run by a board of directors appointed by the Governor of the Virgin Islands, with the advice and consent of the Virgin Islands Legislature."); *WICO*, 2022 WL 704029, at *12 (explaining that PFA appoints WICO's board of directors, and concluding that "WICO is effectively a fully autonomous public corporation, governed entirely by appointees from *another* fully autonomous public corporation" (citing 29 V.I.C. § 918)); *C&C/Manhattan v. Gov't of V.I.*, 40 V.I. 51, 68 (Terr. Ct. 1999) ("PFA [has] broad contracting and 'other corporate powers' that are consistent with its purposes of borrowing money, issuing bonds, and investing funds").

instrumentalities of the GVI. *Cyprian v. Butcher*, 53 V.I. 224, 231–35 (Super. Ct. 2010) (finding no "language in the VITCA that can be remotely construed to generally extend the applicability of the VITCA to independent instrumentalities," and no legislative intent of applicability to independent instrumentalities); *see also Maliandi*, 845 F.3d at 92 n.17 ("We attach only limited significance to a State's denomination of an entity as an arm of the State, [] for blind deference to a legislature's description would abdicate the courts' responsibility to conduct individualized determinations and would bestow upon States the unfettered ability to immunize the activities of any number of entities.").

In sum, while there are no clear statements of legislative intent or judicial findings as to whether PFA is an alter ego of the GVI for purposes of federal diversity jurisdiction, to the extent PFA is excluded from the VITCA, this subfactor tends to weigh against alter ago status. *See Maliandi*, 845 F.3d at 93 (if an entity is subject to a state's tort claims act, this "typically counsels in favor of immunity because it implies that, like the State itself, [the entity] would be immune from tort claims absent the Act").

b. PFA's incorporation

PFA is a public corporation with the right to perpetual existence. 29 V.I.C. §§ 918, 919(First). Additionally, PFA is granted the power "[t]o exercise such other corporate powers . . . as are conferred upon corporations by the laws of the Virgin Islands." *Id.* § 919(Fourth)(L); *see* 13 V.I.C. § 32. Though PFA does not appear to be separately incorporated, the Court finds that these attributes tend to weigh against a finding that PFA is an arm of the Territory.

c. PFA can sue and be sued in its own name

Like other public corporations and autonomous governmental instrumentalities, PFA, "from the time of its inception, was [] designedly armed with the express general power to '*sue*

and be sued in its corporate name.'" *Cyprian*, 53 V.I. at 227 (discussing WAPA and quoting 30 V.I.C. § 105(4)); *see* 29 V.I.C. § 919(Fourth)(G) (granting PFA the power "[t]o sue and be sued"); 5 V.I.C. § 1142 (right of action by or against public corporation); *e.g. Toliver*, 2022 WL 16961442, at *14 ("VIHFA is explicitly granted the ability to sue and be sued").[14] Accordingly, this subfactor weighs against alter ego status. *See Maliandi*, 845 F.3d at 94 ("An entity is more likely to be an arm of the State and partake of Eleventh Amendment immunity if it lacks the ability to sue and be sued in its own name.").

d. PFA is immune from state taxation

PFA's property, income, and activities are exempt from taxes and assessments. 29 V.I.C. § 921. Additionally, bonds issued by PFA are "exempt as to principal and interest from taxation by the [GVI]." *Id.* § 922(c). This supports a finding that PFA is an arm of the Territory. *See Maliandi*, 845 F.3d at 95; *Toliver*, 2022 WL 16961442, at *14.

e. Additional considerations

PFA has some attributes that weigh in favor of alter ego status. To the extent that it is not specifically excluded from the relevant statutes, PFA appears to be a "public employer" for purposes of labor relations, 24 V.I.C. § 362(i) ("'public employer' means the executive branch of the Government of the Virgin Islands and any agency or instrumentality thereof"), and its employees appear to be eligible for government healthcare, 3 V.I.C. § 634(a) ("All persons in the service of the Government of the United States Virgin Islands, . . . whether elected, appointed or employed, shall participate in the health insurance plan . . . ."). *See Maliandi*, 845 F.3d at 95 (when entity's employees benefit from state healthcare and pension programs, this counsels in favor of

[14] The *Cyprian* court determined that by granting WAPA such power, "the Legislature . . . also categorically waived WAPA's claim to sovereign immunity made generally applicable to *the Government of the Virgin Islands* by Congress in the Revised Organic Act." *Cyprian*, 53 V.I. at 228.

immunity). PFA is required to keep written transcripts of its proceedings, and such transcripts are public documents. 29 V.I.C. § 924a.

