IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

LBH Engineers, LLC, Plaintiff, v. ARCHER WESTERN CONTRACTORS, LLC, ARCHER WESTERN CONSTRUCTION, LLC, HUBBARD CONSTRUCTION COMPANY, NORTHWEST EXPRESS ROADBUILDERS, PARSONS CORPORATION, PARSONS TRANSPORTATION GROUP, INC., HEATH & LINEBACK ENGINEERS, INC., GEORGIA DEPARTMENT OF TRANSPORTATION, and STATE ROAD AND TOLLWAY AUTHORITY, Defendants.	:	CIVIL ACTION NO. 1:19-CV-4477-LMM

ORDER

This case comes before the Court on Defendant Georgia Department of Transportation and Defendant State Road and Tollway Authority's Motion to Dismiss under Rule 12(b)(1) [31]. After due consideration, the Court enters the following Order:

I. BACKGROUND[1]

Plaintiff LBH Engineers, LLC claims that Defendants infringed its patented invention for concrete support beams when Defendants incorporated the invention into a highway construction project. Plaintiff's novel construction method instructs builders to partially precast one section of a support beam, set it onto a column, then pour the rest of the support beam in place. This method saves costs because a wholly precast support beam is significantly heavier than a partially precast one. The extra weight of a wholly precast beam requires a crane that is larger, stronger, and therefore more-expensive, and which would occupy a larger footprint on the construction site. The partially precast support beam would lead to fewer traffic flow disruptions and shorter construction windows.

On July 15, 2013, Plaintiff pitched its invention to contractors who were preparing a joint bid on a project not at issue here. Among those contractors were Defendant Archer Western and Defendant Parsons. Plaintiff's representative showed these contractors the schematics for its precast support beam and explained that a patent was pending on the invention. Archer Western and Parsons evidently criticized the invention as unproven and chose not to incorporate it into their bid. The joint bid submitted by Archer Western, Parsons, and the other contractors did not win that project.

[1] The following facts come from the Complaint and are viewed in the light most favorable to Plaintiff, the non-moving party.

However, Archer Western and Parsons, together with several other Defendants here, submitted a bid on a 2013 highway project in Georgia to construct a tollway ("NWC Tollway"). Archer Western and Defendant Hubbard Construction Company formed Northwest Express Roadbuilders ("NWER"), a joint-venture prime contractor for this project. NWER hired subcontractors, including Parsons as lead designer, and Defendant Heath & Lineback as engineer. On July 23, 2013, the Georgia Department of Transportation ("GDOT") and State Road and Tollway Authority ("SRTA") awarded this team the NWC Tollway project.

Plaintiff alleges that "[t]he NWC Tollway was designed and constructed using Plaintiff LBH's Partially Precast Concrete Beam Technology at substantial cost savings to Defendants." Dkt. No. [1] at 38. Based on this allegation, Plaintiff brings a single count of patent infringement against all named Defendants. Dkt. No. [1] ¶¶ 60–73. GDOT and SRTA have moved to dismiss Plaintiff's claims on sovereign-immunity grounds. Dkt. No. [31].

II. LEGAL STANDARD

Under Federal Rule of Civil Procedure 12(b)(1), a party may move to dismiss a claim for lack of subject-matter jurisdiction. Fed. R. Civ. P. 12(b)(1). Attacks on subject-matter jurisdiction "come in two forms": "facial attacks" and "factual attacks." Lawrence v. Dunbar, 919 F.2d 1528, 1528–29 (11th Cir. 1990). When, as here, a party raises a facial attack, Rule 12(b)(1) "requires the court merely to look and see if the plaintiff has sufficiently alleged a basis of subject

matter jurisdiction, and the allegations in his complaint are taken as true for the purposes of the motion." Id. at 1529 (citing Menchaca v. Chrysler Credit Corp., 613 F.2d 507, 511 (5th Cir. 1980)) (alterations adopted). Thus, when the Court considers a facial attack on subject-matter jurisdiction, "a plaintiff is afforded safeguards similar to those provided in opposing a Rule 12(b)(6) motion." Id.

A sovereign-immunity challenge is a challenge to the Court's subject-matter jurisdiction. See U.S. Const. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State[.]"); Lewis v. United States, 502 F. App'x 862, 863 (11th Cir. 2012) ("We conclude from the record that the district court did not err in granting defendants' separate motions to dismiss the complaint under Fed. R. Civ. P. 12(b)(1) for a lack of subject matter jurisdiction, where [] New York and Florida were immune from suit under the Eleventh Amendment."); Manders v. Lee, 338 F.3d 1304, 1308 (11th Cir. 2003) ("The Eleventh Amendment provides immunity by restricting federal courts' judicial power[.]" (citing U.S. Const. amend. XI)). While a question of sovereign immunity "is ultimately a question of federal law[,] the federal question can be answered only after considering provisions of state law." Manders, 338 F.3d at 1309; see also Regents of the Univ. of Cal. v. Doe, 519 U.S. 425, 429 n.5 (1997) ("Ultimately, [] the question whether a particular state agency . . . is [] an arm of the State . . . is a question of federal law. But that federal question can be answered only after considering the provisions of state

law that define the agency's character."); Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977) ("[W]hether the Mt. Healthy Board of Education is to be treated as an arm of the State . . . depends, at least in part, upon the nature of the entity created by state law.").

