*Date of mailing: July 26, 2022

STATE OF NEW JERSEY
MOTOR VEHICLE COMMISSION
CASE FILE #: EXXXX XXXXX 09574

IN THE MATTER OF	**:**	**FINAL ADMINISTRATIVE DECISION AND ORDER OF SUSPENSION**
RICHARD B. EPSTEIN	**:**	**(Hearing on the papers)**
		SUSPENSION TERM: 730 DAYS
		EFFECTIVE DATE: 08/20/22

This is the Motor Vehicle Commission's (Commission) Final Administrative Decision in the matter of Richard B. Epstein (Epstein).

This matter arises out of an Interstate Driver License Compact (N.J.S.A. 39:5D-1 to 5D-14) state notification sent by the New York Department of Motor Vehicles to the Commission, reporting that Epstein was arrested on October 29, 2017, and convicted on February 8, 2019, of driving while ability impaired (NYDWAI). Epstein does not dispute this conviction. A copy of the Out-of-State Conviction report is attached hereto as Exhibit P-1 (reporting conviction under AAMVA "ACD CODE: A25"; which signifies "driving while impaired"[1]).

Pursuant to the Interstate Driver License Compact (N.J.S.A. 39:5D-4), the Commission issued a Scheduled Suspension Notice informing Epstein that his New Jersey driving privilege was subject to suspension for a period of 730 days (this was Epstein's second alcohol-related driving offense) pursuant to N.J.S.A. 39:4-50, N.J.S.A. 39:5-30, N.J.S.A. 39:5D-4, and N.J.A.C. 13:19-11.1 to -11.2. A copy of the Scheduled

[1] "ACD" is the AAMVA (American Association of Motor Vehicle Administrators) Code Dictionary which states use to translate traffic offense convictions and withdrawals into a uniform format, for transmitting under the National Driver Register/Problem Driver Pointer System (NDR/PDPS) and also the Commercial Driver License Information System (CDLIS). See generally, 49 U.S.C.S. §30304; 23 C.F.R. Ch. III, Pt. 1327 and App. A.

Suspension Notice is attached hereto as Exhibit P-2.

In response to the Scheduled Suspension Notice, Epstein (through his attorney Nathan J. Mammarella, Esq.) requested a hearing, arguing that "[t]his [New York] conviction is not equivalent to a New Jersey Driving While Intoxicated." His attorney further indicated that "Epstein is contending that the New York charge was based solely on a .07% BAC and not on general principles of observational intoxication." Epstein also argues that there was a "delay between the New York conviction and the suspension action taken by the New Jersey Motor Vehicle Commission," which violates his due process rights. A copy of Epstein's May 17, 2019, hearing request letter is attached hereto as Exhibit R-1.

The Commission issued a letter to Epstein acknowledging the hearing request, further advising Epstein that he was being afforded an opportunity for a hearing on the papers, and that it was his burden to demonstrate, "by clear and convincing evidence, that the State of New York conviction was based **exclusively** upon a violation of a proscribed blood alcohol concentration (BAC) of less than .08%." The Commission further stated that this was not "an opportunity to re-litigate [the New York] matter or to collaterally attack the New York court conviction in this administrative forum." The Commission also instructed Epstein to "provide a notarized affidavit setting forth all facts in support of [his] position and provide copies of any supporting documents or other evidence (including, but not limited to, the official plea transcript from the State of New York proceeding and/or official court order signed by the New York judge indicating specific findings made in connection with [his] conviction)." A copy of the Commission's May 28, 2019, letter is attached hereto as Exhibit P-3.

Epstein responded with a letter reiterating the arguments contained in the May 17, 2019, letter, including a signed "Certification of Richard Epstein," wherein Epstein states

that he "plead guilty to Driving While Impaired in the Wawarsing Municipal Court, New York." He further states that "[b]efore entering my plea of guilty, I was informed by counsel that the factual basis behind my plea would be limited to admitting a Blood Alcohol Content being between a .05% and a .07% BAC. I entered into this plea arrangement assuming the same." He argues "at no point was any factual basis taken indicating that there was any other evidence of impairment." Epstein also provided a "Transcript of Proceedings" from Wawarsing Town Municipal Court (New York), heard on February 8, 2019, wherein the Honorable Wayne D. Lonstein, J.M.C., accepts the State of New York and Epstein's brokered guilty plea of "a DWAI in full satisfaction, a reduction on those charges," ultimately resulting in a 90-day driving suspension applicable in the State of New York plus associated fines/costs. A copy of Epstein's June 21, 2019 letter, Certification, and court transcript are attached hereto collectively as Exhibit R-2.