Other attributes weigh against finding PFA to be an arm of the Government. PFA owns its own real estate, and can acquire, mortgage, sell, lease, or otherwise dispose of any real or personal property on its own behalf. 29 V.I.C. §§ 918, 919(Fourth)(B), (C); *see Maliandi*, 845 F.3d at 96 (entity's ownership of property weighs against immunity); *e.g. WICO*, 2022 WL 704029, at *10 (finding WICO's ability to make purchases and own and lease real estate, through a board, weighs slightly against alter ego status). Additionally, PFA can make and enter contracts, and has the power "[t]o appoint, employ and contract for the services of officers, agents, employees and professional assistants." 29 V.I.C. § 919(Fourth)(H), (I), (K); *see Maliandi*, 845 F.3d at 95 (an entity's ability to "enter contracts on its own accord . . . cuts against immunity"); *e.g. WICO*, 2022 WL 704029, at *10 (finding that because WICO is free to enter into contracts but does so through a board appointed by the governor's appointees, this factor cuts both for and against alter ego status, "weighing slightly against such status in the aggregate").

While "the multifaceted nature of the status under state law factor can make it so hopelessly 'checkered' that it does not 'significantly help in determining whether [the entity] is [an arm of the state],'" that is not the case here. *Maliandi*, 845 F.3d at 91 (first alteration in original) (quoting *Fitchik*, 873 F.2d at 662). Although PFA has some attributes that weigh in favor of alter ego status, such as its immunity from taxation, the balance of considerations defining PFA's status under Territorial law cuts against alter ego status. *See Toliver*, 2022 WL 16961442, at *15 (finding VIHFA's general treatment under Virgin Islands law and immunity from taxation weigh in favor of alter ego status, but VIHFA's ability to sue and be sued, contract freely, and own and sell real estate weigh heavily against such a finding, and concluding that "on balance, the legal status factor

weighs against finding the VIHFA to be an arm of the [GVI]"); *see also Petersen*, 2009 WL 8391635, at *2 (concluding that "other than WAPA's tax exempt status, WAPA's legal status weighs against recognizing that WAPA has immunity").

iii. The Autonomy Factor

The third *Fitchik* factor "focus[es] on the entity's governing structure and the oversight and control exerted by a State's governor and legislature." *Maliandi*, 845 F.3d at 96. "The lesser the autonomy of the entity and greater the control by the State, the greater the likelihood the entity will share in the State's Eleventh Amendment immunity." *Id.* Thus, this factor asks whether PFA's autonomy is "constrained enough" to deem it an arm of the Territory. *Id.* at 99.

PFA was created as "a public corporation and autonomous governmental instrumentality" "for the purpose of raising capital for essential public projects." 29 V.I.C. §§ 916, 918.[15] While "public corporations are considered to be part of the Executive Branch . . . , courts in the Virgin Islands have consistently held these public corporations enjoy a 'substantial degree of autonomy and independence from the Executive Branch.'" *Bryan v. V.I. Water & Power Auth.*, 77 V.I. 196, 218–19 (Super. Ct. 2023) (citation omitted), *aff'd*, 2024 WL 4614536 (Oct. 29, 2024). Such independence is evident here, where PFA enjoys broad discretion to borrow money, issue bonds, and contract debts, and to invest not only its own funds but also funds of the GVI and all agencies, instrumentalities, commissions, authorities, and subdivisions thereof (excluding the Government Employees Retirement System). *See* 29 V.I.C. §§ 919, 922, 923, 928. PFA has the power to make and repeal bylaws as to its organization, management, administration, "and for carrying into effect [its] powers and purposes," and is authorized to "exercise all such incidental powers as may be

[15] "[W]hether the agency exercises a governmental or proprietary function [] is [not] a valid criterion" under the autonomy factor. *Fitchik*, 873 F.2d at 659 n.2 (pointing to Supreme Court jurisprudence holding that "the line drawing required by the [governmental-proprietary] distinction was unworkable" (citing *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 543–54 (1985))).

necessary or convenient for the purpose of carrying on [its] business and objectives." 29 V.I.C. § 919(Third)(I), (Fourth)(J). PFA also has the power to "appoint, employ and contract for the services of officers, agents, employees and professional assistants" and to determine their compensation. *Id.* § 919(Fourth)(H).

