No. _____

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

ZEUS BANK,
and JOSEPH BLACK,
Petitioners,

vs.

SUPERIOR COURT OF CALIFORNIA
FOR THE COUNTY OF REDWOOD
Respondent.

PAUL GREEN,
Real Party in Interest.

REVIEW OF THE AUGUST 2, 20__ ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ENTERED BY THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF REDWOOD, CASE NO. 1234,
THE HONORABLE JEAN SMITH

OPPOSITION TO PETITION FOR WRIT OF MANDATE

Attorney for Real Party in Interest

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INTRODUCTION

Petitioners-Defendants Zeus Bank and Joseph Black urge this court to adopt an absurd interpretation of both the dismissal-at-pleasure provision set forth in the National Bank Act ("NBA") and of the California Supreme Court decisions that have construed that Act. The NBA (12 U.S.C. § 24, Fifth) allows a bank's board of directors to "to appoint a president, vice president, cashier, and other officers . . . [and to] dismiss such officers or any of them at their pleasure . . . ." Defendants argue that this dismissal-at-pleasure provision applies automatically to *any* bank employee with the title "vice president," regardless of the authority the job actually entails, simply because that job title appears in the NBA. But the supreme court held in *Wells Fargo Bank v. Superior Court (Wertz)* (1991) 53 Cal.3d 1082, 1091, that an employee falls under the general "any other officer" category of that provision only if that employee wields both the authority to legally bind the bank and the power to make decisions that may affect the public's trust in the banking institution.

Denying defendants' alternative motions for summary judgment and summary adjudication, the Honorable Jean Smith, Judge of the Redwood County Superior Court, recognized the illogic of defendants' interpretation of the NBA. It would give banks the freedom to fire *any* employee at will, even a janitor, simply by giving that employee the title "vice president." After determining that plaintiff raised triable issues of material fact as to whether the NBA applied to him based on the *Wertz* test, the superior court never reached the second tier of issues raised by defendants' motions: whether and to what extent the NBA preempted plaintiff's various claims.

Defendants acknowledge that the interpretation of the NBA they urge this court to adopt is illogical. Their rationale: the doctrine of stare

decisis mandates that the lower courts strictly apply as law an enigmatic comment in *Peatros v. Bank of America NT&SA* (2000) 22 Cal.4th 147, 177. But California courts do not apply the doctrine in this blanket manner. Both *Peatros* and *Wertz* relied on facts reasonably distinguishable from those presented here, and neither directly addressed the legal issue raised by defendants' petition: whether a bank employee with the title "vice president" is automatically subject to the NBA's dismissal-at-pleasure provision without regard to that employee's actual responsibility within the bank's organization.

Even if this court accepts defendants' expansive view of the binding effect of these supreme court decisions on the lower courts, it does not have the authority to grant the over-broad relief defendants seek. The superior court recognized that defendants' motions raised two issues: (1) whether the NBA applies; and, if so, (2) the scope of its preemptive effect. That court never reached the second issue because it found triable issues of fact as to whether the NBA applies. *Wertz* held that the NBA does not completely preempt claims brought under the California Fair Employment and Housing Act (FEHA), Government Code § 12900 et seq. Because a number of plaintiff's claims are based on FEHA, triable issues of material fact exist as to whether they are entirely preempted.

PROCEDURAL HISTORY

Defendants' petition includes the relevant facts concerning the procedural history of this case. Matters relevant to defendants' petition were discussed during oral argument that are not reflected in the superior court's order. The superior court explained that it viewed the issues raised by defendants' alternative motions as presenting a two-tiered analysis:

> THE COURT: Now, this tentative decision, Ms. Lee, was adverse to the Bank. And the ground was the motion for summary judgment, summary adjudication, denied.
>
> As I saw it, there was a triable issue of fact whether plaintiff was an officer within the meaning of the National Bank Act. And it seemed to me that if there was a triable issue of fact on that, then I didn't reach these issues of preemption that were raised and for which you have strong arguments. So I kind of came off on the preliminary issue of whether he is an actual officer. And I was persuaded by the test as set forth in the Wertz case. And I didn't think he met it.
>
> The test is pretty comprehensive. I mean, he's really got to be someone that has the power to bind the Bank and that sort of thing. I thought there was a contested issue of fact about that.

Defendants seek an order mandating that the trial court grant summary judgment in their favor. Yet their petition never addresses the second issue raised by both the superior court and their own motion for summary adjudication: if the NBA does apply to plaintiff, which among plaintiff's claims does it preempt?

ADDITIONAL RELEVANT FACTS[1]

Plaintiff held the title of "vice president" in defendant Zeus Bank's in-house Advertising Division for three years, until his summary dismissal on July 28, 20__. Nevertheless, he never had the authority ordinarily associated with a corporate officer. Throughout his tenure, his division supervisors repeatedly reminded him that he could not create or sign any documents binding defendant Zeus Bank with any outside party. Only plaintiff's supervisors had authority to negotiate and sign agreements.