Epstein pled guilty to a violation of N.Y. Veh. & Traf. Law §1192(1) (NYDWAI) on February 8, 2019. The court transcript that Epstein submitted does not indicate any specific court findings or his admission as to a BAC at all, much less a BAC of less than .08% forming the exclusive basis of his conviction.[2]

Based on the documentary exhibits in the record, I find the following:

1. On February 8, 2019, Epstein plead guilty and was convicted of a violation of N.Y. Veh. & Traf. Law §1192(1) ("NYDWAI"), arising from an incident which occurred on October 29, 2017.
2. There are no official documents submitted for this conviction by Epstein which

[2] Noting that it was because Epstein had raised the issue of his BAC level in his hearing request and included statements that the New York conviction was based on a BAC of less than 0.08%, that the Commission had afforded Epstein this opportunity to come forward with evidentiary proof to try to support such potential argument concerning an exclusive basis for his NYDWAI conviction as this is set out in the New Jersey DWI statute.

reflect a BAC whatsoever, or any findings showing that the New York conviction was based exclusively upon a violation of a proscribed BAC of less than .08%.[3] Nowhere in the entirety of the plea colloquy set forth in the Transcript of the New York court's plea proceeding – in which the plea to the New York DWAI, N.Y. Veh. & Traf. Law §1192(1), statutory offense was entered – was Epstein's BAC level mentioned at all.

3. The New York DWAI statute, N.Y. Veh. & Traf. Law §1192(1), is not a per se offense as constructed and enacted by the New York legislature.
4. The subject NYDWAI conviction is Epstein's second alcohol/drug-related driving offense, and it was committed within ten years of his first alcohol/drug-related driving offense.
5. Epstein was previously convicted of DWI under N.J.S.A. 39:4-50, arising from an incident which occurred on February 2, 2008, in Cedar Grove, New Jersey.

Analysis

There is no dispute that Epstein plead guilty and was convicted of NYDWAI. Thus, the sole issue to be determined here is whether Epstein has met his burden to prove, with clear and convincing evidence, that his New York conviction was for an offense "based

[3] Typically, in these types of New York cases, there would be documents supporting the original charges. Such documents would include the law enforcement officer's indications of the various indicia supporting the arrest, which may include admissions, the officer's observations, the results of field testing, and the results of chemical tests, if any. As the Commission has seen in numerous other NYDWAI cases it has reviewed, the document typically used by New York is a "DWI Bill of Particulars and Supporting Deposition," which the officer uses to record information regarding the basis for the charges, including the observations of the driver, performance of field tests, driver admissions, chemical test information, and other evidence. Epstein is in the best position to have such official documentation. New York law requires that the supporting deposition and Bill of Particulars prepared by the state in support of the charges be made available to the defendant upon request, if not already provided to the defendant. NY CPL §100.25 and 200.95.

exclusively upon a violation of a proscribed BAC of less than .08%." In re: Maxine Basch, (unreported) (App. Div. 2013), Dkt. No. A-6009-11T1, 2013 N.J. Super. Unpub. LEXIS 1764 at 1, 6-7, and N.J.S.A. 39:4-50(a)(3). In the absence of such proof, Epstein is subject to the mandatory minimum 730-day suspension of his New Jersey driving privileges, pursuant to N.J.S.A. 39:4-50[4], New Jersey's driving while intoxicated (DWI) statute and N.J.A.C. 13:19-11.1 et seq. As noted above, this is Epstein's second alcohol-related driving offense. The first offense was committed in New Jersey on February 2, 2008, for which Epstein was subsequently convicted on March 12, 2008[5], in Cedar Grove Township municipal court.

Despite the requirement noted in the Commission's response to Epstein's hearing request that Epstein demonstrate, "by clear and convincing evidence, that the State of New York conviction was based **exclusively** upon a violation of a proscribed blood alcohol concentration of less than .08%," Epstein failed to submit any proof whatsoever regarding a BAC. Specifically, Epstein did not submit proof in the official record/plea transcript showing that his NYDWAI conviction by guilty plea was based exclusively on a BAC of less than .08%. The plea colloquy does not mention a BAC finding or admission

[4] The version of N.J.S.A. 39:4-50 that was in effect on the date of the offense, October 29, 2017.

[5] While it is not necessary for the analysis of this matter since it is the fact of conviction, with its corresponding offense date, rather than the specific conviction date for the prior offense, which is the material data entry for purposes of this Compact administrative suspension action, it is noted that it is the New Jersey court's Automated Traffic System (ATS) electronic database which provides the conviction date. By means of an ATS transmission, the court electronically reports to the Commission the particulars of the conviction. Here, the prior N.J.S.A. 39:4-50 (DWI) court conviction arising from the February 2, 2008, incident was reported by the New Jersey court and posted by the Commission to Epstein's Certified Abstract of Driver History Record; see State v. Luzhak, 445 N.J. Super. 241, 248-49 (App. Div. 2016) (in which the court reaffirms the propriety of the abstract's admission as a business record pursuant to N.J.R.E. 803(c)(6) and (8), citing State v. Zalta, 217 N.J. Super. 209, 214 (App. Div. 1987) and State v. Pitcher, 379 N.J. Super. 308, 319 (App. Div. 2005), certif. denied, 186 N.J. 242 (2006)).