III. DISCUSSION

GDOT and SRTA argue that they are immune from Plaintiff's patent-infringement suit because they are shielded by sovereign immunity. Dkt. No. [31]. In response, Plaintiff argues that Congress has abrogated state sovereign immunity through the Patent Remedies Act, 35 U.S.C. § 296(a). Dkt. No. [35]. Plaintiff also argues that SRTA has no sovereign immunity in any event because it is not an "instrumentality of the state." Id.

A. The Patent Remedy Act and Congressional Abrogation

Plaintiff argues that sovereign immunity does not shield GDOT and SRTA because Congress abrogated the states' sovereign immunity through the Patent Remedy Act. Id. at 19. Plaintiff recognizes that this issue was already decided in Florida Prepaid, where the Supreme Court held that the Patent Remedy Act was not in itself a valid abrogation of state sovereign immunity. Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 635–48 (1999). But Plaintiff seeks to preserve the argument that the Patent Remedy Act validly abrogated sovereign immunity in case the Supreme Court decides a pending Copyright case, Allen v. Cooper, No. 18-877 (U.S.), in a manner favorable

to Plaintiff's case. Dkt. No. [35] at 8. For now, Florida Prepaid applies, and the Patent Remedy Act is not an effective abrogation of state sovereign immunity.

B. Whether SRTA is an Arm of the State

Plaintiff also argues that sovereign immunity does not protect SRTA because SRTA is not an "arm of the state." Dkt. No. [35] at 6.[2] Defendants disagree and argue that SRTA is an arm of the state. Dkt. No. [42] at 2. The parties agree that the standard by which to determine whether SRTA is an arm of the state is the Eleventh Circuit's four-prong test. See, e.g., Manders v. Lee, 338 F.3d 1304, 1308 (11th Cir. 2003). Under this test, the Court examines (1) how state law defines SRTA, (2) the degree of state control over SRTA, (3) where SRTA derives its funds, and (4) who is responsible for judgments against SRTA. Id. The Court must apply this test "in light of the particular function in which [SRTA] was engaged when taking the actions out of which liability is asserted to arise." Id. (citing Shands Teaching Hosp. & Clinics v. Beech St. Corp., 208 F.3d 1308, 1311 (11th Cir. 2000)).

While this inquiry is ultimately one of federal law, "[its] resolution . . . depends, in part, on state law." Id. at 1309. The Court therefore applies the Eleventh Circuit's test to Georgia law to determine whether SRTA is an arm of the state. Because this issue comes before the Court on a facial attack to subject matter jurisdiction, the Court takes the facts from Plaintiff's Complaint but can

[2] Plaintiff does not dispute that GDOT is an arm of the state. Dkt. No. [35] at 11 n.1. Since sovereign immunity therefore applies to GDOT, Plaintiff's claims against GDOT are **DISMISSED**.

look to the various Georgia statutes that form the legal framework for how SRTA is formed and operates. See Regents v. Doe, 519 U.S. at 429 n.5 (1997) ("But that federal question can be answered only after considering the provisions of state law that define the agency's character."); Doyle, 429 U.S. at 280 (same).

1. How Georgia law defines SRTA

First, the Court examines Georgia law to determine how SRTA is defined. SRTA is "a body corporate and politic and an instrumentality and public corporation of the state" with "perpetual existence." O.C.G.A. § 32-10-61. In its own name, "it may contract and be contracted with, sue and be sued, implead and be impleaded, and complain and defend in all courts of [Georgia][.]" Id.

SRTA's powers are statutorily delegated. Id. § 32-10-63. Georgia law empowers SRTA "[t]o exercise any power usually possessed by private corporations performing similar functions, which power is not in conflict with the Constitution and laws of Georgia[.]" Id. § 32-10-63(9). But SRTA's creation and function "are in all respects for the benefit of th[e] state[, and SRTA] is an institution of purely public charity and [performs] an essential government function in the exercise of the power conferred upon it[.]" Id. § 32-10-109.

SRTA can acquire property in its own name and dispose of that property. Id. § 32-10-63(2). It can acquire real property or other rights by condemnation for public use. Id. § 32-10-63(4). It can also make contracts, leases, and conveyances. Id. § 32-10-63(5). It can lease property to the United States and the State of Georgia, as well as to private or public persons, "for the construction or

operation of facilities of benefit to the general public." Id. § 32-10-63(11). It can exercise police powers of the state to maintain the peace and handle the traffic and collection of tolls on the projects it operates. Id. § 32-10-64(b).

In executing its function, SRTA is exempt from state property taxes, taxes "upon its activities in the operation or maintenance of the projects erected by it," "other charges for the use of such projects," and from taxes upon "other income received by the authority." Id. § 32-10-109. Its revenue bonds are also tax-exempt. Id. § 32-10-94. The Governor may convey real property to SRTA for nominal consideration because state law treats "the benefits flowing to the state and its citizens [as] full and adequate actual consideration[.]" Id. § 32-10-69. SRTA falls under the Open Meetings Act, O.C.G.A. § 50-14-1(a)(1)(A), the Open Records Act, id. § 50-18-70(b)(1), and the Public Records statute, id. § 50-18-91(1).

