NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1484-20

DELAWARE RIVER JOINT TOLL BRIDGE COMMISSION, WADUD AHMAD, ESQ., individually and in his official capacity, PAM JANVEY, individually and in her official capacity, DANIEL H. GRACE, individually and in his official capacity, JOHN SIPTROTH, individually and in his official capacity, GARRETT LEONARD VAN VLIET, individually and in his official capacity, GEOFFREY S. STANLEY, individually and in his official capacity, LORI CIESLA, individually and in her official capacity, YUKI MOORE LAURENTI, individually and in her official capacity, MICHAEL B. LAVERY, individually and in his official capacity, and JOSEPH J. RESTA, individually and in his official capacity,

Plaintiffs-Respondents,

v.

GEORGE HARMS CONSTRUCTION CO., INC., and MICHAEL RAINVILLE,

Defendants-Appellants.

APPROVED FOR PUBLICATION
April 4, 2023
APPELLATE DIVISION

Argued January 25, 2023 – Decided April 4, 2023

Before Judges Currier, Enright and Bishop-Thompson.

On appeal from the Superior Court of New Jersey, Law Division, Mercer County, Docket No. L-2394-16.

Francis V. Cook argued the cause for appellants (Fox Rothschild LLP, attorneys; Francis V. Cook, of counsel and on the briefs; Corinne B. DeBerry and Ian C. Gillen, on the briefs).

Brian P. O'Neill argued the cause for respondents (Chiesa Shahinian & Giantomasi PC, attorneys; Brian P. O'Neill, John F. Casey and Chelsea P. Jasnoff, on the briefs).

Nathan Kilbert, Assistant General Counsel, (United Steelworkers) of the Pennsylvania bar, admitted pro hac vice, argued the cause for amicus curiae United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, and Allied Industrial and Service Workers International Union (David Tykulsker & Associates and Nathan Kilbert, attorneys; David Tykulsker, on the briefs).

The opinion of the court was delivered by

CURRIER, P.J.A.D.

Plaintiff Delaware River Joint Toll Bridge Commission (Commission) is a bi-state entity created by an interstate compact between the State of New Jersey and the Commonwealth of Pennsylvania and approved by the United States Congress. In this matter, arising out of a construction project to replace the Scudder Falls Bridge that connects the two states, we consider whether the

Commission was authorized to approve, use, and enforce a project labor agreement (PLA) as a mandatory requirement in its bid specifications. This mandate required all bidding contractors and subcontractors to enter into a PLA with certain named unions affiliated with the local building and construction trades councils, recognizing those unions as the sole and exclusive bargaining representatives of the bidder's project workforce.

After defendant George Harms Construction Co., Inc. (Harms) threatened to seek an injunction, the Commission filed a verified complaint seeking a declaratory judgment affirming its actions and the PLA. Harms answered the complaint and asserted multiple counterclaims. The court initially dismissed all but one of the counterclaims without prejudice but later dismissed all of the counterclaims with prejudice as well as the complaint.

Because we find the Commission did not have the authority to approve, use, and enforce a PLA and, therefore, failed to state a cause of action upon which relief may be granted, we affirm the order dismissing the Commission's complaint, albeit for different reasons than articulated by the trial court. In light of our conclusion regarding the Commission's actions, we reverse the order dismissing defendants' amended counterclaims and their motion for sanctions, and remand for a consideration of certain counterclaims.

I.

The Commission was created by an interstate compact in 1934-35 between New Jersey and Pennsylvania, which was incorporated in parallel legislation enacted by each state and then approved by Congress pursuant to the Compact Clause of the United States Constitution.[1] N.J.S.A. 32:8-1 to -30 (New Jersey); 36 Pa. Stat. and Cons. Stat. Ann. §§ 3401-17 (Pennsylvania); Act of Aug. 30, 1935, Pub. L. No. 74-411 § 9, 49 Stat. 1051, 1058-64, ch. 833 (1935) (Congress). The State Legislatures thereafter amended the original compact, and those amendments were subsequently approved by acts of Congress. See, e.g., Act of Aug. 4, 1947, Pub. L. No. 80-355, 61 Stat. 752, 752-56, ch. 480 (1947); Act of Mar. 31, 1952, Pub. L. No. 82-287, 66 Stat. 28, 28-32, ch. 124 (1952). The Commission was created to acquire, construct, maintain, rehabilitate, remove, and replace bridges over certain portions of the Delaware River. N.J.S.A. 32:8-11; 36 Pa. Stat. and Cons. Stat. Ann. § 3401.

The Commission's jurisdiction extends from the Philadelphia-Bucks County line to the New Jersey-New York state border, with the exceptions of the Burlington-Bristol Toll Bridge, the Turnpike Bridge, and the Dingman's Ferry Bridge.

---

[1] The Compact Clause states: "No State shall, without the consent of Congress, . . . enter into any Agreement or Compact with another State, or with a foreign Power . . . ." U.S. Const. art. I, § 10, cl. 3.

The Commission is governed by a board of ten commissioners, five from each state. New Jersey's members are nominated by the Governor and confirmed by the Senate for three-year terms. Pennsylvania's members are appointed by the Governor and serve at the Governor's pleasure. Each Governor has "a veto power . . . over any action of any commissioner from that state at any time within [ten] days . . . after receipt at the Governor's office of a certified copy of the minutes of the meeting at which such vote was taken." N.J.S.A. 32:8-3; 36 Pa. Stat. and Cons. Stat. Ann. § 3503, art. III.

In both states' implementing statutes, the respective Legislatures stated, "[n]otwithstanding the delegation of power to the commission, it is incumbent upon [New Jersey and Pennsylvania] to ensure that the commission carries out its duties in a manner which ensures prudent use of toll payer monies." N.J.S.A. 32:8-3.8(c); 36 Pa. Stat. and Cons. Stat. Ann. § 3401.11(3). Toll revenues are the Commission's sole source of financial support.

A.

In September 2000, the Commission identified the Scudder Falls Bridge as a "high priority for improvement." Therefore, it began the planning, permitting and design of a construction project to replace the bridge with an expanded, twin-span structure (the project). In 2010, the commissioners unanimously voted to use bridge tolls to fund the project. Although

Commission staff initially estimated the project's cost at $260 million, the figure was later revised to $327 million.

In 2013, Joseph Resta, the Commission's Executive Director, hired Keystone Research Center (Keystone) to study the feasibility of using a PLA for the project. Resta had previously used Keystone to evaluate a proposed PLA when he was the project executive for the Pennsylvania Convention Center expansion project.

In its January 2016 report to the Commission, Keystone concluded that a PLA was appropriate because it would guarantee a high-quality and diverse skilled workforce for the project, ensure regular and effective communication between labor and management, prohibit work stoppages and disruptions, ensure standardization and consistency, and promote efficiency and smooth project operation.

Resta also solicited a Labor Quantification Analysis and Report from Hill International (Hill) to "identify the skilled and unskilled labor that [would] be needed to construct the new Scudder Falls Bridge and related work on both sides of the Delaware River." Hill identified the Philadelphia Building and Construction Trades Council, the Mercer County Building and Construction Trades Council, and United Steel Workers (USW), Local 15024 as "[t]he labor organizations which [would] provide workers for the project."

In September 2016, the Commission sent out a notice advertising the bidding for the project. The notice informed potential bidders that the Commission was "contemplating the use of a [PLA] for this Contract," and "the terms, conditions, requirements and obligation of the Contractor under the PLA" would be issued via an addendum. Bids were due by November 22, 2016.[2]

The PLA, which covered all craft labor services for the project, was between the Commission and two local building and construction trades councils and their affiliated local unions: the Mercer-Burlington Counties and Vicinity Building Trades Council, AFL-CIO; and the Building and Construction Trades Council of Philadelphia and Vicinity, AFL-CIO. The PLA required the successful bidder's contractor and all subcontractors to hire their project workforce through the identified signatory local unions. However, contractors were also permitted to hire up to twenty-five percent of the project workforce from other unidentified unions or non-union laborers.

The PLA stated the Commission had resolved to enter into the agreement because "the timely and proper completion of the construction" was "necessary to control construction costs and institute tolling of the bridge." Those goals were dependent upon, in addition to other bases: (1) "an adequate supply of

[2] The bidding date was later extended.

consistently high quality skilled labor"; (2) a prohibition on work stoppages and other disruptions; and (3) the "standardization and consistency of work rules across all participating trades."