to a BAC amount at all; instead, it contains Epstein's acceptance of the NYDWAI, §1192(1) statutory offense – which offense in its elements provides that there was impairment of the ability to drive. Indeed, the simple fact that Epstein was convicted in New York of driving while ability impaired and not driving while intoxicated does not demonstrate, by clear and convincing evidence, that the New York conviction for driving while ability impaired was based exclusively upon a violation of a proscribed BAC of less than .08%. The impairment of driving ability can be shown by observational evidence alone or in combination with a BAC level that was below .08%.

Because the New Jersey legislature specifically provided in the New Jersey DWI statute, N.J.S.A. 39:4-50(a)(3), that it is the driver's burden to show that the conviction was "based exclusively" on the BAC level below .08%, explicitly stating "unless the defendant [driver] can demonstrate [that exclusive basis]"-- it cannot suffice for Epstein here in this New Jersey administrative action to argue that there had been an insufficient factual basis for his plea in New York where there was acceptance by Epstein of a conviction under the §1192(1) New York statute's elements—which specifically includes the impairment element. Any argument concerning an alleged inadequate factual basis should have been raised by Epstein in the New York appellate court forum, to seek to vacate the plea that was officially accepted and entered. The New Jersey DWI statute does not set the burden on the State of New Jersey in this Compact-reported administrative action to make a showing with respect to the factual basis for the plea. That there is the "impairment of driving ability" element in the particular statutory provision Epstein explicitly accepted on the record and there is an absence of any specific BAC level admitted or acknowledged as the basis for that impairment means Epstein cannot meet the "clear and convincing evidence" standard required under this burden.

The controlling New Jersey case law has well established that the Commission has

the authority to suspend a New Jersey licensee's driving privilege for an out-of-state conviction, pursuant to N.J.S.A. 39:5D-4, and that N.Y. Veh. & Traf. Law §1192(1) is substantially similar to N.J.S.A. 39:4-50. State v. Zeikel, 423 N.J. Super. 34, 44-49 (App. Div. 2011); New Jersey Div. of Motor Veh. v. Lawrence, 194 N.J. Super. 1, 2-3 (App. Div. 1983). See Mize v. NJMVC, (unreported) (App. Div. 2018), Dkt. No. A-0781-17T1, 2018 N.J. Super. Unpub. LEXIS 2542; Markowiec v. NJMVC, (unreported) (App. Div. 2018), Dkt. No. A-2492-15T1, 2018 N.J. Super. Unpub. LEXIS 257 (the driver's argument based on there being no BAC evidence for his NYDWAI conviction was rejected by the Appellate Division and the court affirmed the NJMVC's suspension of the home state New Jersey driver license); Ford v. NJMVC, (unreported) (App. Div. 2014), Dkt. No. A-3117-12T1, 2014 N.J. Super. Unpub. LEXIS 304, at 5, certif. denied, 217 N.J. 587 (2014); Xheraj v. NJMVC, (unreported) (App. Div. 2013), Dkt. No. A-2125-12T1, 2013 N.J. Super. Unpub. LEXIS 2893; Wayne v. NJMVC, (unreported) (App. Div. 2013), Dkt. No. A-3008-12T1, 2013 N.J. Super. Unpub. LEXIS 1827, at 8-9; New Jersey Motor Veh. Comm'n v. Gethard, (unreported) (App. Div. 2012), Dkt. No. A-4657-10T3, 2012 N.J. Super. Unpub. LEXIS 287, at 5; In re: Alan D. Weissman, (unreported) (App. Div. 2009), Dkt. No. A-2154-07T3, 2009 N.J. Super. Unpub. LEXIS 1303, at 2 (the court specifically notes that "[n]either N.Y. Veh. & Traf. Law §1192(1) nor N.J.S.A. 39:4-50(a), require a minimum blood alcohol reading for a conviction"). See also State v. McCauley, (unreported) (App. Div. 2006), Dkt. No. A-4622-04T2, 2006 N.J. Super. Unpub. LEXIS 2422 (the court rejected McCauley's argument that he fit within the "very limited exception" in the statute, N.J.S.A. 39:4-50(a)(3), even assuming that his BAC was 0.06%, since New York's driving while ability impaired statute, N.Y. Veh. & Traf. Law §1192(1), "on its face" is not a "per se" offense and his conviction under that provision "must have been based on other evidence") and In re: Maxine Basch, MVC Chief Administrator Supplemental Final

Decision and Final Order on Remand, issued January 8, 2016, found at http://www.nj.gov/mvc/pdf/about/jab_final_decisions16.pdf (suspension imposed for NYDWAI conviction in accord with Appellate Division remand instruction where a "plea bargain" had been entered to the lesser-included offense, also noting other potential evidence of impairment included officer observations, field sobriety tests and/or admissions, as well as a BAC result of .17%)[6].