Plaintiff argues that the way Georgia defines SRTA suggests that SRTA is independent of the state and that this weighs against sovereign immunity. Dkt. No. [35] at 14. Plaintiff emphasizes that Georgia law empowers SRTA to act as a private corporation would. This includes SRTA's power to "'contract and be contracted with, sue and be sued, implead and be impleaded, and complain and defend in all courts of [Georgia]' in its own name." Id. (citing O.C.G.A. § 32-10-61). It also includes SRTA's independence from other departments within the state government: "SRTA is completely outside of the executive branch of Georgia." Id. at 15 (citing Fouche v. Jekyll Island State Park Auth., 713 F.2d 1518,

1520 (11th Cir. 1983)). And Plaintiff adds that "Georgia law does not assign SRTA to any department for administrative purposes." Id. at 9.

Defendants disagree, arguing that state law defines SRTA as an arm of the state. Defendants cite SRTA's statutory definition at O.C.G.A. § 32-10-61: "an instrumentality of the State of Georgia and a public corporation of the state." Dkt. No. [42] at 3. Defendants point out that SRTA's corporate purpose under state law is "in all respects for the benefit of th[e] state[;] the authority is an institution of purely public charity and [performs] an essential government function in the exercise of the power conferred upon it[.]" Id. at 4 (citing O.C.G.A. § 32-10-109). Defendants also note that SRTA falls under the definition of "State" in the Tort Claims Act, O.C.G.A. § 50-21-20 *et seq*. Id. (citing O.C.G.A. § 32-10-60(2)). And Defendants add that SRTA has a number of features that suggest it is an arm of the state: the power to acquire real property by condemnation; the obligation to develop and improve Georgia highways; police powers of the State necessary to maintain the peace and handle traffic and collection of tolls; exemption from state income tax and state and local property tax; and SRTA's falling within the scope of the Open Meetings Act, Open Records Act, and the Public Records Statute. Id. at 4–5.

The Court finds that this factor—how Georgia law defines SRTA—weighs in favor of sovereign immunity. Georgia law calls SRTA a "body corporate and politic and an instrumentality and public corporation of the state." O.C.G.A. § 32-10-61. As the Eleventh Circuit noted when evaluating the putative immunity of

community service boards, "entities considered 'instrumentalities' of the State presumptively share in the State's Eleventh Amendment immunity." Miller v. Advantage Behavioral Health Sys., 677 F. App'x 556, 559 (11th Cir. 2017) (citing Manders, 338 F.3d at 1308). SRTA's creation and purpose "are in all respects for the benefit of the people of [Georgia]," and SRTA "is an institution of purely public charity [] performing an essential government function." O.C.G.A. § 32-10-109. The Georgia Supreme Court noted similar language in Georgia Law describing the Georgia Ports Authority, which it ultimately held to be an arm of the state. See Ga. Ports Auth. v. Lawyer, 821 S.E.2d 22, 31 (Ga. 2018) (citing O.C.G.A. § 52-2-37 ("[T]he creation of the [Ports Authority] and the carrying out of its corporate purpose is in all respects for the benefit of the people of this state and is a public purpose[, and] the [Ports Authority] will be performing an essential governmental function in the exercise of the power conferred upon it.")).[3]

Also weighing in favor of arm-of-the-state status are several of SRTA's powers. As a threshold matter, the Court notes that these powers are expressly outlined by Georgia law. See O.C.G.A. § 32-10-63; see also Pelliterri v. Prine, 776 F.3d 777, 780 (11th Cir. 2015) (finding state control where "[t]he Georgia

[3] While sovereign immunity is a question of federal law, the Eleventh Circuit has at times looked to decisions of state supreme courts to determine how a state defines an entity. See, e.g., Harris v. Univ. of Ala., 792 F. App'x 713, 715 (11th Cir. 2019) ("[T]he Alabama Supreme Court considers its universities to be instrumentalities of the state entitled to immunity." (citing Ex Parte Jacksonville State Univ., 40 So. 3d 672, 673 (Ala. 2009))).

Constitution [] grants the state legislature the exclusive authority to establish and control a sheriff's powers and duties"). SRTA can exercise police powers to maintain the peace, control the flow of traffic, and collect tolls. Id. § 32-10-64(b). SRTA's operations income is tax exempt, id. § 32-10-109, as are its revenue bonds. Id. § 32-10-94. SRTA can also acquire property by condemnation. Id. § 32-10-63(4). And SRTA is subject to the Open Meetings Act, Open Records Act, and the Public Records Statute. These factors show that Georgia law defines SRTA as an arm of the state. See Lawyer, 821 S.E.2d at 31 (noting identical powers in the Georgia Ports Authority, an arm of the state).

The Court finds Georgia's SRTA to be like Florida's South Florida Water Management District in terms of this factor, which the Eleventh Circuit held to be an arm of the state. United States ex rel. Lesinski v. S. Fla. Water Mgmt. Dist., 739 F.3d 598 (11th Cir. 2014). The Eleventh Circuit found "little dispute that Florida law define[d] the District as an arm of the State." Id. at 602. This was so because Florida's water management districts were "creatures of statute created and defined [] to implement a 'comprehensive statewide plan for the conservation, protection, management, and control of state waters.'" Id. (citing St. Johns River Water Mgmt. Dist. v. Deseret Ranches, 421 So.2d 1067, 1068 (Fla. 1982)). In practical terms, "the districts [we]re designed to perform a state function—water management and protection—with regional flexibility and discretion." Id. at 603. "Ultimately, the District's power to manage South Florida's waters stem[med] solely from, and [wa]s limited by, the State; the

District [wa]s not autonomous, and no county, municipality, or other local government delegate[d] to it any authority." Id. (citing Abusaid v. Hillsborough Cty. Bd. of Cty. Comm'rs, 405 F.3d 1298, 1309 (11th Cir. 2005)).