On November 10, 2016, the Commission issued Addendum No. 5 to the bid documents, advising it was using a PLA for the contract and attaching a copy of the agreement.

Harms is a heavy construction business associated with numerous major bridge and highway projects in New Jersey since 1960. Harms has a collective bargaining agreement with the USW naming it as the "sole bargaining representative" for its covered employees. Defendant Michael Rainville worked at Harms for many years and has been a USW member since 1989. He is also a bridge toll payer, and a Pennsylvania resident.

Several days after the issuance of Addendum No. 5, USW's counsel sent Resta a letter explaining that, although USW was not affiliated with the local building and construction trades councils, there was a "Harmony Agreement" existing "between the USW and AFL-CIO's Building and Construction Trades Department and its affiliates (BCTD) permitting workers represented by the BCTD and USW to work side by side on the same work projects." Therefore, counsel asked Resta to include USW in the PLA as a signatory union. The Commission did not reply to USW's letter.

According to John E. Shinn, Director of USW's District 4, the Harmony Agreement was "negotiated for the express purpose of allowing [USW and BCTD] to work side by side on projects," such as this one. He explained in a certification that, because Harms is a party to a collective bargaining agreement with USW, it could not bid on any project where USW was excluded from the PLA.

During this same time, Harms's counsel sent letters to the Commission advising that Harms was prevented from bidding on the project because it was a party to a collective bargaining agreement with USW, which was excluded from the PLA. Counsel referred to the Harmony Agreement, stating there was "a private agreement between USW and the Building and Construction Trades Department that specifically allow[ed] for USW to be included in PLAs like the one for this Project." Harms threatened to seek an injunction to prevent the project from moving forward with the PLA unless the Commission added USW as a signatory union to the PLA.

B.

On December 2, 2016, the Commission filed a single count verified complaint, alleging it would suffer irreparable financial harm if Harms was successful in obtaining an injunction based upon its "faulty premise, first, that the PLA being utilized by the . . . Commission in this matter is barred by New

Jersey law, and more fundamentally, that the . . . Commission is even subject to New Jersey law."

The complaint stated that the Commission was "governed by its Compact as approved by the United States Congress and that, unless there is complimentary, and identical, legislation in both States, which is incorporated into the Compact, and is further approved by the United States Congress, that no such laws apply to the Commission." The Commission further alleged its use of a PLA was "in no way restricted by federal law" and it was "entitled to a declaration that it may proceed to receive bids and award the contract in this matter, including the PLA." Therefore, the Commission sought an order: (1) declaring it was "entitled to proceed with receipt of bids and award of the contract to perform the reconstruction of the Scudder Falls Bridge, including the use of the [PLA] included within the specifications issued to bidders"; and (2) for costs of suit and any other relief the court deemed proper against Harms.

Thereafter, Harms filed an answer with affirmative defenses and a verified counterclaim against the Commission alleging violations of competitive bidding laws, 42 U.S.C. § 1983, the State Constitution, and preemption pursuant to the National Labor Relations Act, 29 U.S.C. §§ 151-169 (NLRA), and seeking a declaratory judgment enjoining the bid opening

and an award of compensatory and punitive damages and attorney's fees. Harms also filed an application for temporary restraints and a preliminary injunction to prevent the Commission from accepting and opening bids and awarding a contract for the project. On January 5, 2017, the court denied Harms's application for a preliminary injunction.

Five days later, the Commission opened the sole bid—from Trumbull Corporation (Trumbull) for $396 million. Harms's president and chief operating officer certified that, if permitted to bid, Harms would have submitted a bid for $325 million—$71 million less than the successful bid.

Because there was only one bid, the Commission hired two engineering firms, Hill and Michael Baker International, to evaluate whether to award the project to Trumbull or rebid the contract. The firms both recommended awarding the bid to Trumbull.

In September 2017, the court permitted Harms to amend its answer and counterclaim to add: claims for punitive and compensatory damages, and breach of fiduciary duty against the Commission; designate Rainville as a "[c]ounterclaimant"; and name the individual commissioners and Resta as "[c]ounterclaim [d]efendants."

In its counterclaim, defendants alleged that, by failing or refusing to include USW as a signatory union to the PLA, which precluded Harms from

bidding due to its preexisting union affiliation with USW, and then proceeding with the bid opening and award, which was higher than Harms would have bid, the counterclaim defendants: (1) violated the competitive bidding laws of New Jersey and Pennsylvania by transferring control over the bid specifications to the signatory unions (count I); (2) violated the NLRA by adopting a PLA that was preempted by federal law (count II); (3) violated 42 U.S.C. § 1983 by denying defendants' First Amendment Federal Constitutional rights to freedom of association and freedom from coerced association (count III); (4) violated 42 U.S.C. § 1983 by denying defendants' federal and state constitutional due process rights (count IV); (5) violated 42 U.S.C. § 1983 by denying defendants' federal constitutional equal protection rights (count V); (6) violated N.J.S.A. 10:6-2 by denying and interfering with defendants' federal and state constitutional rights and their rights in private employment to organize and bargain collectively (count VI); and (7) breached their fiduciary duty to the toll payers and users of the Scudder Falls Bridge, including Rainville, by defying N.J.S.A. 32:8-3.8 and 36 Pa. Stat. and Cons. Stat. Ann. § 3401.11 to "ensure prudent use of toll-payer moneys" in their "planning, construction, maintenance and rehabilitation of certain Delaware River crossings" (count VII). Defendants also alleged they were entitled to a declaratory judgment (count VIII) finding the Commission was bound by the

competitive bidding laws of New Jersey and Pennsylvania and that it implemented an unlawful PLA in violation of state constitutions, federal labor laws and the federal constitution.

Defendants sought: (1) compensatory damages for Harms's lost profits and costs to prepare a bid proposal and for Rainville's lost wages and benefits; (2) the increased cost of the bridge construction paid by Rainville; (3) an award of costs and attorney's fees; and (4) an award of punitive damages against Resta and the commissioners in their individual capacities.

Plaintiff and counterclaimants moved to dismiss the first amended counterclaim. On February 2, 2018, the court partially granted the motion and dismissed counts I-VI without prejudice. The court granted defendants leave to file a second amended answer and counterclaim.

During the discovery period, defendants moved to compel depositions and discovery of other evidence, including letters, papers, emails, and text messages. The Commission produced ordered documents, which the court examined in camera and ordered the disclosure of some of them. Defendants deposed Resta, three commissioners and several staff members.

C.

In October 2020, defendants moved for summary judgment on counterclaim counts VII and VIII, and for a dismissal of the Commission's

verified complaint. The Commission and counterclaimants cross-moved for summary judgment.

Defendants also moved for sanctions under the Frivolous Claims Act, N.J.S.A. 2A:15-59.1, and Rule 1:4-8. They contended the Commission filed its lawsuit against Harms "without first obtaining approval through a majority vote [of the commissioners, which] is not permitted under the Compact through which the Commission derives its power." They also asserted the commissioners had not voted on whether to exclude USW from the PLA.

On December 18, 2020, the court issued an oral opinion (1) granting the Commission's cross-motion for summary judgment and dismissing the remaining counterclaims; (2) denying Harms's motions for summary judgment and to reinstate counterclaims and for sanctions;[3] and (3) dismissing the Commission's complaint for declaratory judgment as moot. The court's decisions were memorialized in three separate orders on December 23, 2020.

In addressing the counterclaim that the Commission violated competitive bidding laws, the court noted the issue was subject to the laws construing interstate compacts. The court explained that "in order to be subject to

[3] Defendants only challenge the denial of their motion to reinstate as to three counterclaims—violation of competitive bidding laws, infringement of First Amendment rights, and breach of fiduciary duty. Therefore, we do not include the court's reasoning for the dismissal of the additional counterclaims.

particular law[s] of one or the other state, the two states have to pass . . . substantially similar legislation or the compact has to authorize unilateral legislation or the substantive law of the two states needs to be the same." The court noted that although New Jersey and Pennsylvania have similar public bidding laws, the laws as to PLAs are "not the same . . . so . . . there is not the complementary legislation." New Jersey has a statute controlling PLAs while Pennsylvania only has case law and no legislation. Therefore, the court found "there was no unanimity of Pennsylvania and New Jersey law on the topic of [PLAs]." The court concluded that "[t]o apply the New Jersey precedents here would essentially authorize unilateral legislation and that's not something that the [c]ourt can do. That's the choice of the Commission." The court held the Commission had the choice to use a PLA.