As constructed and enacted by the New York legislature, N.Y. Veh. & Traf. Law §1192(1) is specifically, on its face, not a per se type of offense; instead, it is the impairment of a person's ability to operate a motor vehicle that is the critical statutory element established by Epstein's conviction. Compare, New Jersey Div. of Motor Veh. v. Ripley, 364 N.J. Super. 343, 349-50 (App. Div. 2003) (in which the court specifically discusses the NYDWAI offense and the fact that NYDWAI contains the element of impaired driving ability, thus distinguishing it from a statute like the former Utah

[6] For context only, the Commission notes that in its experience handling the many out-of-state New York reported "driving while ability impaired" convictions, in those instances where the supporting documents are submitted, it is frequently the case that the NYDWAI conviction was the result of a "plea bargain" to this lesser-included offense and that the police reports and chemical test documents reveal potential evidence of BAC levels of .08% and above as well as observational-type evidence including field sobriety tests, officer observations, driving behavior, and/or driver admissions.

In a typical year, the Commission receives approximately 200 such driving while ability impaired reported convictions, for which it receives a significant number of hearing requests as to the proposed administrative suspension action. Such hearing requests are among the approximate 8,000 to 9,000 hearing requests the Commission handles for the various proposed administrative suspension actions issued each year, not including those involving the medical and fatal accident type cases. These arise from the enormous volume of both in-state and out-of-state reported convictions that are sent to the Commission on a daily basis, amounting to more than 1 million convictions yearly coming from the in-state court matters alone. The Commission recognizes that each of these DWAI case matters must be assessed on a case-by-case basis in accordance with the particular submissions made by the driver in an effort to meet the clear and convincing evidence standard for fitting within the limited affirmative defense in the New Jersey DWI statute.

"alcohol-related reckless driving" statute that was at issue in that case, which Utah statute did not have impaired driving ability as an element of the offense); accord Zeikel, supra, 423 N.J. Super. at 46, 47 (the court "viewed 'impaired driving ability' as the crucial element necessary to apply the statute of another jurisdiction as substantially similar to New Jersey's DWI statute.").

In Zeikel, supra, the court determined that a conviction under New York's DWAI statute was "substantially similar" to a conviction under New Jersey's DWI statute to qualify as a prior conviction for sentencing purposes under N.J.S.A. 39:4-50(a)(3). Zeikel, supra, 423 N.J. Super. at 45-49. The court rejected the defendant's argument that New Jersey sets a higher threshold than New York by requiring a finding of "intoxication," reasoning that "[i]ntoxication not only includes obvious manifestations of drunkenness but any degree of impairment that affects a person's ability to operate a motor vehicle". Id. at 48. See also, State v. Aziz, (unreported) (App. Div. 2020), Dkt. No. A-1268-18T4, 2020 N.J. Super. Unpub. LEXIS 757, in which the Appellate Division affirmed the lower court's holding that the appellant's prior conviction for New York DWAI constituted a prior conviction under New Jersey law. In relying on Zeikel, the court stated: "[In Zeikel,] We held that absent proof that a New York DWAI conviction was based exclusively on a blood alcohol reading of less than .08, a DWAI conviction is 'substantially similar [in] nature' to driving under the influence under New Jersey law, and shall be treated as a prior conviction for sentencing enhancement purposes." Aziz, supra, at 2, quoting Zeikel, supra, at 48. The Aziz court further noted that, "[f]irst, a New York defendant conceivably may be prosecuted for DWAI, instead of DWI, simply because there is no BAC evidence at all" and "[s]econdly, a DWAI offender with less than .08 B.A.C. still commits an offense substantially similar in nature to a New Jersey DUI under N.J.S.A. 39:4-50(a), so long as the less-than-.08 reading is not the exclusive basis for the New York conviction." Id. at 2-

3. With the Aziz court further explaining that the totality of the circumstances in that case, if proved, concerning the field sobriety tests, the officer's observations and the defendant's driving behavior, as well as the driver's refusal to submit to a "binding" chemical test, would be sufficient to "establish an observational DUI violation under [New Jersey] law." Id. at 3-4.