SRTA is like the South Florida Water Management District in each of these relevant respects. SRTA is a creature of state statute. It performs the essential government function of building and managing tollways. And its powers stem from the State and not from any other governmental body. Though it has some flexibility in its operations, that flexibility derives from Georgia law and is ultimately subject to the authority of SRTA's state-government members. Thus, the Court holds that this factor, how Georgia law defines SRTA, suggests that it is an arm of the State.

2. The State of Georgia's control over SRTA

Second, the Court examines Georgia law to determine whether and to what degree Georgia controls SRTA. SRTA's members are "the Governor, the commissioner of transportation, the director of the Office of Planning and Budget, one member to be appointed by the Lieutenant Governor . . . , and one member to be appointed by the Speaker of the House of Representatives[.]" O.C.G.A. § 32-10-62. For these members, service is "a separate and distinct duty for which they [] receive no additional compensation." Id. SRTA may also elect a secretary and treasurer, "who need not necessarily be members of the authority." Id. The members of the authority elect one of their own to serve as chairperson. Id. Also, SRTA may "appoint [] additional officers, who need not be members of

the authority . . . and [] employ such experts, employees, and agents as may be necessary[.]" Id. § 32-10-63(3). SRTA fixes these additional officers and employees' compensation and is responsible for their hiring and firing. Id.

Plaintiff argues that SRTA operates independently of the State of Georgia. Dkt. No. [35] at 15. Plaintiff acknowledges the predominantly state-government origin of SRTA's members, but Plaintiff notes that SRTA may appoint non-members to the positions of Secretary and Treasurer. Id. Plaintiff also points out that SRTA may appoint additional experts, employees, and agents to carry on its business and that those persons need not be members. Id. SRTA can hire and fire those persons and set their compensation. Id.

Plaintiff emphasizes SRTA's operating latitude under state law. In its own name, SRTA can acquire, and dispose of, real and personal property. Id. at 16. It can also make contracts, leases, and conveyances. Id. And Plaintiff notes that SRTA can lease its property to the state or federal government, and to public or private persons, "for the construction or operation of facilities of benefit to the general public." Id. (citing O.C.G.A. § 32-10-63(11)).

Defendants argue that the State of Georgia controls SRTA "to a significant degree." Dkt. No. [42] at 5. They start by emphasizing that SRTA's powers are expressly delegated by the state legislature. Id. at 6 (citing O.C.G.A. § 32-10-63). Defendants also emphasize that SRTA's membership mostly comes from the

State government and includes the Governor,[4] the Commissioner of Transportation, the Director of the Office of Planning and Budget, one member appointed by the Lieutenant Governor, and one member appointed by the Speaker of the Georgia House. O.C.G.A. § 32-10-62. Defendants add that the Georgia Attorney General "is the principal legal counsel to GPA." Dkt. No. [42] at 6 (citing O.C.G.A. § 45-15-14 ("The Attorney General is vested with complete and exclusive authority and jurisdiction in all matters of law relating to state authorities and no such state authority shall be authorized without the approval of the Attorney General to employ other counsel in any manner whatsoever.")). Defendants also argue that SRTA may only incur debt with approval from the State Financing and Investment Commission, which the Governor chairs. Id. at 7 (citing O.C.G.A. §§ 50-17-22(b)(1), 50-17-22(f)(1)). And SRTA is subject to audit by the State Auditor at least once a year. Id. (citing O.C.G.A. § 32-10-62(b)).

Defendants argue that SRTA's corporate powers are qualified by the state government's control over its membership. For example, SRTA may sell or lease property without the approval of the executive branch as such, but it still needs the approval of "its Chair, the Governor." Id. (citing O.C.G.A. § 32-10-124(a)(10)).

[4] Defendants argue that the Governor, as the highest-ranking member of the state government, chairs SRTA's board. Dkt. No. [42] at 6 n.4. Defendants cite no authority for this contention, but Plaintiff seems to accept it as true and certainly does not challenge it. See Dkt. No. [69] at 5 ("SRTA makes much of the fact that the Governor is the chairman of SRTA, but ignores that SRTA is required by law to elect a Secretary and Treasurer, who are not required to be members.").

Defendants also point out that the Governor may convey real property owned by the State to SRTA for nominal consideration. Id.

Defendants conclude with a laundry list of laws indicating that Georgia controls SRTA:

- SRTA may accept loans and grants from the federal government only with the Governor's approval. O.C.G.A. § 32-10-63(7)(A).
- SRTA is subject to the constitutional prohibition against gratuities. Id. § 32-1-8.
- After SRTA has paid off its bonds, GDOT takes ownership of SRTA's roads, and they become part of the state highway system for $1.00 consideration. Id. § 32-10-108.
- SRTA must provide annual reports to the state legislature detailing its funds collected through tolls and how those funds were used or disposed of. Id. § 32-10-65.2.
- SRTA must let construction contracts by competitive bid. Id. § 32-10-68.
- Venue for lawsuits against SRTA is restricted to Fulton County Superior Court. Id. § 32-10-110.

In its Sur-reply, Plaintiff takes issue with some of Defendants' arguments about the Georgia's control over SRTA. Dkt. No. [69] at 5–6, 7. Plaintiff reemphasizes that SRTA's secretary and treasurer need not be members. Id. at 5. Plaintiff reemphasizes that SRTA may hire and fire its own employees. Id.