The court further stated:

> I've gone over all the reasons why [the PLA] was adopted by the Commission, the reports on which it was based, the concerns about delaying costs and so forth and simply Harms has not met its burden of proof to show that it was an abuse of discretion, unreasonable or invalid, because the Commission retained the discretion as an independent bi-state agency that is not subject to [PLA] law. And where the states are not in agreement on [PLAs] in terms of the law that governs them, the Commission retains the right to follow its own policies which other Courts in other contexts have approved despite there being a difference of opinion on [PLAs] agreements generally

> as an appropriate policy or not. The Commission had the authority to enact a [PLA].

In a supplemental oral decision issued on December 22, 2020, the court found the Commission's actions were "cloaked with a presumption of regularity" and "there's a heavy burden to show that the government action constitutes an abuse of the discretion that's vested in the governmental body."

Furthermore, because the Commission established a need for promptness and timely completion of the project, the court found the Commission did not abuse its discretion in its unanimous decisions to adopt the PLA and to award the project to the sole bidder. Citing Bldg. Indus. Elec. Contractors Ass'n v. New York, 678 F.3d 184, 191-92 (2d Cir. 2012), the court explained it looked at the "objective factors . . . on the face of the action and not the allegations about individual official[s'] motivations in adopting the policy or action." The court also noted Colfax Corp. v. Ill. State Toll Highway Auth., 79 F.3d. 631, 635 (7th Cir. 1996), that concluded a court should not go behind a PLA to determine if its adoption was based on an improper motive.

The court also addressed defendants' counterclaim that the PLA violated their First Amendment rights to freedom of association and speech. When the counterclaim was initially dismissed in 2018, the court found Harms chose to solely affiliate with USW and that there were no facts showing or alleging the Commission's "substantial interference or any . . . interference" with

Rainville's "ability to freely continue to associate with the [USW] and with Harms" or that he was "prevented from continuing to . . . be a member of the [USW]" or was "targeted by the Commission in any way."

In its 2020 decision, the court reiterated that the PLA did not impinge on the freedoms of association and speech because it did not require that all of a contractor's employees participate in a particular union with opposite beliefs to their own. The court stated the PLA "does not require an employee to join a union . . . [or] require the contractor to do anything more than to agree to abide by the signatory union collective bargaining terms for this project and this project only." The court noted the PLA permitted a contractor to hire, up to twenty-five percent of its labor force, workers who were not members of the trade council. Not every person working on the project had to become a member of the building trades affiliated union.

The third dismissed counterclaim defendants challenge is the Commission's breach of its fiduciary duty to the toll payers and users of the Scudder Falls Bridge, including Rainville.

In considering the counterclaim, the court stated it was "clear" that the commissioners "had an obligation to serve the public with the highest fidelity," however there was "nothing in the record in this case to show any corrupting influence on the determination to do a [PLA] with . . . the trades union."

Nevertheless, the court agreed that the Commission had a duty to vote to approve the initiation of this action and it was "of concern to the [c]ourt" that it had failed to do so. Even so, the court declared that it "went over the facts of this case so carefully" and found nothing to suggest "some untoward agreement between [the] former Governors," or any "claims of political c[]ronyism or favoritism," or "improper action or influence by the Commission," such as any commissioner's promotion of the PLA or other possible conflict of interest. Additionally, the court's "review of the depositions showed that [the Commission's employees] were public servants doing their jobs."

In its supplemental oral decision, the court explained that defendants' arguments were not persuasive. The court found the Commission's need for promptness and timely completion of the project were valid factors underlying its decisions to adopt the PLA and accept the sole bid. "[W]hile it may be difficult or distasteful for [defendants] to accept a [PLA], [that] does not mean that it's anticompetitive or discriminatory or unreasonable or . . . an abuse of discretion."

The court also considered defendants' assertion they were entitled to sanctions because the Commission filed its complaint without the

commissioners' required authorization and then attempted to cover up its actions.

In denying the motion, the court found the Commission's claims were not frivolous. Although the court was troubled that the Commission had filed its verified complaint before getting the proper authorization from the commissioners, it found the suit was not filed in bad faith, as there was no indication of malicious intent or wrongful purpose. The court determined the Commission's claims were founded on credible information that Harms was going to try and stop the construction and, therefore, the application was well-grounded in the established law. The court also relied on the concepts of ratification and the failure of the commissioners to repudiate the suit after they learned of the filing of the action.

II.

On appeal, defendants contend the court erred because the Commission and the PLA violated competitive bidding laws, the First Amendment's constitutional freedoms of speech and association, and the fiduciary duty owed to bridge toll payers. They further assert the court erred by thwarting their discovery attempts at deposing all the commissioners and by denying their motion for sanctions.

We granted USW leave to appear as amicus curiae. USW supports the use of PLAs, asserting the agreements ensure that construction projects are completed quickly and efficiently. However, amicus contends that whether a PLA is legally permissible for a public sector construction project turns on an application of the state's competitive bidding laws. Here, amicus argues, the Commission exceeded its authority by entering into a PLA only with the local building and construction trade councils and their affiliated local unions and, therefore, requiring all bidders to accept those unions as the "sole and exclusive bargaining representatives" of their project workforce.[4]

Our review of the compact under contract principles and the interpretation of the applicable New Jersey and Pennsylvania statutes is de novo. See Checchio v. Evermore Fitness, LLC, 471 N.J. Super. 1, 6 (App Div. 2022); Real v. Radir Wheels, Inc., 198 N.J. 511, 524 (2009). In addition, when analyzing pure questions of law raised in a dismissal motion, we undertake a de novo review. Smith v. Datla, 451 N.J. Super. 82, 88 (App. Div. 2017). A "trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference."

[4] Amicus only addresses the court's order dismissing with prejudice amended counterclaim count I, the violation of competitive bidding laws.

Manalapan Realty, LP v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

A.

The project was completed and the bridge opened for use during the course of the trial court litigation. Therefore, we consider whether the matter is moot.[5] See Advance Elec. Co. v. Montgomery Twp. Bd. of Educ., 351 N.J. Super. 160, 166 (App. Div. 2002) ("[A] court will not decide a case if the issues are hypothetical, a judgment cannot grant effective relief, or there is no concrete adversity of interest between the parties.").

As we stated in Advance Elec., we will rule on potentially moot matters "where they are of substantial importance and are capable of repetition while evading review." Ibid. There, we found that issues squarely implicating the public bidding process were matters "of great public interest," and "given the time it takes to hear and decide appeals [on bidding matters], it is likely that future appeals on the same issue would not be decided until the construction was completed." Id. at 167. Similarly, in In re Protest of Cont. Award for Project A1150-08, N.J. Exec. State House Comprehensive Renovation & Restoration, 466 N.J. Super. 244, 263 (App. Div. 2021), we dismissed a bid

[5] The Commission urged this court to refrain from considering the merits of this appeal as there was no contract to void, no work to enjoin, and no damages to award, thus rendering the matter moot.

protest as moot because it was too late to order rebidding or award the contract to another bidder. Nevertheless, we still addressed the issues because statutory interpretation in public bidding disputes is a matter "of sufficient public importance." Ibid.

Here, we have addressed the threshold issue of the viability of the PLA because of the importance of interstate compacts. It is highly likely the Commission or another bi-state entity involving New Jersey may use a PLA during the bidding process for one of its projects, making the issue one of grave public importance. In fact, in its supplemental brief, the Commission implies it could use a PLA in its next solicitation. Therefore, the Commission has not met its heavy burden of persuasion by making it "absolutely clear" that its actions will not reoccur. See Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 189 (2000) (quoting United States v. Concentrated Phosphate Exp. Ass'n, 393 U.S. 199, 203 (1968)) ("The 'heavy burden of persuading' the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness.").

B.

Following the receipt of the merits briefs, we inquired of the parties whether we had jurisdiction to hear the appeal. Since an interstate compact is sanctioned through congressional consent, we questioned whether the

construction of an interstate compact was a question of federal law. See Cuyler v. Adams, 449 U.S. 433, 438 (1981); Del. River Joint Toll Bridge Comm'n v. Colburn, 310 U.S. 419, 427 (1940). Both parties agreed the matter was properly before the New Jersey state court.