Governing New Jersey case law repeatedly recognizes that "observational" evidence is by itself sufficient in New Jersey to support a conviction under New Jersey's unified DWI statute, N.J.S.A. 39:4-50, even without a BAC result. See, e.g., State v. Sorenson, 439 N.J. Super. 471, 479-82 (App. Div. 2015) (noting distinction between the "per se violation" and the "observation violation" both under New Jersey's DWI statute, N.J.S.A. 39:4-50); State v. Campbell, 436 N.J. Super. 264, 267-68 (App. Div.), certif. denied, 220 N.J. 208 (2014) (noting that New Jersey DWI prosecutions under N.J.S.A. 39:4-50(a) may be pursued on "four distinct alternative grounds" one type of which is the "so-called 'observation' cases based on other non-BAC evidence of a defendant's impairment while driving"); State v. Kent, 391 N.J. Super. 352, 384 (App. Div. 2007) (affirming a defendant's DWI conviction based upon his erratic driving in causing a single-car accident and a police officer's field observations of his multiple signs of inebriation, despite the inadmissibility of hearsay laboratory reports measuring the BAC level in defendant's blood sample); see also State v. Howard, 383 N.J. Super. 538, 548 (App. Div.) (quoting State v. Kashi, 360 N.J. Super. 538, 545 (App. Div. 2003), aff'd, 180 N.J. 45 (2004)), certif. denied, 187 N.J. 80 (2006) (instructing that a violation of N.J.S.A. 39:4-50 can be proven "through either of two alternative evidential methods: proof of a defendant's physical condition or proof of a defendant's blood alcohol level.").

Moreover, the court in Zeikel, supra, 423 N.J. Super. at 48 (App. Div. 2011), confirmed that a conviction of New Jersey's driving while intoxicated statute is

sustainable if it is supported by sufficient evidence of "any degree of impairment that affects a person's ability to operate a motor vehicle" while further highlighting that "[like] New Jersey, New York defines impairment broadly to include any degree of impairment of a person's physical or mental abilities to operate a motor vehicle." See also, In re Johnston, 75 N.Y.2d 403, 409-10, 553 N.E.2d 566, 554 N.Y.S.2d 88 (1990) (New York's highest judicial tribunal construes "impairment" under N.Y. Veh. & Traf. Law § 1192(1) as meaning that "the actor by 'voluntarily consuming alcohol . . . has actually impaired, to any extent, the physical and mental abilities which he is expected to possess in order to operate a vehicle as a responsible and prudent driver"; quoting People v. Cruz, 48 N.Y.2d 419, 427, 399 N.E.2d 513, 423 N.Y.S.2d 625 (1979)).

In the submitted "Certification of Richard Epstein," Epstein stated that he "was informed by counsel that the factual basis behind my plea would be limited to admitting a Blood Alcohol Content being between a .05% and .07% BAC," yet he has failed to present any documentation supporting this statement, more important, demonstrating that his New York conviction was based exclusively on a BAC of less than .08%. Specifically, neither Epstein nor his attorney (Jeremiah Flaherty, Esq.) at the plea proceeding stated or admitted onto the official record any of the details that Epstein is claiming to have understood would be part of his plea. Without these claims being corroborated in the plea colloquy, they therefore must be treated as self-serving. And noting that, even if his attorney had informed him with these outside-the-record statements as he now claims was done, the critical determinant here must remain what was placed into the official record that was accepted by the New York judge in taking the plea. Furthermore, ambiguous references in the plea transcript to "jurisdictional issues" and "a DWAI in full satisfaction, a reduction on those charges" both fall well short of the required clear and convincing evidence standard.

Absent clear and convincing evidence presented by Epstein that a BAC of less than .08% was made the exclusive basis of the NYDWAI conviction, Epstein's New Jersey driving privilege is subject to suspension. See, e.g. Markowiec v. NJMVC, (unreported) (App. Div. 2018), Dkt. No. A-2492-15T1, 2018 N.J. Super. Unpub. LEXIS 257 (affirming the Commission's final decision and order suspending Markowiec's driving privilege based on a NYDWAI where Markowiec argued that there was no chemical test performed and that his BAC was under .08%, but there was no clear and convincing evidence, such as a plea transcript or court order showing that the conviction was based exclusively on a BAC of less than .08%. The court also emphasized that the finding of substantial similarity between a NYDWAI and a New Jersey DWI did not turn on evidence of a BAC level). A conviction for driving while ability impaired need not be based on BAC at all, or it may be based on a BAC below .08% in combination with other observational evidence supporting the element of impaired driving ability.[7]

Given these factors, Epstein has failed to show, by clear and convincing evidence, that his NYDWAI conviction was based exclusively on a BAC of less than .08%, as is required to meet the very limited exception in New Jersey's DWI statute.[8]

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[7] Indeed, it is noted that under the New York DUI statute's "Probative value" section as to "Chemical test evidence", N.Y. Veh. & Traf. Law § 1195(2)(b), evidence of a BAC of .051% to .069%, is considered "relevant evidence, but shall not be given prima facie effect, in determining whether the ability of such person to operate a motor vehicle was impaired by the consumption of alcohol." Therefore, for a conviction of NYDWAI to be entered with this BAC amount there must have been other sufficient observational evidence to support the "impairment of ability to operate a motor vehicle" statutory element, as the NYDWAI provision is specifically not a per se offense. Similarly, if the BAC test result evidence was .05% or below, that range is considered "prima facie evidence that the ability of such person to operate a motor vehicle was not impaired by the consumption of alcohol", and thus again, this means that with this lower level BAC amount there must have been sufficient other observational evidence despite that BAC result to establish beyond a reasonable doubt the element of "impairment of ability to operate a motor vehicle" for such NYDWAI conviction. N.Y. Veh. & Traf. Law § 1195(2)(a).