Plaintiff also contests Defendants' argument that the Governor must approve SRTA's sale or lease of property because the provision Defendants cite for support, O.C.G.A. § 32-10-124(a)(10), deals with SRTA's operation of the Georgia Transportation Infrastructure Bank. The provision governing SRTA's powers generally, O.C.G.A. § 32-10-63, says nothing about who must approve sales and leases.

Plaintiff also criticizes Defendants' laundry-list of arguments about control. It says this list does not explain why SRTA is an arm of the state for purposes of constructing the Northwest Corridor project. Dkt. No. [69] at 9–10. One fact—that GDOT takes control of SRTA roads after SRTA pays of its bonds—Plaintiff argues cuts against Defendants' position. GDOT will only take control of the roads after SRTA has fully paid them off and when the project is deemed "to be in a safe and satisfactory condition of repair and traffic capacity." O.C.G.A. § 32-10-108. Plaintiff argues that this arrangement suggests that SRTA, not the State of Georgia, is responsible for the financing and repair of the roads. Dkt. No. [69] at 10.

The Court holds that this factor—state control over SRTA—weighs in favor of sovereign immunity. Most importantly, at least five of Georgia's seven members come from the state government. Georgia law names five people that must sit as members of SRTA: the Governor of Georgia, the Commissioner of Transportation, a Lieutenant Governor appointee, the Director of the Office of Planning and Budget, and one person appointed by the Speaker of the Georgia

House. O.C.G.A. § 32-10-62. These members receive no additional compensation for their SRTA duties, id., which suggests that SRTA membership is one aspect of their roles in the state government. While SRTA's membership must also include a secretary and treasurer, those members are elected by the state-government members. Id.; see Harris, 792 F. App'x at 715 (finding state control where "state law indicates that the University [of Alabama] is run by a board of trustees, whose members are elected with oversight by the state government"); Williams v. Dist. Bd. of Trustees, 421 F.3d 1190, 1194 (11th Cir. 2005) ("The governor appoints the members of the board of trustees of a community college, and the senate confirms the appointees. . . . There is no local control or governance of community colleges."); Lawyer, 821 S.E.2d at 31 ("[T]he State has significant control over the Ports Authority. . . . The Governor appoints all members of the Ports Authority board . . . and the director of the Office of Planning and Budget . . . sits on the board ex officio.").

Even if the two elected members do not come from Georgia's government, they still comprise only two of SRTA's seven members. And while SRTA may hire and fire additional employees, those employees serve at the pleasure of SRTA's members, at least five of whom (of seven total) come directly from Georgia's government. See Pelliteri, 776 F.3d at 780 (finding that sheriffs were arms of the State in part because "[t]he Georgia legislature has enacted laws giving sheriffs alone the power to hire their deputies, independent of any influence from county governments"); Ross v. Jefferson Cty. Dep't of Health, 701 F.3d 655, 660 (11th

Cir. 2012) (holding that a county health department was an arm of the state when making employment decisions because "the Health Officer, a state official, is the appointing authority who both hires and terminates employees") (citations omitted). No matter what latitude Georgia law affords SRTA in carrying out its purpose, that latitude must be viewed within the context of control by SRTA's membership—a membership derived mainly from Georgia's government.

Several other factors reinforce Georgia's control over SRTA: the requirement that SRTA obtain the approval the State Financing and Investment Commission before incurring debt; the requirement that SRTA obtain the Governor's approval before accepting federal loans and grants; SRTA's being subject to state audit at least once a year; the requirement that SRTA provide annual reports of its toll funds; and the Georgia Attorney General's serving as legal counsel to SRTA. See Lawyer, 821 S.E.2d at 31–32 (noting that the Attorney General served as counsel to the Ports Authority, that the State Financing and Investment Commission needed to approve the Authority's debt issuances, and that the Ports Authority was subject to state audit). In sum, this factor weighs in SRTA's favor.

The Eleventh Circuit's holding with respect to Florida's control of its water management districts supports this Court's holding. Lesinski, 739 F.3d at 603–04. The Eleventh Circuit found Florida's control of the South Florida Water Management District "pervasive and substantial": the District's governing board was appointed by the Governor of Florida and approved by Florida's Senate; the

Governor could remove any officer of the District; the Executive Director of a District needed to be approved by the Governor and confirmed by the Senate; the District's budget needed to be submitted to the state government and approved by the Governor; and the Florida governor and his cabinet, through the Florida Land and Water Adjudicatory Commission, had the power to review any order or rule of a water management district. Id. at 603.

SRTA's structure is similar and is in some respects more closely controlled by Georgia. While the Governor of Florida appointed the board of the water management districts, SRTA's board includes the Governor of Georgia and comes directly from the state government (apart from two elected members, which are chosen by the state-government members). The officers and executive of SRTA are also chosen by the state-government-dominated membership. And while SRTA's budget need not be approved by the state government directly, the state government substantially controls SRTA and effectively sets SRTA's budget regardless. "That [SRTA] maintains some degree of autonomy over its day-to-day operations does not change the fact that the State of [Georgia] ultimately retains near-total control over it." Id. at 604 (citing Fouche, 713 F.2d at 1521). Thus, the Eleventh Circuit's holding in Lesinski supports the Court's holding that Georgia controls SRTA.