Clearly, the federal courts have jurisdiction to hear cases and appeals involving interstate compacts under 28 U.S.C. §§ 1331 and 1291. However, state courts have not been barred from construing compacts concerning bi-state agencies.

In Int'l Union of Operating Eng'rs, Local 68, AFL-CIO v. Del. River & Bay Auth. (Local 68), 147 N.J. 433 (1997), our Supreme Court stated that "[u]nless a case involves a dispute between two states or an express statutory prohibition against the exercise of jurisdiction by the courts of either state, those courts may construe compacts concerning bi-state agencies." Id. at 442. The Court explained:

> For years, . . . both federal and state courts have construed the terms of interstate compacts. At no time has the United States Supreme Court ruled that state courts do not have jurisdiction to construe . . . compacts. Implicitly recognizing the powers of state courts, the Court has written that it has the final say in compact-construction cases even when the matter concerns a question on which a state court has already spoken. On occasion, the Court has even remanded a compact-construction case to a state court for reconsideration.

[Id. at 441-42 (citations omitted).]

Although a state court has jurisdiction to consider disputes under a bi-state compact, the United States Supreme Court has the final say. Ballinger v. Del. River Port Auth., 172 N.J. 586, 593-94 (2002).

At issue in Local 68 was the bi-state compact between New Jersey and Delaware for the Delaware River Bay Authority (DRBA). 147 N.J. at 437. The compact specifically provided: "Judicial proceedings to review any . . . action of the authority . . . , may be brought in such court of each state, and pursuant to such law or rules thereof, as a similar proceeding with respect to any agency of such state might be brought." Id. at 443 (quoting N.J.S.A. 32:11E-1, art. XV).

Consequently, the Court found that "the [DRBA] Compact's plain language makes clear that the courts of New Jersey and Delaware have concurrent jurisdiction to review any action taken by the DRBA." Ibid. "Article XV vests the courts of New Jersey and Delaware with concurrent jurisdiction over the DRBA's labor disputes." Ibid. The Court explained: "When a state signs a compact, a court of that state may not construe the compact absent the Compact's recognition of that state's jurisdiction. Whether a creator state unilaterally may exercise jurisdiction over a bi-state agency depends, then, on the terms of the compact." Id. at 442-43 (citations omitted).

The Court stated that the compact itself determines whether the state courts could hear challenges to "action of the authority." Id. at 443 (quoting N.J.S.A. 32:11E-1, art. XV).

In contrast, the compact at issue here contains no similar provision to that within the DRBA compact. There is no language at all regarding jurisdiction over disputes.

This dispute concerns the Commission's authority and whether its creator states have expressly or implicitly granted it the powers to approve, use, and order the mandatory compliance with a PLA in its bidding specifications. Those are questions of federal law. We turn again to the compact to discern any basis for jurisdiction in state court.

The compact grants the Commission the powers, among other things, "[t]o sue and be sued" and "[t]o enter into contracts." N.J.S.A. 32:8-3(b) and (h); 36 Pa. Stat. and Cons. Stat. Ann. § 3401, art. II(b) and (h). N.J.S.A. 32:8-12 states:

> Upon its signature on behalf of the state of New Jersey and the commonwealth of Pennsylvania, this compact or agreement shall become binding and shall have the force and effect of a statute of the state of New Jersey, and the commission shall thereupon become vested with all the powers, rights, and privileges, and be subject to the duties and obligations contained therein, as though the same were specifically authorized and imposed by statute, and the state of New Jersey shall

> be bound by all of the obligations assumed by it under this compact or agreement. . . .
>
> The governor is hereby authorized to apply, on behalf of the state of New Jersey, to the congress of the United States for its consent and approval to this compact or agreement; but in the absence of such consent and approval, the commission shall have all of the powers which the state of New Jersey and the commonwealth of Pennsylvania may confer upon it without the consent and approval of congress.

This statute is parallel to 36 Pa. Stat. and Cons. Stat. Ann. § 3504 (stating "compact or agreement shall be and become binding and shall have the force and effect of a statute of the Commonwealth of Pennsylvania").

Since both states adopted the cited language and because state courts have jurisdiction to interpret their own statutes in suits brought before them, Magliochetti v. State by Comm'r of Transp., 276 N.J. Super. 361, 366 (Law Div. 1994), we are satisfied our state courts have jurisdiction to review and construe the Commission's compact and determine whether the Commission can approve, use, and enforce PLAs when they enter into contracts or issue bid specifications.

C.

We turn then to a consideration of whether the Commission had the authority under its compact to approve and use a PLA in its bidding process.

"A '[PLA]' is a form of prehire agreement with labor organizations under which a contractor agrees to use the members of specified labor organizations on a project in exchange for the member unions' guarantees of labor stability." George Constr. Co. v. N.J. Tpk. Auth., 137 N.J. 8, 13-14 (1994). "Such agreements serve important purposes in assuring efficient and economical administration of large construction projects." Id. at 14.

Approximately ten states, including New Jersey, have legislation or administrative or executive orders permitting PLAs; ten states expressly prohibit the agreements. Approximately fifteen states, including Pennsylvania, have no legislation or administrative or executive orders directly discussing PLAs; and sixteen states have legislation that is neutral toward PLAs, meaning that State entity bid specifications may not require nor prohibit "a bidder, offeror, contractor, or subcontractor from adhering to an agreement with one or more labor organizations in regard to that project." See, e.g., N.C. Gen. Stat. § 143-133.5(b)(1).

In 2009, Presidential Executive Order No. 13502 issued governing the use of PLAs for federal construction projects, stating: "[I]t is the policy of the Federal Government to encourage executive agencies to consider requiring the use of [PLAs] in connection with large-scale construction projects in order to promote economy and efficiency in Federal procurement." Exec. Order No.

13502, 3 C.F.R. 224-26 (2010). The 2009 order permitted a federal agency to use a PLA.

In February 2022, the federal policy changed. The 2009 order was revoked by Presidential Executive Order No. 14063, which stated: "[I]t is the policy of the Federal Government for agencies to use [PLAs] in connection with large-scale construction projects to promote economy and efficiency in Federal procurement." Exec. Order No. 14063, 87 Fed. Reg. 7363-66 (Feb. 9, 2022). The 2022 Order made the use of PLAs mandatory, providing:

> Project Labor Agreement Presumption. Subject to sections 5 and 6 of this order, in awarding any contract in connection with a large-scale construction project, or obligating funds pursuant to such a contract, agencies shall require every contractor or subcontractor engaged in construction on the project to agree, for that project, to negotiate or become a party to a [PLA] with one or more appropriate labor organizations.
>
> [Ibid.]

Sections 5 and 6 of the 2022 Order permit exceptions from the requirement to use a PLA, such as when the project is of short duration and lacking operation complexity or a project involving only one craft or trade. Nevertheless, Section 7 states:

> Nothing in this order precludes an agency from requiring the use of a [PLA] in circumstances not covered by this order, including projects where the total cost to the Federal Government is less than that

> for a large-scale construction project, or projects receiving any form of Federal financial assistance (including loans, loan guarantees, revolving funds, tax credits, tax credit bonds, and cooperative agreements). This order also does not require contractors or subcontractors to enter into a [PLA] with any particular labor organization.
>
> [Ibid.]

Prior to the Executive Orders, the United States Supreme Court held that the NLRA did not preempt a government entity from requiring a PLA for construction projects so long as the entity acted as a market participant. Bldg. & Constr. Trades Council of Metro. Dist. v. Associated Builders & Contractors of Mass./R.I., Inc., 507 U.S. 218, 232-33 (1993). The Court stated, "[i]n the absence of any express or implied indication by Congress that a State may not manage its own property when it pursues its purely proprietary interests, and where analogous private conduct would be permitted, this Court will not infer such a restriction." Id. at 231-32. The Court concluded that the state agency had acted as a private party because "[t]o the extent that a private purchaser may choose a contractor based upon that contractor's willingness to enter into a prehire agreement, a public entity as purchaser should be permitted to do the same." Id. at 231 (emphasis in original). The Court also emphasized that contractors "who do not normally enter such [prehire] agreements are faced with" the same choice as they would have with a private purchaser: "They may

alter their usual mode of operation to secure the business opportunity at hand, or seek business from purchasers whose perceived needs do not include a [PLA]." Ibid.

However, the case did not implicate an interstate compact. The Court has not addressed the legality of PLAs under state or federal competitive bidding laws.