[8] That very limited exception in the New Jersey statute most specifically would apply where there was a conviction under a per se law in another state, for which the other

Epstein's argument of delay and prejudice must also be rejected. Epstein has not provided any particulars regarding prejudice due to the timing of the suspension of his New Jersey driving privilege. Following an extended New York adjudicatory process resulting in Epstein's conviction on February 8, 2019, the Commission received notice of this conviction on March 4, 2019. See, Exhibit P-1. Subsequently, and in contrast to In re Arndt, 67 N.J. 432 (1975), Epstein has been on notice since receiving the Commission's Scheduled Suspension Notice that was computer-generated and issued on April 26, 2019, after the Commission's data entry "batching"/intake process which gathers similar type offenses for entry/posting to the driver history system.[9] Epstein was made aware that his New Jersey driving privilege was subject to a 730-day suspension as a result of the New York conviction, and has had ample time to prepare for the suspension. Further significantly distinguishing the In re Arndt matter from the herein Compact matter is that the Arndt decision concerned an underlying offense that was yet to be proven and which necessarily involved witness testimony about the offense that could be affected by the

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state's per se threshold was lower, at the time of the offense, than the per se prong contained within the New Jersey "unified" DWI statute, N.J.S.A. 39:4-50 (which contains a per se prong as well as an observational prong). An example of this would be a New York DWI- per se .08 conviction, under N.Y. Veh. & Traf. Law § 1192(2) ("driving while intoxicated; per se"), that specifically occurred during the timeframe in which the New York per se statutory threshold had been lowered to .08 prior to the effective date of the New Jersey law changing its per se threshold from .10 to .08; namely between July 1, 2003 and January 19, 2004. See, New Jersey Div. of Motor Veh. v. Pepe, 379 N.J. Super. 411, 414, footnote 1 (App. Div. 2005) (in which the court points out the different effective dates for New York's and New Jersey's lowering of the statutory BAC per se threshold to .08); also, it is noted that currently the State of Utah has lowered its statutory per se threshold to a BAC of .05, thus specific Utah convictions under its DWI- per se provision would meet this limited exception.) This is not the case for Epstein's conviction under the NYDWAI statutory provision, N.Y. Veh. & Traf. Law §1192(1).

[9] Due to the large volume of violation/conviction reports received by the Commission, there is a "batching" of like kind offenses during the manual process for data entry of the mailed reports' information into the driver history system. Thus, this conviction was entered with the batch which posted to the system on April 25, 2019, triggering the computer-generated Scheduled Suspension Notice to be issued the next morning.

passage of time due to witness memory issues. In contrast, this subject Epstein matter concerns an already established conviction entered by a court of competent jurisdiction, thus the issue of delay affecting witness memory is not present here. Indeed, a key rationale for the Arndt court's determination was this consideration of the effect on witness testimony that was still necessary for proving the Arndt offense in the first place. There is no similar effect for this Epstein matter which concerns a court-entered final disposition as to Epstein's conviction of the NYDWAI offense. Also there is no statutory time frame set for taking the suspension action that is required pursuant to the Compact.

Moreover, it is noted that Epstein also requested a hearing, contesting the proposed 730-day suspension, and submitted documents and legal arguments in support. Pending the Commission's review of Epstein's submission and issuing a final decision, the effective date of the suspension has been stayed. "Delay will not generally affect the validity of an administrative determination, particularly where no prejudice is shown." In re Garber, 141 N.J. Super. 87, 91, certif. denied, 71 N.J. 494 (1976) (agency final decision issued approximately 12 months after hearing officer made recommendations as to suspension, and approximately 22 months after issuance of notice of proposed suspension).

It remains undisputed that Epstein was convicted by the State of New York of N.Y. Veh. & Traf. Law § 1192(1), "driving while ability impaired," while holding and presenting a New Jersey driver's license. Accordingly, the State of New Jersey is required to suspend his New Jersey driving privilege in accordance with the Interstate Driver License Compact Agreement (N.J.S.A. 39:5D-1 to -14) and the New Jersey Administrative Code (N.J.A.C. 13:19-11.1).