3. Where SRTA derives its funds

Third, the Court examines where SRTA derives its funds. Georgia law provides some guidance. SRTA can borrow money for any of its corporate

purposes and issue negotiable revenue bonds payable from its projects. O.C.G.A. § 32-10-63(8)(A). Bonds issued by SRTA "shall be executed in the name of the authority by the chairperson and secretary of the authority." Id. § 32-10-93. But the bonds "shall not be deemed to constitute a debt of the State of Georgia or a pledge of the faith and credit of the state . . . ; and the issuance of [the] bonds shall not directly, indirectly, or contingently obligate the state to levy or to pledge any form of taxation [] or to make any appropriation for the payment thereof." Id. § 32-10-99. Even so, SRTA must obtain the approval of the State Financing and Investment Commission, which the Governor chairs, for "financial advisory matters relating to the issuance or incurrence of debt." O.C.G.A. § 50-17-22. And the books and records of SRTA "shall be inspected and audited by the state auditor at least once a year." O.C.G.A. § 32-10-62.

SRTA can also "collect tolls on each and every project which it, the department, or local governing authority shall cause to be constructed." Id. § 32-10-64. The tolls "shall not be subject to supervision or regulation by any other commission, board, bureau, or agency of the state." Id. § 32-10-65. SRTA may spend its revenue in excess of obligations to pay debt, fund projects, invest in securities, or fund GDOT projects. Id. § 32-10-72. But SRTA must submit an annual report to the Georgia House and Senate detailing its collected toll funds and describing how those funds have been used or disposed of. Id. § 32-10-65.2.

Plaintiff argues that SRTA is financially independent from Georgia. Dkt. No. [35] at 16. SRTA can borrow money for its corporate purposes and issue

negotiable revenue bonds payable from project revenues. Id. at 16–17 (citing O.C.G.A. §§ 32-10-63(8)(a); 32-10-90 to 32-10-110). Plaintiff stresses that these bonds do not bind or pledge the faith and credit of the State of Georgia, nor do they obligate the state to levy taxes to make payments. SRTA may collect tolls to manage its own projects. These tolls are not "subject to supervision or regulation by any other commission, board, bureau, or agency of the state." Id. at 17 (citing O.C.G.A. § 32-10-64). And Plaintiff notes that SRTA has latitude to spend revenues in excess of its obligations to fund its various activities. Id. at 17 (citing O.C.G.A. § 32-10-72).

Plaintiff also emphasizes that SRTA does not submit its budget for review and approval by the state, a factor that courts have sometimes found suggests financial dependence. Id. at 17–18 (citing Fouche, 713 F.2d at 1520; Harden v. Adams, 760 F.2d 1158, 1163 (11th Cir. 1985)). In fact, Plaintiff argues, SRTA must sometimes reimburse the State, like when GDOT fronts SRTA funds for a project study. O.C.G.A. § 32-10-67(a).

Defendants argue that Georgia provides extensive financial support to SRTA. Dkt. No. [42] at 9. They argue that SRTA's projects are funded "in large part" by federal-aid highway funds. Id. (citing O.C.G.A. §§ 32-2-2, 32-5-1(a), 32-10-60(6.1)(A)). And Defendants say that each year, Georgia's appropriations act includes payments to SRTA "to fund debt service payments and other finance instruments and for operations." Id. (citing Ga. Laws 2018, Vol 1, Appendix, p. 118, SFY 2018–2019 (appropriating $253,950,452 in total funds to SRTA)).

Defendants also contend that SRTA issues grant anticipation revenue vehicle bonds ("Garvee Bonds") to fund highway construction, which are retired with federal-aid highway reimbursement funds. Id. (citing Campbell v. State Rd. & Tollway Auth., 583 S.E.2d 32, 33–34 (Ga. 2003)). And Defendants contend that SRTA enters a joint resolution with GDOT to return any federal funds that it does not use to pay down debt or pay the costs of a reserve fund. Id. at 10 (citing Campbell, 583 S.E.2d at 32 (citing O.C.G.A. § 32-10-67(a))).

Defendants add that the State provides other financial support to SRTA. Id. That includes SRTA employees' participation in the State's retirement system, O.C.G.A. § 47-2-327(b), and SRTA's participation in the State's self-insurance program, O.C.G.A. § 50-2-12.

In its Sur-reply, Plaintiff contests several of Defendants' claims about the source of SRTA's funding. Dkt. No. [69] at 4 ("[T]he facts show that SRTA raises its own money and that its funds are separate from those of the State."). Plaintiff argues that Defendants have presented no evidence that SRTA's major capital projects, including the project at issue here, are funded through bonds paid from the State treasury with tax revenues. Id. This is important because the Court must determine whether SRTA is an arm of the state "in light of the particular function in which [SRTA] was engaged when taking the actions out of which liability is asserted to arise." Manders, 338 F.3d at 1308. Plaintiff also argues that SRTA employees' participation in the State's retirement program does not show that SRTA is subject to significant control by the State. Dkt. No. [69] at 6.

Plaintiff attacks Defendants' claim that SRTA's operations are funded in part through federal-aid highway funds. It reemphasizes that SRTA can raise its own funds through revenue bonds, loans, and tolls. Id. at 8. And it argues that SRTA's receipt of federal funds does not suggest that the Georgia funds SRTA. Id. Plaintiff adds that Defendants have not shown that federal highway funds supported SRTA's construction of the highway at issue here. Id. (citing Manders, 338 F.3d at 1308).