In New Jersey, PLAs have, at times, been favored and at other times, disfavored.

In 1993, Harms was the lowest bidder on the New Jersey Turnpike Authority's (TPA) widening project of a portion of the Turnpike. George Harms, 137 N.J. at 14. Seven days after the opening of the bids, the TPA adopted a resolution requiring it to award a contract to the lowest bidder who had entered into a PLA with the Building and Construction Trades Council (BCTC) unions. Id. at 15. At the time, there was an ongoing conflict between a BCTC local and the USW to which Harms's employees belonged. Id. at 16. The policy would be applied retroactively to the project on which Harms was the lowest bidder. Ibid.

Within days, Governor Florio issued Executive Order No. 99, which required all State agencies to adopt PLAs with BCTC unions "whenever feasible and whenever such agreement[s] substantially advance[] the interests

of costs, efficiency, quality, safety, timeliness and the State's policy regarding minority- and women-owned businesses." Id. at 17 (alterations in original) (quoting 25 N.J.R. 4543 (Oct. 4, 1993)).

We reviewed Harms's appeal of the TPA resolution and found the PLA requirement was permissible under the NLRA. Ibid. The Court granted certification. Ibid. (citing 134 N.J. 560 (1993)). However, before the Court could rule, newly elected Governor Whitman superseded Executive Order No. 99 with Executive Order No. 11, which allowed PLAs on a project-by-project basis and did not require the use of any particular union. Ibid. Because the executive order was prospective, the appeal pending before the Court was not moot. Ibid.

In its 1994 decision, the Supreme Court invalidated the PLA, finding it violated the basic public policies underlying the state's competitive bidding requirements in the Local Public Contracts Law (LPCL), N.J.S.A. 40A:11-1 to -60 that "is analogous to the TPA bidding statute," which are to promote competition and combat corruption in public bidding. Id. at 42, 44. The Court concluded that "the effect of project-labor agreements is to lessen competition," id. at 44, explaining that "the standards of delegation set forth in our public-bidding laws," that is, fostering unfettered competition in public contracts, did not "yet embrace specifications for the type of project-labor

agreement in this case, which designated a sole source of construction services and the exclusive organization with which a construction contractor might enter an acceptable project-labor agreement." Ibid. Nevertheless, the Court noted that the "policy choice is close; the lessened competition may produce other aspects of efficiency." Ibid. But the Court cautioned: "Our function is not to make the policy choice; our function is to assess whether the TPA's choice is consistent with the existing State public-bidding policy to foster competition." Ibid. The Court concluded the PLA did not "encourage free, open and competitive bidding." Ibid. (quoting N.J.S.A. 40A:11-13).

The Court also considered a PLA in Tormee Constr., Inc. v. Mercer Cnty. Improvement Auth., 143 N.J. 143, 150-51 (1995) and again found it violative of New Jersey's competitive bidding laws. Id. at 150. The Court determined that the project for which a PLA was adopted lacked size and complexity, making the PLA too restrictive because only two unions could qualify. Id. at 147-48. The restriction of project labor to two organizations "binds too tightly to satisfy the statutory requirements for bidding on local public contracts." Id. at 148.

The Court also determined that the PLA conflicted with the policy underlying Whitman's Executive Order No. 11. Id. at 150. It explained that, even though the executive order was "not binding on local public contractors,"

it "represents state policy" and "[did] not contemplate the use of PLAs on routine construction projects." Ibid. Thus, the Court invalidated the PLA, stating:

> In reaching that result, we recognize that the Legislature is better suited than the judiciary to determine "the size, complexity and cost" of projects that justify recourse to a PLA. We also believe that the Legislature is better suited to accommodate the several interests of labor, management, and the public. Until such time as the Legislature acts, however, we are obligated to adjudicate such bid specifications case-by-case.
>
> [Id. at 150-51 (citations omitted).]

In July 2002, the Legislature did address the use of a PLA in the context of public works projects when it passed the Project Labor Agreement Act (PLA Act), N.J.S.A. 52:38-1 to -7. The Act promoted the positive attributes of a PLA, stating it gave "the State an effective means to advance the interests of efficiency, quality, and timeliness of suitable public works projects." N.J.S.A. 52:38-1(o).

Under the statute, a public entity may include a PLA in a public works project where the total cost of the project will equal or exceed $5 million dollars. N.J.S.A. 52:38-2.

The statute permits a public entity to include a PLA:

> if the public entity determines, taking into consideration the size, complexity and cost of the

> public works project, that, with respect to that project the [PLA] will meet the requirements of section 5 of this act, including promoting labor stability and advancing the interests of the public entity in cost, efficiency, skilled labor force, quality, safety and timeliness . . . . If the public entity determines that a [PLA] will meet those requirements with respect to a particular public works project, the public entity shall either: directly negotiate in good faith a [PLA] with one or more labor organizations; or condition the award of a contract to a construction manager upon a requirement that the construction manager negotiate in good faith a [PLA] with one or more labor organizations. . . . The decision by the public entity to require the inclusion of a [PLA] requirement shall not be deemed to unduly restrict competition if the public entity finds that the [PLA] is reasonably related to the satisfactory performance and completion of the public works project, and any bidder for the public works project refusing to agree to abide by the conditions of the [PLA] or the requirement to negotiate a [PLA] shall not be regarded as a responsible bidder.
>
> [N.J.S.A. 52:38-3.]

And N.J.S.A. 52:38-4 states in pertinent part:

> Any [PLA] negotiated pursuant to this act between the public entity or its representative or a construction manager and one or more labor organizations shall be binding on all contractors and subcontractors working on the public works project and may include provisions that permit contractors and subcontractors working on the public works project to retain a percentage of their current workforce, and provisions that the successful bidder and any subcontractor of the bidder need not be a party to a labor agreement with the labor organizations

> other than for the public works project covered by the [PLA].

In contrast, Pennsylvania has no legislative directive governing PLAs. Instead, PLAs have been governed exclusively by case law from the Pennsylvania Commonwealth Court.

Initially Pennsylvania courts favored the use of PLAs. In Sossong v. Shaler Area Sch. Dist., 945 A.2d 788, 791-94 (Pa. Commw. Ct. 2008), appeal denied, 967 A.2d 962 (Pa. 2009), the court rejected a challenge by nonunion contractors and upheld the school district's requirement that all bidders use a specified PLA, holding that the school district "was concerned about the prompt completion of the projects" and that the PLA provided that time was of the essence. Id. at 794. The court explained, "because the PLA requirement is related to the need for prompt completion of the projects, the School District did not abuse its discretion by requiring that the lowest responsible bidder enter into the PLA." Ibid.

In A. Pickett Constr., Inc. v. Luzerne Cnty. Convention Ctr. Auth., 738 A.2d 20-21, 23-24 (Pa. Commw. Ct. 1999), the court rejected a bid protest by mostly nonunion contractors, holding that the defendant had discretion under the competitive bidding laws to require the successful bidder of a construction contract to sign a PLA requiring it to employ a certain number of union workers from the Northeastern Pennsylvania Building and Construction Trades

Council. The court found that, not only was it "entirely within the discretion of the [the defendant] to consider and take steps to assure the timely completion of the Project," its required PLA did not mandate the total integration of local collective bargaining agreements, because it permitted the contractor to employ nonunion personnel comprising twenty to fifty percent of its project workforce. Id. at 24-25. The court, without further explanation, also found our Court's reasoning in Tormee and George Harms "unpersuasive." Id. at 26.

Ten years later, the Commonwealth Court struck down the lawfulness of PLAs, finding they violated the state's public competitive bidding laws. J.D. Eckman, Inc. v. Dep't of Transp., 202 A.3d 832, 835 (Pa. Commw. Ct. 2019); Allan Myers, LP v. Dep't of Transp., 202 A.3d 205, 216 (Pa. Commw. Ct. 2019).

In Allan Myers, a nonunion construction company petitioned for review of the Secretary of Transportation's order dismissing its protest to the PLA requirement in a bid solicitation for a Pennsylvania Department of Transportation (PennDOT) highway construction project. 202 A.3d at 207-09. The PLA required "all contractors to hire their workforce through the Local Unions, but United Steelworkers contractors are exempted from that requirement." Id. at 213. A report prepared by Keystone for PennDOT

recommended the use of the PLA, but the protestor challenged the report, alleging it did not use "objective data" and was "inherently biased." Id. at 209.