At the same time, plaintiff's work environment was hostile toward

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[1] In the interests of brevity, all references to the factual record have been deleted from this sample document.

gay men generally, and toward plaintiff in particular as an openly gay man. Managers constantly referred to gay men as "faggots"; plaintiff's manager referred to him on a number of occasions as "Paula," a feminization of plaintiff's given name, Paul; and other managers subjected him to demeaning comments about his sexual orientation.

During February 20___, after plaintiff was hospitalized, defendant Black constantly interrogated him as to whether this hospitalization was related to his HIV status, which plaintiff had been illegally forced to disclose. On July 28, 20___, plaintiff was called into the office from home, handed a memorandum, and fired. The reasons given related to several alleged complaints about plaintiff's conduct, some of which had occurred several months before his summary termination. Plaintiff requested an exit interview, but defendant Black refused. After his termination, other employees at defendant Bank told plaintiff that it was against bank policy to fire a vice president without progressive discipline.

Plaintiff unsuccessfully appealed his termination.

DISCUSSION

1. *Wertz* and *Peatros* are not binding precedent on the issue of whether the NBA's dismissal-at-pleasure provision automatically applies based only on job title.

A. The doctrine of stare decisis does not make dicta binding precedent.

The California Supreme Court's "statements of law remain binding on the trial and appellate courts of this state [citations] and must be applied whenever the facts of a case are not fairly distinguishable from the case in which [it has] declared the applicable principle of law." *People v. Triggs*

(1973) 8 Cal.3d 884, 890-891. Only the principle or rule on which a higher court's decision is based—the ratio decidendi—carries the full binding weight of precedent. *Bunch v. Coachella* (1989) 214 Cal.App.3d 203, 212. Thus, to determine its binding effect, an opinion must be read in light of the facts and issues raised, with distinctions drawn between statements of law necessary to the decision, as opposed to general comments or dicta. *Ibid*. (citing 9 B. Witkin, CALIFORNIA PROCEDURE (3d ed. 1985) Appeal, § 783, at 753). Although supreme court dicta may serve as persuasive authority, the lower courts need not follow dicta if they do not find it "compelling." *Ibid.*; *Chevron, USA, Inc. v. Worker's Comp. Appeals Bd.* (1990) 219 Cal.App.3d 1265, 1272 (*citing* Witkin, *supra,* § 786, at 756).

B. *Wertz* and *Peatros* are factually distinguishable and only in dicta addressed the NBA's "automatic application."

The issue here is whether the NBA's dismissal-at-pleasure provision properly applies to any bank employee holding the title "vice president" without regard to the employee's authority or duties. The supreme court did not directly rule on this issue in either *Wertz* or *Peatros*.

In *Wertz*, the supreme court addressed two questions: (1) whether the plaintiff bank employees were "officers" as defined by the NBA; and (2) whether the plaintiffs were discharged by the bank's board of directors. *Wertz*, 53 Cal.3d at 1086. The three plaintiffs all were branch managers who held the title of "assistant vice president." Referring to the NBA's language, history, and purpose, the court observed that the term "other officer" should be broadly construed. *Id.* at 1090. Additionally the court considered evidence of banking industry custom and practice, including a statement by the employer-bank's chairman and CEO that he considered an

"officer" as having at least some authority to sign documents that legally bind the bank. *Id.* at 1090-1091. The supreme court concluded that an "*officer*" of the bank, within the meaning of the NBA, must possess the attributes comprising its four-part test. *Id.* at 1091. Significantly, the court did not state that the test applied solely to persons referred to as "other officers." Instead, it presumed that *any* bank officer—including those with titles enumerated in the NBA's dismissal-at-pleasure provision—would carry sufficient authority within a bank's organizational structure to meet its four-part test.

Applying its test to the plaintiff-employees in *Wertz*, the supreme court noted that "there is no dispute that they had authority to deal with third parties and bind the bank in third party transactions by executing contracts and instruments." *Ibid*. Each of these plaintiffs had the authority to commit the bank to unsecured loans by approving overdrafts in amounts ranging from $10,000 to $250,000, and as branch managers supervised bank operations and transactions that "could affect the integrity of the bank and the public trust reposed in it." *Ibid*.

Justice Kennard's concurring opinion disagreed with the majority's four-part test. Instead, she opined that "officers" under the NBA were only "those executives who occupy the highest positions in the bank, have bankwide authority and responsibility, and are the institution's chief operational officers." *Id.* at 1105.