And last, Plaintiff attacks Defendants' argument that SRTA uses Garvee Bonds to fund its projects. Plaintiff emphasizes that Garvee Bonds do not obligate the State. Dkt. No. [69] at 9. In fact, Plaintiff argues, the Georgia Constitution prohibits agreements between the State and public authorities that would secure the authority's bonds or pledge the States full faith, credit, and taxing power to guarantee repayment of the bonds. Id. (citing Campbell, 276 Ga. at 716–17 (citing Ga. Const. art. VII, sec. IV, para. IV)).

At this stage, and without more information, the Court finds that this factor weighs against sovereign immunity. The Court does not have enough undisputed factual evidence at this stage to determine how SRTA would fund a project like the NWC Tollway. And the Court must focus on "the particular function at issue" when it asks who funds SRTA's operations. See Abusaid, 405 F.3d at 1310 ("We find nothing in Florida law to suggest that the state . . . funds 'the particular function in issue'—namely, enforcement of county ordinances.") (alteration adopted). As Plaintiff argues, Georgia law empowers SRTA to fund its operations

through revenue bonds and tolls. The revenue bonds do not bind the State, which suggests some degree of independence, as do the tolls, which SRTA collects in managing its own projects.

To be sure, Defendants point out that SRTA may also receive considerable sums from the State, including federal-aid highway funds, appropriations, and grants to redeem Garvee Bonds. But the Court cannot look too deeply into these claimed sources of funding at this stage because the Defendants have raised a facial challenge: the Court must accept the well-pleaded allegations of subject-matter jurisdiction in the Complaint. Defendants' claimed sources of funding for SRTA go deeper than Georgia's laws; they are factual contentions about how SRTA funds its projects in practice. These are not proper for the Court to consider until the facts have been more fully developed. Because Georgia law governing SRTA does not alone establish this factor, SRTA has not met its burden to show that this factor weighs in its favor. See Haven v. Bd. of Trustees, 625 F. App'x 929, 933 (11th Cir. 2015) ("As the governmental entity invoking the Eleventh Amendment, the Library 'bears the burden of demonstrating that it qualified as an arm of the state entitled to share in its immunity.'" (citing Woods v. Rondout Valley Cent. Sch. Dist. Bd. of Educ., 466 F.3d 232, 237 (2d Cir. 2006))).

4. Who is responsible for judgments against SRTA

Fourth, the Court examines Georgia law to determine who is responsible for judgments against SRTA. The Supreme Court has often emphasized the

importance of this factor. See Regents v. Doe, 519 U.S. at 430 ("Of course, the question whether a money judgment against a state instrumentality or official would be enforceable against the State is of considerable importance to any evaluation of the relationship between the State and the entity or individual being sued." (citing Hess v. Port Authority Trans-Hudson Corp., 513 U.S. 30, 45–51 (1994); Edelman v. Jordan, 415 U.S. 651, 663 (1974); Ford Motor Co. v. Dep't of Treasury, 323 U.S. 459 (1945))); see also Freyre v. Chronister, 910 F.3d 1371, 1384 (11th Cir. 2018) (calling this factor "the most important of the Manders calculus"). That said, "it 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, that is relevant." Regents v. Doe, 519 U.S. at 431 (emphasis added).

Plaintiff argues that SRTA, not the State of Georgia, would pay a judgment awarded against SRTA. Dkt. No. [35] at 18. Plaintiff reasons that this is so because SRTA's funds are separate from the general public funds of Georgia. Id. Defendants disagree and argue that judgments against SRTA significantly impact the State. Dkt. No. [42] at 10. They reason that the State is responsible for judgments against SRTA in tort actions. Id. at 10–11 (citing O.C.G.A. § 50-21-22(5), (6), (7)). They argue that Georgia's Tort Claims Fund is the only source for payment of tort judgments against SRTA. Id. at 11 (citing O.C.G.A. § 50-21-34(a)). When a judgment exceeds the threshold for payment from the Tort Claims Trust Fund, those judgments "are payable only when the General

Assembly next appropriates funding for it." Id. (citing O.C.G.A. § 50-21-34(d)). Defendants also emphasize that the State appropriates funds to support the self-insurance funds in which SRTA participates. Id. (citing O.C.G.A. § 50-5-16(b)). Defendants reason that judgments against SRTA impact the State treasury because the State's self-insurance funds spread risk among the entities that pay into those funds. Id. at 11.

Plaintiff disagrees with Defendants' argument that the State would pay for judgments against SRTA. Plaintiff argues that Defendants have not shown that SRTA participates in the Tort Claims Trust Fund or any state self-insurance program. Dkt. No. [69] at 10. Plaintiffs also argue that Georgia law does not allow the Tort Claims Trust Fund to satisfy a judgment in this case. Id. That is because the Tort Claims Trust Fund applies to judgments against entities under the Georgia Tort Claims Act, O.C.G.A. § 50-21-20. See O.C.G.A. § 50-21-34(a). That Act waives Georgia's sovereign immunity for certain torts and "only with respect to actions brought in the courts of the State of Georgia." O.C.G.A. § 20-21-23. But this case is a patent suit in federal court, so, Plaintiff reasons, the Tort Claims Trust Fund would not fund a judgment against SRTA here.

The Court finds that this factor—whether a judgment against SRTA would burden the State—weighs in favor of sovereign immunity. The parties have argued at length about who would pay a judgment against SRTA. But the relevant inquiry is not "whether an adverse judgment could in fact be satisfied against the state," but rather "whether liability would fall to the state." McCurdy v. Ala.