The court invalidated the PLA, holding that PennDOT had failed to establish that its project involved "extraordinary circumstances." Id. at 215. The court announced that "[t]he use of a PLA is permitted where the contracting agency can establish extraordinary circumstances, and PennDOT did not make that demonstration in this case." Ibid. The court found the project was "a long term road improvement, the first phase of which was completed a year ahead of schedule. Nor is there any evidence that there is a labor shortage in the greater Philadelphia area. . . . [And a]ll road improvements inconvenience motor vehicle operators." Ibid. Moreover, it found that the boilerplate phrases of "time is of the essence" and "nonunion contractors may bid" were inadequate to preserve the validity of the PLA, as were those cases that upheld PLAs simply due to that language or to the mere existence of critical construction deadlines. Ibid.

The court also found the PLA itself did not place nonunion contractors "on an equal footing" with union contractors. Id. at 214 (quoting Phila. Warehousing & Cold Storage v. Hallowell, 490 A.2d 955, 957 (Pa. Commw. Ct. 1985) (requiring "[b]idders for a public contract to be 'on an equal footing' and enjoy the same opportunity for open and fair competition")). The court

explained that "[u]nlike contractors affiliated with the Local Unions or United Steelworkers, a nonunion contractor that bids on the . . . [p]roject cannot use its own experienced workforce." Ibid. Instead, a nonunion contractor had to hire all craft labor personnel employed on the project through the local unions. Ibid. Thus, the court found the PLA violated the integrity of the competitive bidding process and frustrated the purpose of competitive bidding. Id. at 215-16.

The court followed this same reasoning later in 2019 in J.D. Eckman, 202 A.3d at 835. In that case, PennDOT issued a bid solicitation requiring all contractors to sign a PLA with the Building and Construction Council of Philadelphia and Vicinity, which represented local unions, but "if the successful bidder already has a collective bargaining agreement with United Steelworkers, that bidder was not subject to the hiring requirements under the PLA and [was] permitted to use its United Steelworkers workforce." Id. at 832-33. A nonunion contractor filed a bid protest, which the court granted, and subsequently ordered the cancellation of the solicitation with the PLA. Id. at 832, 835.

We glean from Allan Myers and J.D. Eckman that although PLAs are permissible in Pennsylvania, the Commonwealth Court will now scrutinize two factors: (1) the existence of "extraordinary circumstances" in the project; and

(2) whether the PLA treats union and nonunion contractors evenly. It further appears from those cases that the first requirement will require a factual analysis of the project and cannot be met with boilerplate declarations of project efficiency or disruption to the public, while the second requirement presents a legal analysis.

Having discussed New Jersey and Pennsylvania's treatment of PLAs, we also must consider the language of the compact in our review of the Commission's authority to mandate a PLA. The compact declares:

> The effectuation of its authorized purposes by the commission is and will be in all respects for the benefit of the people of [New Jersey and Pennsylvania], and for the increase of their commerce and prosperity, and . . . the commission will be performing essential governmental functions in effectuating said purposes . . . .
>
> [N.J.S.A. 32:8-9; 36 Pa. Stat. and Cons. Stat. Ann. § 3401, art. VIII.]

The compact grants the Commission the powers, among other things, "[t]o sue and be sued" and "[t]o enter into contracts." N.J.S.A. 32:8-3(b) and (h); 36 Pa. Stat. and Cons. Stat. Ann. § 3401, art. II(b) and (h). In addition, the Commission "may replace any one or more existing bridges across the Delaware River," according to the compact's Article X, and "[n]othing contained in any other of the provisions of this compact or agreement shall be deemed or construed to amend, modify or repeal any of the powers, rights or

duties conferred by, or limitations or restrictions expressed in, Article X . . . ." N.J.S.A. 32:8-3; 36 Pa. Stat. and Cons. Stat. Ann. § 3401, arts. II and X.

The compact further grants the Commission the power

> [t]o exercise all other powers, not inconsistent with the Constitutions of [New Jersey and Pennsylvania] or of the United States, which may be reasonably necessary or incidental to the effectuation of its authorized purposes or to the exercise of any of the powers granted to the commission by this agreement or any amendment thereof or supplement thereto . . . ; and generally to exercise, in connection with its property and affairs and in connection with property under its control, any and all powers which might be exercised by a natural person or a private corporation in connection with similar property and affairs.
>
> [N.J.S.A. 32:8-3(p); 36 Pa. Stat. and Cons. Stat. Ann. § 3401, art. II(p).]

In 1994 and 1996, the Legislatures of New Jersey and Pennsylvania, respectively, amended the Commission's compact by adding competitive public bidding requirements. New Jersey's amended statute read:

> c. Notwithstanding the delegation of power to the commission, it is incumbent upon the State of New Jersey and the Commonwealth of Pennsylvania to ensure that the commission carries out its duties in a manner which ensures prudent use of toll payer monies.
>
> d. Therefore, it is in the best interest of the public to supplement or limit the powers of the commission, as the case may be, to require the commission to competitively bid contracts in

> accordance with the public policies of the State of New Jersey and the Commonwealth of Pennsylvania.
>
> [N.J.S.A. 32:8-3.8.]

Two years later, Pennsylvania's Legislature passed identical legislation, only switching the names of the creator states to put the Commonwealth first. 36 Pa. Stat. and Cons. Stat. Ann. § 3401.11.

Both Legislatures also passed legislation providing:

> The Delaware River Joint Toll Bridge Commission, in the exercise of its authority to make and enter into contracts and agreements necessary or incidental to the performance of its duties and the execution of its powers, shall adopt standing operating rules and procedures requiring that, except as hereinafter provided, no contract on behalf of the commission shall be entered into for the doing of any work, or for the hiring of equipment or vehicles, where the sum to be expended exceeds $10,000 unless the commission shall first publicly advertise for bids therefor, and requiring that the commission award the contract to the lowest responsible bidder . . . .
>
> [N.J.S.A. 32:8-3.9(a); 36 Pa. Stat. and Cons. Stat. Ann. § 3401.12.]

D.

Against this extensive backdrop, we review the Commission's PLA in light of the two states' legislation, case law and the compact.

A bi-state agency created by an interstate compact is "not subject to the unilateral control" of either of the participating states. Hess v. Port Auth.

Trans-Hudson Corp., 513 U.S. 30, 42 (1994). Therefore, "a single state cannot dictate the policy of a bi-state agency." E. Paralyzed Veterans Ass'n, Inc. v. Camden, 111 N.J. 389, 407 (1988).

As we have discussed, both New Jersey and Pennsylvania have purposefully made the Commission subject to public bidding laws in their respective legislation amending the interstate compact, however the compact is silent on PLAs. Therefore, we look to the two states' treatment of PLAs, which is divergent, as discussed. New Jersey has the PLA Act, but Pennsylvania governs PLAs under case law emanating from the Commonwealth Court. The current Pennsylvania case law disfavors PLAs unless the project involves "extraordinary circumstances" and the PLA treats union and nonunion contractors evenly. Allan Myers, 202 A.3d at 214-16.

Under these circumstances, a split of authority has resulted in two corollary legal tests for reviewing whether a bi-state entity has been given additional duties or powers not within its interstate compact. One test, emanating out of the Third Circuit, has been rejected by both New Jersey and Pennsylvania courts.

The second test, found in case law from our Supreme Court and in Pennsylvania, is whether the bi-state agency may be subject to complementary or parallel state legislation or common law in the signatory states or,

alternatively, whether the agency impliedly consented to unilateral state regulation.

In E. Paralyzed Veterans, our Supreme Court declined to hold the Delaware River Port Authority (DRPA) subject to the New Jersey Uniform Construction Code. 111 N.J. at 398-99. The Court declared that a single state's law is only applicable to the DRPA when the compact itself explicitly recognizes that it is subject to single-state jurisdiction. Id. at 399. However, the Court noted that a bi-state agency may be "subject to complementary or parallel state legislation," which it defined as "substantially similar legislative acts." Id. at 400-01. It observed that if the states do not have "complementary" legislation then a court must make "additional findings" to determine whether the bi-state agency "impliedly consented" to unilateral state regulation. Id. at 402.

