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8 UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
9

10 In the Matter of
11 SCOMAS OF SAUSALITO, LLC
12 and
13 UNITE HERE, LOCAL 2850,
14

CASE NO.: 20-CA-116766

SCOMAS OF SAUSALITO, LLC'S
STATEMENT OF POSITION RE
ALTERNATIVE REMEDY ON REMAND
FROM THE COURT OF APPEALS

15
16 **I. INTRODUCTION**

17 Employer SCOMAS OF SAUSALITO, LLC ("Scomas") hereby submits the instant
18 Statement of Position regarding an alternative remedy to their technical unlawful withdrawal of
19 recognition occurring on or about October 31, 2014.

20 On August 21, 2015, the Board found that Scoma's unilateral withdrawal of recognition
21 from the union was in violation of Section 8(a)(5) and (1) of the National Labor Relations Act and
22 issued an affirmative bargaining order. Scoma's filed a Petition for Review of the Board's Order,
23 on August 21, 2015 in the United States Court of Appeals for the District of Columbia Circuit
24 ("D.C. Circuit"). Specifically at issue was, "Whether the Respondent, the National Labor Relations
25 Board, erred by requiring as a remedy an affirmative bargaining order instead of an election in
26 situations where employees have been induced to waive their right to an election only by Union
27 gamesmanship."

28 After oral arguments before the DC Circuit, on February 7, 2017, on March 7, 2017, the DC



1 Circuit ordered that the Board’s bargaining order be vacated and the case be remanded for further
2 proceedings.

3 **II. THE ALTERNATIVE REMEDY SHOULD BE FASHIONED TO**
4 **EFFECTUATE EMPLOYEE FREE CHOICE**

5 “The National Labor Relations Board's remedies are the vehicles through which the policies
6 of the National Labor Relations Act are realized, and the means by which rights conferred by the
7 Act are protected. Through the appropriate remedies, the Board ensures that conditions at the
8 workplace are restored to those which existed before the onset of unlawful conduct. Effective
9 remedies also deter unlawful conduct and promote voluntary compliance with the Act.

10 Congress chose not to specify the precise remedies that would be available to the Board,
11 understanding the Board's need for flexibility to meet diverse situations and those which Congress
12 did not expressly envision. As the Supreme Court noted, "in the nature of things Congress could not
13 catalogue all the devices and stratagems for circumventing the policies of the Act. Nor could it
14 define the whole gamut of remedies to effectuate these policies in an infinite variety of specific
15 situations. Congress met these difficulties by leaving the adaptation of means to end to the
16 empirical process of administration." *Richmond Journal of Law and the Public Interest*; Vol. 5,
17 No. 1 (2000).

18 The instant case is exactly the type of case where the Board needs to be flexible and devise
19 a remedy that is “out of the box”. As the DC Circuit stated and the Board should keep in mind, this
20 case is “an unusual one . . . Scoma’s violation was unintentional. . . [Scoma’s] acted in good faith.”
21 (*Scoma’s of Sausalito, LLC v., NLRB*, No. 15-1412 (D.C. Cir. 2017) pg 13-15).

22 Furthermore, the DC Circuit also stated that in Scoma’s case, “It follows that an election can
23 fairly be held without a bargaining order and attendant bar on questioning the Union’s majority
24 status. Contrary to the Board’s analysis, there is no “taint” to “dissipate ”.” (*Supra* at pg. 16).

25 Finally, the DC Circuit stated, “. . . in imposing a remedy, the Board must balance
26 deterrence with “ascertainable employee free choice.” (*Supra* at pg. 17).

27 The “take-away” from the DC Circuit’s opinion is the following:

28 1. This is an unusual case with an unintentional violation;



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- 2. Scoma’s acted in good faith;
- 3. An election can fairly be held at any time;
- 4. Scoma’s unintentional violation did not “taint” the election process;

What then shall be the remedy?

While not a traditional remedy for this type of violation, the Board is urged to order an election which would meet the recommendation of the DC Circuit: the employees’ free choice will be effectuated, AND should the Union prevail, the Employer will be deterred for at least one year. Further, this remedy puts all parties in the position they were in before the Union’s gamesmanship caused the employees to withdraw their decertification petition. ¹

Alternatively, Scoma’s suggests that an appropriate remedy is to post a notice stating the following:

“FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT withdraw recognition from UNITE HERE Local 2850 (the Union), and fail and refuse to recognize and bargain with the Union, as the exclusive collective-bargaining representative of our employees in the following appropriate bargaining unit (the Unit) unless and until we receive notice that a majority of the employees do not wish to be represented by the Union or the Board, following a valid election, certifies that another labor organization or no labor organization has been selected to represent the Unit employees: All servers, cooks, dishwashers, bartenders, hostesses, and bussers, excluding

¹ Of note, and contained in the record, the employees of Scoma’s provided two additional decertification petitions to the Employer after the one which resulted in the employer withdrawing recognition on October 31, 2014. Also of note, the employees provided a fourth petition to the Scoma’s on March of 2017 signed by a majority requesting withdrawal.



1 all other employees.”

2 This type of notice posting likewise balances deterrence with “ascertainable employee free
3 choice”.

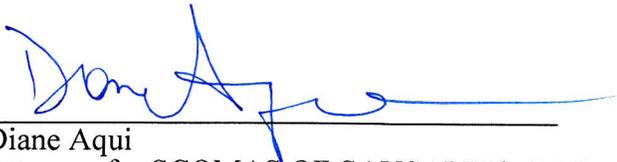
4 **III. CONCLUSION**

5 It is not news that the NLRB has been criticized extensively for having remedies so weak
6 they fail to enforce the law and to protect employees. There also can be no argument that the Act
7 has heretofore been interpreted in a manner that robs it of the flexibility intended by Congress in
8 1935 when the mandate was only that the remedy “must effectuate the policies of the Act.”

9 The statute does not limit remedies to a notice posting or a cease and desist order. The
10 statute requires the Board to be creative and think of alternative remedies other than the norm to
11 “effectuate the purposes of the Act.” Scoma’s urges the Board to do just that by choosing one of
12 the two options set forth above.

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14 Dated: August 7, 2017

15 SMITH DOLLAR PC

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18 By 
19 Diane Aqui
20 Attorney for SCOMAS OF SAUSALITO, LLC

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PROOF OF SERVICE

I am employed in the County of Sonoma, State of California. I am over the age of 18 years and not a party to the within action. My business address is 404 Mendocino Avenue, Second Floor, Santa Rosa, CA 95401. On August 7, 2017, I served the SCOMAS OF SAUSALITO, LLC'S STATEMENT OF POSITION RE ALTERNATIVE REMEDY ON REMAND FROM THE COURT OF APPEALS on the parties to this action by serving:

Jill Coffman
United States Government, National Labor
Relations Board
Region 20
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San Francisco, CA 94103-1738

Jennifer Benesis
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/X/ BY U.S. MAIL: I placed each such sealed envelope, with postage thereon fully prepaid for first-class mail, for collection and mailing at the address above, following ordinary business practices. I am readily familiar with the practice of Smith Dollar PC for processing of correspondence, said practice being that in the ordinary course of business, correspondence is deposited in the United States Postal Service the same day as it is placed for processing.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: August 7, 2017

Stephanie D. Abbott