While it is true that the Legislature has prescribed some limitations on PFA's power, these do not rise to the level of "constrained enough" to deem PFA an alter ego of the Territory. For example, PFA is limited to financing "only [] those projects specifically approved and authorized by the Legislature" or other government agency or authority. 29 V.I.C. § 920. PFA must submit to the Legislature an annual business report that includes its expenditures, but there appears to be no requirement that PFA submit a budget for approval. 29 V.I.C. § 924; *see WICO*, 2022 WL 704029, at *12 (finding WICO submits no budget to the legislature and funds its operations entirely on its own revenue, and while WICO is required to make revenue reports to the legislature, "there is no authority that these reports lead to any legislative constraint on WICO's operations"). PFA is governed by a board of directors consisting of the Governor, two cabinet-level members, and four non-governmental members appointed by the Governor with the advice and consent of the Legislature. 29 V.I.C. § 919(Fifth)(A). But the Governor has no veto power over the board's actions, and "[g]ubernatorial appointment of board members typically weighs only 'slightly' in favor of immunity." *Febres*, 445 F.3d at 231; *e.g. Petersen*, 2009 WL 8391635, at *3 ("The fact that the Governor appoints [WAPA's] Board members and that three are government employees weighs 'slightly' in favor of immunity."). And, while PFA generally exercises its powers through the board, the board may also delegate to any of "the Authority's officer's, agents or employees such duties and responsibilities as it may deem necessary." 29 V.I.C. § 919(Fifth)(B).

In sum, that PFA exercises its powers broadly subject to only minimal legislative

constraints is indicative of the Authority's autonomy. *See Bryan*, 77 V.I. at 220 (PFA has certain "enumerated powers which purely Executive branch agencies do not have"). While the Governor retains the power to appoint PFA's board members and thus exercises some general control over PFA, this operates as a minimal limitation on PFA's autonomy. Accordingly, the Court finds that the autonomy factor weighs against alter ego status for PFA. *See, e.g.*, *Toliver*, 2022 WL 16961442, at *16 (finding that while "VIHFA may be subject to certain government oversight laws, [] these steps toward transparency hardly rise to the level of an operational constraint," and ultimately concluding the autonomy factor weighs strongly against finding VIHFA is an arm of the GVI).

iv. Balancing the Factors

"After identifying the direction in which each factor points, [the Court] balance[s] them to determine whether an entity amounts to an arm of the State." *Maliandi*, 845 F.3d at 84. Here, the funding factor weighs strongly against alter ego status because the Territory has no overarching legal obligation to pay any judgment against PFA, and PFA has alternative sources of funding to satisfy any judgment entered against it. The status factor, though less definitive, also weighs against PFA being considered an arm of the Government based on PFA's overall treatment under territorial law. Finally, the autonomy factor also weighs against such status because although PFA is subject to some governmental oversight and control, it enjoys a "substantial degree of autonomy and independence from the Executive branch" in its day-to-day operations. *Bryan*, 2023 WL 2504725, at *10 (citation omitted).

Accordingly, the Court finds that PFA is not an arm of the GVI for purposes of diversity.

B. Whether Diversity Jurisdiction is Proper

Because the Court concludes that PFA is not an alter ego of the Government for diversity

purposes, PFA necessarily has citizenship under § 1332. PFA alleges it is a citizen of the Virgin Islands and its principal place of business is in the Virgin Islands. Plaintiff does not dispute this assertion, and the Court finds no evidence to contradict it. *See Doolin*, 424 F. App'x at 109 ("a political subdivision of a state, unless it is simply 'the arm or alter ego of the State,' is a citizen of the State for diversity purposes" (citation omitted)); *WICO*, 2022 WL 704029, at *12 (finding no evidence to contradict assertion of Virgin Islands citizenship). As such, complete diversity exists here.

The Court further finds that the amount in controversy requirement is met.[16] Accordingly, diversity jurisdiction was properly invoked on removal, and the Court should accept Plaintiff's notice of withdrawal and deny the motion to remand.[17]

---

[16] "In actions seeking declaratory or injunctive relief, it is well established that the amount in controversy is measured by the value of the object of the litigation." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 347 (1977). Here, Hill seeks to enjoin the award of a $107,000,000 contract to CH2M, and alleges it was wrongfully denied an award for its bid of $30,288,984.64.