The governing regulation, N.J.A.C. 13:19-11.1(a) and (b), provides that out-of-state convictions shall be given the same effect as if such convictions had occurred in the

State of New Jersey. Indeed, N.J.A.C. 13:19-11.1(b) explicitly states that New Jersey driving privileges shall be suspended pursuant to New Jersey law. See, e.g., Martinez v. NJMVC, (unreported) (App. Div. 2010), Dkt. No. A-0147-09T3, 2010 N.J. Super. Unpub. LEXIS 597 at 4-5; see also New Jersey Div. of Motor Vehicles v. Egan, 103 N.J. 350, 357 (1986) (the New Jersey Supreme Court reviewed and upheld the policy of the Director of the Division of Motor Vehicles to exercise the discretion granted by N.J.S.A. 39:5D-4 to "uniformly impos[e] New Jersey's more stringent penalty instead of being reduced to 'the least common denominator of other States[.]'"); DiGioia v. NJMVC, (unreported) (App. Div. 2021), Dkt. No. A-3587-19, 2021 N.J. Super. Unpub. LEXIS 533 (the court declared, in affirming the Commission's imposition of suspension of the New Jersey home state license for a New York conviction, that "the Compact simply requires that New Jersey consider appellant's New York conviction as if the offense occurred in New Jersey, which the Commission indisputably did"); State v. Luzhak, 445 N.J. Super. 241, 248 (App. Div. 2016) (the court again emphasized that New Jersey has a "strong public policy against drunk driving"); and State v. Thompson, 462 N.J. Super. 370, 375 (App. Div. 2020) (in which the Appellate Division reiterated the New Jersey Supreme Court's declaration regarding the construction of the DWI laws: "As the Supreme Court held in [State v. Tischio, 107 N.J. 504 (1987)] – and it apparently bears repeating – '[w]e are thus strongly impelled to construe [the statute] flexibly, pragmatically and purposefully to effectuate the legislative goals of the drunk-driving laws,' [Id. at 514] which, of course, are to rid our roadways of the scourge of drunk drivers [Id. at 512]. See also [State v. Mulcahy, 107 N.J. 467, 479 (1987)] (recognizing, in quoting [State v. Grant, 196 N.J. Super. 470, 476 (App. Div. 1984)], that the drunk driver remains 'one of the chief instrumentalities of human catastrophe')."

Furthermore, it is also well-established by New Jersey case law that it is proper

under the doctrine of dual sovereignty, and specifically is not a violation of double jeopardy, for the "home state" which issued the driver license to impose the statutorily mandated suspension after receiving a report of such out-of-state alcohol-related driving conviction under the Interstate Compact. See Pepe, supra, 379 N.J. Super. at 418-419; In re Johnson, 226 N.J. Super. 1 (App. Div. 1988); and Lawrence, supra, 194 N.J. Super. at 2-3.

The court in Pepe, supra, 379 N.J. Super. at 416, specifically held that the "suspension imposed by NJDMV is in accordance with the statute, N.J.S.A. 39:4-50, and not redundant to the penalty imposed in New York, which involved only defendant's driving privileges within that state." (citing Boyd v. Div. of Motor Vehicles, 307 N.J. Super. 356, 360 (App Div.), certif. denied, 154 N.J. 608 (1998), emphasis added). The Pepe court further instructed that "under the doctrine of dual sovereignty, the double jeopardy clause does not bar two states from prosecuting a defendant for the same offense." Id. at 418. The Pepe court also considered Pepe's constitutional equal protection, res judicata/collateral estoppel and laches-type arguments in the context of that Compact case and found those to be without merit.

It remains undisputed, and I therefore find, that Epstein was convicted of an alcohol-related driving offense that occurred on October 29, 2017, in the State of New York (for which he was convicted on February 8, 2019). As such, pursuant to N.J.S.A. 39:5D-4, 39:5-30, 39:4-50 and N.J.A.C. 13:19-11.1 et seq., I order his New Jersey driving privilege to be suspended for 730 days. The suspension period imposed here is the minimum mandated by New Jersey statute for this second alcohol-related driving offense, which was committed before December 1, 2019[10]; there is no discretion to impose a

[10] The NJ DWI statutory penalties were amended effective December 1, 2019, for offenses committed on or after that date. Thus, the amended penalties do not apply here. State

reduced suspension term.

Conclusion and Final Order

Based on the foregoing, I conclude that the Commission's proposed suspension is proper. I specifically conclude that Epstein's submissions to the Commission are insufficient to meet his affirmative burden to show, by clear and convincing evidence, that his NYDWAI conviction was based exclusively on a BAC below .08%. The New Jersey legislature, in N.J.S.A. 39:4-50, explicitly required that the submitted evidence meet this high standard of proof. The New Jersey Supreme Court has stated:

> The clear and convincing evidence standard is not a hollow one, as
>
> > [c]lear-and-convincing evidence is that which produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable the factfinder to come to a clear conviction, without hesitancy, of the precise facts in issue.
> >
> > [New Jersey Div. of Youth & Family Servs. v. I.S., 202 N.J. 145, 168 (2010), quoting In re Seaman, 133 N.J. 67, 74 (1993) (citation, internal quotation and editing marks omitted).]