Disability Determination Serv., 753 F. App'x 784, 791 (11th Cir. 2018) (citing Regents v. Doe, 519 U.S. at 431; Manders, 338 F.3d at 1327).

The Eleventh Circuit clarified this distinction in Lesinski. There, the relator argued that the State of Florida would not "be liable for adverse judgments" because "he would look only to the [Water Management] District to satisfy any money judgment," and the District was "empowered to levy ad valorem taxes, issue bonds, buy land, and borrow money," though "the State of Florida provide[d] a significant, albeit fluctuating, portion of the District's funding[.]" Lesinksi, 739 F.3d at 604, 605. Also, the relator argued that the District maintained "a self-insurance fund," which "ensure[d] that only the District, and not the State of Florida, would be liable for adverse judgments." Id. at 605.

The Eleventh Circuit rejected the relator's argument because the relator mistakenly focused on "ultimate financial liability," instead of viewing "a State's legal liability for judgments against a state agency [] as an indicator of the relationship between the state and its Creation." Id. at 605 (citing Regents v. Doe, 519 U.S. at 430–31).

> Moreover, this argument digresses from the real funding issue: Should judgment creditors deplete the District's funds to the point that it can no longer effectively function, the State would ultimately have to choose between increasing its appropriation to make up the shortfall or shirking its constitutionally mandated duty to 'conserve and protect [the State's] natural resources and scenic beauty.' . . . Ultimately then, 'while a judgment is legally enforceable against the district . . . [t]he state's treasury is directly implicated.' . . . The fourth Manders factor therefore favors concluding that the District constitutes an arm of the State.

Id. at 605 (citations omitted). In other words, the State of Florida would have suffered the impact of judgments against the District because the District fulfilled one of Florida's critical governmental roles: conservation of the State's natural resources and scenic beauty. Any impairment to that function would ultimately impair the State of Florida.

The same is true here. Like Florida's water management districts, SRTA is partly self-funded. As the Court has discussed, SRTA has the power to issue negotiable revenue bonds and pay down those bonds with its revenues, and it can collect tolls, though the State of Georgia provides at least some funding to SRTA. But regardless of how SRTA is funded, SRTA performs an "essential government function"—road and tollway construction. See O.C.G.A. § 32-10-109 (declaring that "the authority is an institution of purely public charity and will be performing an essential governmental function in the exercise of the power conferred upon it by this article"). For this reason, the Governor may convey state property to SRTA for nominal consideration, "the benefits flowing to the state and its citizens constituting full and adequate actual consideration[.]" Id. § 32-10-69. And Georgia's Constitution includes several provisions that indicate the centrality of road and tollway construction to the Georgia's governmental role. See Ga. Const. art. I, § III, para. I(b) (authorizing just compensation for eminent domain takings "for public road or street purposes"); id. art. III, § VI, para. VI(g) ("The General Assembly may provide by law for a program of indemnification with respect to the death or permanent disability of any state highway employee

who is or at any time in the past was killed or permanently disabled in the line of duty."); id. art. III, § IX, para. VI(b) (providing for appropriations of sums "derived from motor fuel taxes received by the state . . . for all activities incident to providing and maintaining an adequate system of public roads and bridges in this state, as authorized by laws enacted by the General Assembly"); id. art. VII, § IV, para. I(c) (empowering the State to incur general obligation debt "to acquire, construct, develop, extend, enlarge, or improve land, waters, property, highways, buildings, structures, equipment, or facilities of the state"); id. art. VII, § IV, para. I(f)(1) (authorizing the State to incur guaranteed revenue debt "by guaranteeing the payment of revenue obligations issued by an instrumentality of the state if such revenue obligations are issued to finance . . . [t]oll bridges or toll roads").

In developing roads and tollways, SRTA performs an essential government function that Georgia would need to perform even if SRTA did not exist. This suggests that Georgia would appropriate funds to rescue SRTA from judgments that SRTA could not fulfill, just as Florida would rescue its water management districts. Liability against SRTA therefore implicates the treasury of the State of Georgia. As in Lesinksi, "[t]he fourth Manders factor therefore favors concluding that the District constitutes an arm of the State." Lesinksi, 739 F.3d at 605.

5. Balancing of Factors

In sum, the Court finds that the Manders factors weigh in favor of sovereign immunity. Georgia law defines SRTA as an arm of the state, and Georgia's government exercises substantial control over SRTA. While the Court

cannot yet determine how SRTA's road and tollway construction projects are funded, the State would bear the ultimate burden of a judgment against SRTA because SRTA performs an essential government function. SRTA is therefore an arm of the State and is protected by sovereign immunity. Defendants' Motion to Dismiss is **GRANTED** as to Defendant SRTA.

IV. CONCLUSION

Based upon the foregoing, Defendants GDOT and SRTA's Motion to Dismiss [31] is **GRANTED**. Defendant Georgia Department of Transportation and Defendant State Road and Tollway Authority are hereby **DISMISSED** from this case.

The Clerk is **DIRECTED** to lift the Court's Stay of Discovery [63]. Counsel are **DIRECTED** to conduct a telephone conference and prepare a proposed joint scheduling order for the Court's consideration. The Court is mindful that additional time for discovery may be needed given the current pandemic.

IT IS SO ORDERED this 31st day of March, 2020.

Leigh Martin May
United States District Judge