In Ballinger, the Court considered whether the DRPA was subject to New Jersey's Conscientious Employee Protection Act (CEPA), even though the DRPA's compact did not mention CEPA or expressly allow its application. 172 N.J. at 592-96. The Court stated that "the appropriate test to apply in deciding whether the law of one state may be applied to a bi-state agency is whether or not the laws of the two states, either common law or statutory law, are substantially similar." Id. at 599. The Court further added that "[i]n order

to be deemed substantially similar, the two laws at issue must 'evidence some showing of agreement.' In other words, the New Jersey and Pennsylvania Legislatures must 'have adopted a substantially similar policy' that is apparent in their respective statutes." Id. at 600 (quoting Loc. 68, 147 N.J. at 445, 447). "That principle applies even where the statutes at issue do not expressly refer to the bi-state agency." Id. at 594. The Court noted that "the common law can be applied to the extent it fills a void in the compact," but "the common law . . . , like the statutory law, must be substantially similar so that its application not be deemed a unilateral imposition." Id. at 597, 599. The Court remarked that "state courts in both New Jersey and Pennsylvania have recognized that complementary state legislation may be applied to DRPA and other bi-state agencies." Id. at 594.

Applying those principles, the Court found the terminated DRPA employee could not bring their action under CEPA, because CEPA was not "substantially similar" to the parallel Pennsylvania Whistleblower Law. Id. at 600-08.

Five months later, the Third Circuit in Int'l Union of Operating Eng'rs, Loc. 542 v. Del. River Joint Toll Bridge Comm'n (Loc. 542), 311 F.3d 273, 279-80, 279 n.5 (3d Cir. 2002), essentially disapproved Ballinger for the more stringent "express intent" test. The Third Circuit explained that principles of

federalism and state sovereignty require the amendment of an interstate compact to include an express intention before unilateral state legislation can be found to modify the powers of the created bi-state agency. Id. at 276-79, 281. The court stated that a court's "role in interpreting [a] [c]ompact is . . . to effectuate the clear intent of both sovereign states, not to rewrite their agreement or order relief inconsistent with its express terms." Id. at 27. Therefore, the court declared that a compact can be amended only when both states have "concurred in" the alteration and both State Legislatures must make an express statement to that effect. Id. at 279-81. The court found the Commission's compact was "unique" as it did not contain any language expressly authorizing the signatory states to amend it through legislation "concurred in" by the other. Id. at 281.

Our state courts have rejected the Third Circuit's theory and continue to apply the "complementary and parallel" test from Ballinger. Sullivan v. Port Auth. of N.Y. & N.J., 449 N.J. Super. 276, 285-87 (App. Div. 2017), certif. denied, 232 N.J. 282 (2018); Alpert v. Port Auth. of N.Y. & N.J., 442 N.J. Super. 146, 150-52 (Law Div. 2015). Pennsylvania's Commonwealth Court also follows the "substantially similar" test. See, e.g., Del. River Port Auth. v. Commonwealth, State Ethics Comm'n, 585 A.2d 587, 588-89, 588 n.5 (Pa. Commw. Ct. 1991) (finding New Jersey and Pennsylvania did not have

substantially similar ethics laws); Nardi v. Del. River Port Auth., 490 A.2d 949, 952 n.10 (Pa. Commw. Ct. 1985) (finding New Jersey and Pennsylvania did not have substantially similar disability compensation laws but identical legislation was not required).

Moreover, in Sullivan, 449 N.J. Super. at 285, the Appellate Division added that "[i]f the states do not have complementary legislation, the court must determine whether the bi-state agency impliedly consented to unilateral state regulation."

In 2019, we applied the Ballinger complementary and parallel, substantially similar test in considering whether a bi-state agency, The Port Authority of New York and New Jersey (PANYNJ), was subject to New Jersey arbitration law. Port Auth. of N.Y. & N.J. v. Port Auth. of N.Y. & N.J. Police Benevolent Ass'n, Inc., 459 N.J. Super. 278, 283-87 (App. Div. 2019). We concluded the PANYNJ was subject to New Jersey's Arbitration Act because that legislation was substantially similar to New York's arbitration law; that is, they contained the same types of procedural "mechanisms" and promoted the similar policy of encouraging alternative dispute resolution. Id. at 285-88.

We apply the Ballinger test here to determine whether the compact is subject to one state's regulation permitting the mandate of a PLA in a bid solicitation. The test is "whether or not the laws of the two states [as to

PLAs], either common law or statutory law, are substantially similar," Ballinger, 172 N.J. at 599, and if not, "whether the bi-state agency impliedly consented to unilateral state regulation," Sullivan, 449 N.J. Super. at 285. The answer is "no" to both inquiries.

It is clear from our discussion above that New Jersey and Pennsylvania do not have parallel or substantially similar legislation or case law. Although both New Jersey and Pennsylvania have similar public bidding laws, the laws as to PLAs are not the same so there is no complementary legislation. New Jersey has a statute controlling PLAs while Pennsylvania only has case law. And Pennsylvania's PLA case law is unpredictable as it now focuses on a court's discretionary determination of whether the project has extraordinary circumstances and whether the PLA treats everyone evenly. Therefore, there is no unanimity of Pennsylvania and New Jersey law regarding PLAs.

Nor is there evidence that the Commission impliedly consented to the unilateral state regulation of PLAs. Implied consent is found when either the bi-state entity voluntarily cooperates with the exercise of single-state jurisdiction or agrees to meet the requirements of that state's law. Loc. 68, 147 N.J. at 445. The Commission's October 31, 2016 meeting notes do not reflect the commissioners discussed the states' laws or the Commission's authority before they authorized Resta to enter into the mandatory PLA. The reports

from Keystone and Hill did not inform the commissioners of New Jersey's PLA legislation. Keystone's report only discussed Pennsylvania's PLA case law and a "handful of legal challenges to the use of PLAs in the public sector."

Therefore, under Ballinger and its progeny, we find the Commission did not have the power to create and authorize use of the mandatory PLA for its project because: (1) there is no express authority for unilateral action in the compact; (2) New Jersey and Pennsylvania have not enacted complementary or parallel legislation or case law and do not have similar common law on PLAs; and (3) the Commission has not consented to exercise of single-state jurisdiction.

In addition, we disagree with the trial court and the Commission that the absence of complementary legislation or unanimity of state law on the topic of PLAs allows the Commission to make its own choice whether it has the authority to approve, use, and enforce a mandatory PLA. The Commission derives its authority from its compact or the legislation and case law of its creator states. Without express authority in the compact, or substantially similar legislation or state law, a court cannot effectuate the clear intent of both states. Therefore, the trial court improperly rewrote the compact in enforcing the PLA.

E.

Our decision is also supported by the unambiguous legislation in New Jersey and Pennsylvania incorporating public bidding laws into the Commission's compact. "Interstate compacts are construed as contracts under the principles of contract law." Tarrant Reg'l Water Dist. v. Herrmann, 569 U.S. 614, 628 (2013) (citing Texas v. New Mexico, 482 U.S. 124, 128 (1987)).

In Del. River Joint Toll Bridge Comm'n v. Sec'y Pa. Dep't of Lab. & Indus., 985 F.3d 189, 195 (3d Cir. 2021), the Third Circuit reviewed the same compact at issue here by using contract law. There, the controversy between the Commission and the Secretary of Pennsylvania's Department of Labor and Industry began when the Commission built its Scudder Falls Administration Building on the Pennsylvania side of the river without applying for permits. Id. at 191-92. The construction was part of the same project here, and the Commission claimed it was "exempt from Pennsylvania's regulatory authority under the express terms of the Compact." Id. at 192. When the Department threatened the elevator subcontractor with sanctions, the Commission filed a complaint seeking injunctive relief and a declaration that the Department lacked any authority to enforce Pennsylvania's building code absent express language in the compact itself. Ibid. The Secretary argued that Pennsylvania

had reserved its regulatory power over property use matters as an exercise of its fundamental police powers. Ibid.

The district court sided with the Commission, finding that Pennsylvania had unambiguously ceded some of its sovereign authority. Id. at 194-95. The court pointed to the compact's express terms which, when it created the Commission, gave Pennsylvania no right to "'unilaterally interfere, direct, inspect, or regulate' the Commission's 'elevator operations.'" Id. at 192. The Third Circuit agreed. Id. at 196. Using the principles of contract law in a de novo review, the circuit court examined the compact's specific language and concluded that both states had delegated their relevant regulatory authority to the Commission and, therefore, had ceded their sovereign authority to enforce building safety regulations. Id. at 195-96.