The facts presented in *Peatros* are also fairly distinguishable. The plaintiff, a vice president and branch manager, was demoted to a non-managerial position, based on losses the bank suffered when she allegedly approved several checks deposited with the bank for immediate credit that were later returned unpaid. The day after the demotion, the plaintiff took an

extended medical leave of absence. After her absence exceeded 24 months, the bank, according to its policy, terminated her employment. From these facts, one can readily ascertain that, before her demotion, Ms. Peatros fit the four-part *Wertz* test. She could legally bind the bank in transactions. She too was a branch manager. The only difference was that Ms. Peatros bore the title "vice president" while the *Wertz* plaintiffs were "assistant vice presidents."

Defendants here apparently base their "automatic application" construction on a general observation offered by the majority in *Peatros*: "As a vice-president, she was one of the officers enumerated by the provision, whether or not she would be included among its other officers solely by virtue of her work as a branch manager." *Id.* at 177. This statement is merely dictum; it cannot fairly be construed to be the holding of the case.

The majority opinion said nothing further on this "automatic application" of the NBA's dismissal-at-pleasure provision. The court's language makes sense only if one views it as a response to Justice Kennard's separate opinion, in which she again attacked the propriety of the *Wertz* four-part test. See *id.* at 180 (Kennard, J., concurring and dissenting). The facts in *Peatros* indicate that, until the time of her simultaneous demotion and leave of absence, the plaintiff not only had the title of vice president, but also met the four-part test set forth in *Wertz*. The *Peatros* majority simply made an offhand remark that the facts of that case did *not* indicate an unwelcome need for the supreme court to re-visit the propriety of the *Wertz* test.

In denying defendants' motions for summary judgment and summary adjudication here, the superior court recognized the absurdity of auto-

matically applying the NBA's dismissal-at-pleasure provision to a bank employee simply by virtue of his title, with no regard to that employee's authority to bind the bank:

> THE COURT: What you are telling me is you're telling me that your arguments, as I see it, is that if the guy doesn't have the title of vice president, he's got to be a real officer. But if he's got the title of vice president, it could be anyone. It doesn't have any power at all. We could make a janitor a vice president, and that would be the case.
>
> ***
>
> MS. LEE: I'm not telling you that, that is what the Supreme Court is telling you.

Extending the doctrine of stare decisis to the dictum in *Peatros*, as defendants urge, would bind the lower courts to an absurd interpretation of the NBA. Viewed in the full context of the circumstances in both *Wertz* and *Peatros*, the majority opinions demonstrate that the supreme court intended that the *Wertz* test create a "floor"— for application of the NBA dismissal-at-pleasure provision to *any* bank officer—not just those whose precise titles are not enumerated in the NBA.

2. Even if this court agrees with their contention that the NBA automatically applies to this plaintiff, defendants are not entitled to a writ mandating that the superior court grant them summary judgment.

Defendants' verified petition requests a writ compelling the superior court to set aside its order of August 2, 20___, and to issue a new order granting them summary judgment. Yet the superior court observed that, because it decided that the NBA did not apply to plaintiff, it did not need to examine whether the NBA preempted each of plaintiff's various claims, including those based on FEHA and the ADA. Additionally, defendants

cite no authority establishing that they are entitled to summary judgment as a matter of law on the issue of complete preemption. Defendants could not provide such authority because *Peatros*—which defendants recognize as binding precedent--held to the contrary.

In *Peatros*, *supra*, 22 Cal.4th at 154, the supreme court held that the NBA dismissal-at-pleasure provision preempts FEHA, but only to the extent that it conflicts with the NBA, as impliedly amended by Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e *et seq*. (Title VII)) and the Age Discrimination in Employment Act of 1967. 29 U.S.C. § 621 *et seq*. (ADEA). The decision does not mention the ADA, which forms the basis of several of plaintiff's discrimination claims here. Nevertheless, an appropriate analysis under *Peatros* would be to examine how the ADA, as a later-enacted federal law, impliedly amends the NBA.

Thus, if this court agrees with defendants that the NBA applies here, the only remedy it can provide is an order that the superior court vacate its prior order, and reconsider their motions for summary judgment and adjudication in terms of the NBA's preemptive effect on the claims raised in plaintiff's complaint. Because *Peatros* held that the NBA does not completely preempt FEHA, the superior court is required to deny summary judgment as to plaintiff's discrimination claims. Summary adjudication of several of plaintiff's claims may be appropriate, but that determination is best made in the first instance by the superior court, rather than by this court on petition for writ of mandate.

CONCLUSION

The superior court committed no error when it denied defendants' motions for summary judgment and summary adjudication. Its interpre-

tation of the relevant supreme court precedent was correct, and it properly determined that triable issues of material fact existed as to the NBA's application to plaintiff, regardless of his title as vice president. Accordingly, this court should deny defendants' petition for a writ of mandamus.

Dated:

Respectfully submitted,

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Attorney for Real Party in Interest
Paul Green