[17] The forum defendant rule provides that "[a] civil action otherwise removable solely on the basis of [diversity jurisdiction] may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." *Encompass Ins. Co. v. Stone Mansion Rest. Inc.*, 902 F.3d 147, 152 (3d Cir. 2018) (alterations in original) (quoting 28 U.S.C. § 1441(b)(2)). The Third Circuit has emphasized that the rule "precludes removal on the basis of in-state citizenship only when the defendant has been properly joined *and* served." *Id.* (emphasis added).

In an action against a state or local government, the Federal Rules require service on the chief executive officer of the governmental organization, or service in the manner prescribed by state law for such a defendant. Fed. R. Civ. P. 4(j)(2). Under Virgin Islands law, "[t]o serve an autonomous or semi-autonomous governmental agency or board that can be sued in its own name, a party must serve the chief executive officer, or any other person authorized by law to accept service of process." V.I. R. Civ. P. 4(i)(2)(C). Similarly, when suing a public corporation that can be sued under 5 V.I.C. § 1142(b), "a party must serve the designated registered agent, the chief executive officer, or any other person authorized by law to accept service of process." V.I. R. Civ. P. 4(i)(2)(B); *see VIWAPA Pro. & Tech. Emps. Union Inc. v. V.I. Water & Power Auth.*, 2019 WL 1903978, at *3–4 (V.I. Super. Ct. Mar. 29, 2019).

Here, the Superior Court issued summons to PFA Executive Director Kevin McCurdy on September 11, 2024. *See* [ECF 53-29] at 2. But Plaintiff did not serve McCurdy prior to removal. Instead, Plaintiff served "Arlene James, Contract Assistant," who is not a named defendant in this case. *See* [ECF 53-34] at 2–4. Nor is there any indication that Ms. James is an agent or other person authorized by law to receive service of process on behalf of Defendant. *See Tobal v. V.I. Police Dep't*, 2022 WL 136841, at *9 (D.V.I. Jan. 13, 2022) ("Mere acceptance of service by an employee does not establish that the employee was authorized to accept service."); *Worldwide Travel Staffing, Ltd. v. Governor Juan F. Luis Hosp. & Med. Ctr.*, 75 V.I. 77, 84 (Super. Ct. 2021) (finding no indication that defendant public corporation was properly served, reasoning that "the 'executive assistant to the president of a corporation' is not a person authorized under Rule 4(i)(2)(B) to accept service of process for a public corporation," and plaintiff failed to

IV. CONCLUSION

In sum, federal district courts are courts of limited jurisdiction, and it is the burden of the party seeking to litigate a dispute in this Court to prove that it belongs here. While Defendant failed to meet that burden, the Court *sua sponte* finds that PFA is not an alter ego of the Government for purposes of federal diversity jurisdiction, and that complete diversity exists here. With the amount in controversy requirement also met, the undersigned finds that diversity jurisdiction over this action is proper.

Accordingly, for the reasons set forth above, the Court **RECOMMENDEDS** that Plaintiff's motion for remand be **DENIED**. Any objections to this Report and Recommendation must be filed in writing within 14 days of receipt of this notice. Failure to file objections within the specified time shall bar the aggrieved party from attacking such Report and Recommendation before the assigned District Court Judge. 28 U.S.C. § 636(b)(1); LRCi 72.3.

ENTER:

Dated: December 18, 2024

/s/
G. ALAN TEAGUE
U.S. MAGISTRATE JUDGE

provide any evidence that assistant was the designated registered agent of defendant or was person authorized by law to accept service of process). While Defendant evidently received notice of the suit such that it was able to file its notice of removal, "notice . . . is not sufficient to effect service." *Grand Ent. Grp., Ltd. v. Star Media Sales, Inc.*, 988 F.2d 476, 492 (3d Cir. 1993) ("Although notice underpins [Fed. R. Civ. P.] 4 concerning service, notice cannot by itself validate an otherwise defective service.").

Thus, because Hill did not properly serve PFA prior to PFA removing this action to federal court, the forum defendant rule does not apply to prevent removal here. *See Encompass Ins. Co.*, 902 F.3d at 153–54 (the rule does not preclude an in-state defendant "to use pre-service machinations to remove a case that it otherwise could not").