As in any de novo review of a traditional contract, we begin "by examining the express terms of the Compact as the best indication of the intent of the parties [or states]." Tarrant, 569 U.S. at 628. In the event of an ambiguity, the court "turn[s] to other interpretive tools to shed light on the intent of the Compact's drafters." Id. at 631 (citing Oklahoma v. New Mexico, 501 U.S. 221, 235 n.5 (1991)).

Here, there is no ambiguity. The compact states in N.J.S.A. 32:8-3.9(a) and 36 Pa. Stat. and Cons. Stat. Ann. § 3401.12 that the Commission shall

enter no contract "for the doing of any work, . . . where the sum to be expended exceeds $10,000 unless the commission shall first publicly advertise for bids. . . [and] award the contract to the lowest responsible bidder . . . ." Indeed, both New Jersey and Pennsylvania have a strong policy favoring open competitive bidding of public contracts. See e.g., the LPCL; the CPC; the State Procurement Law, N.J.S.A. 52:34-6 to -27. The compact further states in N.J.S.A. 32:8-3.8(d) and 36 Pa. Stat. and Cons. Stat. Ann. § 3401.11(4) that "it is in the best interest of the public . . . to require the commission to competitively bid contracts in accordance with the public policies of [New Jersey and Pennsylvania]." It also grants the Commission power "[t]o exercise all other powers, . . . which may be reasonably necessary or incidental to the effectuation of its authorized purposes . . . ." N.J.S.A. 32:8-3(p); 36 Pa. Stat. and Cons. Stat. Ann. § 3401, art. II(p).

The Commission urges us to focus on whether PLAs are "reasonably necessary or incidental" to the Commission's requirement to competitively bid contracts in accordance with the two states' public policies. However, for reasons already stated, we cannot do so.

Because New Jersey has legislation governing PLAs and Pennsylvania only has everchanging case law from its Commonwealth Court and no

authority from its Supreme Court, there is "no unanimity" regarding the Commission's authority to approve and use a PLA.

In addition, there are significant distinctions in determining what is public policy in each state party to the Commission's compact.

In Pierce v. Ortho Pharm. Corp., 84 N.J. 58, 72 (1980), our Supreme Court stated: "The sources of public policy include legislation; administrative rules, regulations or decisions; and judicial decisions." See also Barila v. Bd. of Educ. of Cliffside Park, 241 N.J. 595, 613 (2020) (alteration in original) ("In contrast to mandatorily negotiable terms and conditions of employment, '[m]atters of public policy are properly decided, not by negotiation and arbitration, but by the political process.'") (quoting In re Loc. 195, 88 N.J. 393, 402 (1982)). Thus, the public policy in New Jersey has been codified in the PLA Act.

In significant contrast, the Pennsylvania Supreme Court stated in Weaver v. Harpster, 975 A.2d 555, 563 (Pa. 2009) (citing Mamlin v. Genoe, 17 A.2d 407, 409 (Pa. 1941)), that "[i]n our judicial system, the power of the courts to declare pronouncements of public policy is sharply restricted. Rather, it is for the legislature to formulate the public policies of the Commonwealth." In fact, in Mamlin, 17 A.2d at 409, which has been

positively cited in Pennsylvania state and federal courts as recently as 2022, the court stated:

> In our judicial system the power of courts to formulate pronouncements of public policy is sharply restricted; otherwise they would become judicial legislatures rather than instrumentalities for the interpretation of law. . . .
>
> The right of a court to declare what is or is not in accord with public policy does not extend to specific economic or social problems which are controversial in nature and capable of solution only as the result of a study of various factors and conditions. It is only when a given policy is so obviously for or against the public health, safety, morals or welfare that there is a virtual unanimity of opinion in regard to it, that a court may constitute itself the voice of the community in so declaring. There must be a positive, well-defined, universal public sentiment, deeply integrated in the customs and beliefs of the people and in their conviction of what is just and right and in the interests of the public weal.

Consequently, the Commission cannot rely on the case law in Pennsylvania as validating its approval and use of PLAs during its competitive bidding process, since the compact requires it to competitively bid contracts in accordance with each state's public policy and the Pennsylvania courts cannot formulate the Commonwealth's public policy. Weaver, 975 A.2d at 563. And the Pennsylvania Legislature is silent on the issue.

Since the Commission's actions approving and using the PLA were not justified under the applicable reviewing test, or pursuant to the bidding

requirements in the compact itself, we find as a matter of law that the Commission's actions creating and using the PLA were ultra vires as against its interstate compact. "'Ultra vires' acts are acts that are 'void and may not be ratified.'" In re Adoption of N.J.A.C. 17:2-3.8 & 17:2-3.13, 458 N.J. Super. 326, 343 (App. Div. 2019) (quoting Port Liberte II Condo. Ass'n v. New Liberty Residential Urb. Renewal Co., LLC, 435 N.J. Super. 51, 65 (App. Div. 2014)).

To be clear, we do not condemn the use of PLAs. Our Legislature has approved their use, citing their beneficial qualities in the PLA Act. But the Commission is not subject to the unilateral laws of New Jersey. And Pennsylvania has no statutory authority for PLAs and the case law is variable. Therefore, under these circumstances, there was no authority for the Commission to mandate a PLA.

Furthermore, the only public policy articulated in the PLA was the promotion of competitive bidding. The Commission was required to competitively bid contracts. The Commission's use of a PLA resulted in one bidder—with a bid of $69 million over the estimated price for the project.

Although that is not our basis for invalidating the PLA, if the compact is amended in the future or there is proper authority tendered to the Commission to utilize a PLA, the Commission must be mindful that its "authorized

purpose" is "to benefit the people" of New Jersey and Pennsylvania. N.J.S.A. 32:8-9; 36 Pa. Stat. and Cons. Stat. Ann. § 3401, art. VIII.

Because we find the Commission's actions were ultra vires, we affirm, albeit for different reasons, the court's dismissal of plaintiff's complaint. The Commission did not have the power to approve, use, and enforce a PLA and, therefore, it failed to state a cause of action in its verified complaint upon which relief may be granted. R. 4:6-2(e).

III.

We turn then to the court's grant of summary judgment to plaintiff and the order dismissing defendants' counterclaims. Our review of a ruling on summary judgment is de novo, applying the same legal standard as the trial court. Green v. Monmouth Univ., 237 N.J. 516, 529 (2019). We review issues of law de novo and accord no deference to the trial judge's conclusions on issues of law. Nicholas v. Mynster, 213 N.J. 463, 478 (2013).

A.

In light of our conclusion that the Commission's actions in implementing and enforcing a PLA were ultra vires, we must reverse the court's orders dismissing with prejudice the two amended counterclaim counts seeking monetary damages (compensatory and punitive). This includes the constitutional First Amendment claims alleging the Commission and the PLA

violated the freedoms of association and speech. On remand, the court must consider whether the ultra vires actions were unconstitutional and, if so, whether defendants sustained provable damages.

We also reverse the order dismissing the breach of fiduciary duty counterclaim. On remand, the court must consider whether the ultra vires actions breached any fiduciary duty, and whether defendants incurred damages.

B.

We turn to the order denying defendants' motion for sanctions. Defendants contend sanctions are warranted under Rule 1:4-8(a) and N.J.S.A. 2A:15-59.1(a)(1) because the Commission filed its complaint without the required authorization from the commissioners and then "rogue actors" tried to cover up its actions.

In light of our decision that the Commission's actions were ultra vires, we vacate the order denying sanctions and remand for a reconsideration of defendants' arguments. We do not opine on the merits of the reconsideration.

C.

We next address defendants' arguments regarding certain discovery orders.

We review trial court orders concerning discovery using an abuse of discretion standard. Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 371 (2011). We will "generally defer[ ] to a trial court's disposition of discovery matters unless the court has abused its discretion or its determination is based on a mistaken understanding of the applicable law." C.A. ex rel. Applegrad v. Bentolila, 219 N.J. 449, 459 (2014) (quoting Pomerantz, 207 N.J. at 371).

Our review of the discovery orders at issue reveals no error of discretion. To the contrary, the court painstakingly examined records and gave detailed analyses of its determinations. We discern no basis to overturn those decisions. To the extent we have not commented on them specifically, all other points defendants raise on appeal lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed in part, reversed in part, vacated in part, and remanded for further proceedings in accordance with this opinion. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.

CLERK OF THE APPELLATE DIVISION