Epstein's submissions to the Commission fall far short of this standard and cannot be said to constitute "evidence so clear, direct and weighty and convincing as to enable the factfinder to come to a clear conviction, without hesitancy, of the precise facts in issue."

The effective date of suspension of Epstein's driving privilege is August 20, 2022. (Suspension term: 730 days).

Also, pursuant to the governing statutory and regulatory requirements under N.J.S.A. 39:4-50(b) and N.J.A.C. 13:19-11.2, Epstein must successfully complete or show satisfactory proof of completion of an alcohol/drug education and highway safety

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program. It is noted that with respect to any alcohol education classes/program already completed pursuant to the New York conviction, Epstein may present any official documentation as to such classes/program to the Intoxicated Driver Program (IDP)/Intoxicated Driver Resource Center (IDRC), which will determine whether these can be accepted in partial or full satisfaction of the IDP alcohol/drug education program required pursuant to N.J.S.A. 39:4-50(b) and N.J.A.C. 13:19-11.2.

This constitutes the Commission's final decision in this matter.[11] Any appeal from this decision must be made to the Appellate Division of the Superior Court by filing a Notice of Appeal with the Appellate Division within 45 days from the date of this decision. If an appeal is filed with the court, pursuant to Court Rule, R. 2:5-1(e), service of copies of all papers must be made on both the New Jersey Motor Vehicle Commission, Chief Administrator, as well as the Attorney General. The Appellate Division may be contacted by calling (609) 815-2950.

Note: The Superior Court, Appellate Division has provided specific instructions for the filing of papers. Please visit the Judiciary's website at www.njcourts.gov/courts/appellate.html.

If you file an appeal with the court and you are seeking a stay of this Order while your appeal is pending, your request for stay, made pursuant to New Jersey Court Rule 2:9-7, must be in writing and submitted to the NJMVC with proof that a notice of appeal has been filed with the Appellate

[11] Although this matter had been considered among those that were being processed for transmission to the Office of Administrative Law for a plenary hearing, upon further review by the Commission it was noted that there are no factual issues requiring an evidentiary hearing and therefore this final administrative decision and order was issued. See Frank v. Ivy Club, 120 N.J. 73, 98 (1990), cert. denied, 498 U.S. 1073, 111 S. Ct. 799, 112 L. Ed.2d 860 (1991); Pepe, supra, 379 N.J. Super. 411 (App. Div. 2005).

Division. Your request for stay and proof of filing should be submitted to the Office of Legal and Regulatory Affairs, NJMVC (attention: STAY REQUEST/ APP. DIV. PROOF OF FILING) either by fax to (609) 984-1528, or by email to: StayrequestAppDivcase@mvc.nj.gov. *Please include a fax number or an email address where the determination as to your stay request will be sent.

Further Note: A stay of this Order is not automatically granted upon filing a Notice of Appeal with the Appellate Division. In requesting that a stay be granted in conjunction with the filing of your appeal, you have the burden to show that your case meets each of the factors set out in New Jersey case law to warrant the issuance of that type of injunctive relief. See, Garden State Equality v. Dow, 216 N.J. 314, 320 (2013).

Latrecia Littles-Floyd
Acting Chair and Chief Administrator

LLF: kw/mn

c: Nathan J. Mammarella, Esq.

EXHIBIT LIST

*copies redacted of other drivers' personal identifying information

Commission Exhibits

P-1 Copy of NYDMV Out-of-State Conviction report dated February 27, 2019, received by the Commission on March 4, 2019 (1 page, redacted) *

P-2 Copy of New Jersey Motor Vehicle Commission, Scheduled Suspension Notice, (front and back), date prepared April 26, 2019 (2 pages)

P-3 Copy of Commission letter to Epstein advising him of the opportunity to submit clear and convincing evidence of the conviction being exclusively based on a BAC of less than 0.08% (affording a hearing on the papers), dated May 28, 2019 (1 page)

Epstein's Exhibits

R-1 Copy of hearing request (3 pages) from Nathan J. Mammarella, dated May 17, 2019

R-2 Copy of letter to the Commission from Nathan J. Mammarella, dated June 21, 2019 (3 pages) with enclosures: Copy of May 17, 2019, letter (R-1), Certification of Richard Epstein (3 pages), Copy of Transcript of Proceedings from Wawarsing Town Municipal Court (New York), dated February 8, 2019 (5 pages)