UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

GRAPETREE SHORES, INC. D/B/A DIVI CARINA BAY RESORT -- and -- VIRGIN ISLANDS WORKERS UNION	Case Nos. 24-CA-10700 24-RC-8566

EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

Employer Grapetree Shores, Inc. d/b/a Divi Carina Bay Resort ("Divi"), by and through its undersigned attorneys, pursuant to Section 102.46 of the National Labor Relations Board's Rules and Regulations, respectfully submits its Exceptions to the Administrative Law Judge Paul Bogas' Decision in the above-captioned matters ("ALJ Decision").

Divi takes exceptions to the following findings, conclusions, and failure to find or conclude:

1. "Henry did not explain why he thought it was 'important' that, during the July 11 meeting regarding the upcoming election, employees 'be informed' about the new benefits." (ALJ Decision at 5).
2. "Henry did not specifically deny that the reason he thought it was important that employees be informed about the benefits on July 11, rather than on a later date close in time to implementation, was that he hoped hearing about the new benefits before the July 13 election would influence how employees voted." (ALJ Decision at 5).
3. "Henry made the announcement regarding the new 401(k) benefits and other improved benefits during the critical period preceding the representation election, thus giving rise

to an inference that the timing of the announcement was coercive. That inference is particularly strong in this case. . . ." (ALJ Decision at 6).

4. "Since the Respondent's announcement of new benefits raises an inference of unlawful coercion, the Respondent must establish that it announced the benefits when it did for some reason other than the upcoming representation election." (ALJ Decision at 6).

5. "I conclude that the Respondent has failed to show that the Governor's July 10 action would have caused it to announce the yet-to-be-finalized benefits to employees on July 11 and 12 if not for the fact that a representation election was scheduled to take place on July 13." (ALJ Decision at 7).

6. "[T]he Governor's approval of the EDC plan was only one of multiple milestones along the way to implementation of the new benefits." (ALJ Decision at 7).

7. "The fact that the Respondent failed to tell employees about the new benefits it was developing prior to the critical pre-election period undermines its contention that the timing of the grant of benefits was governed by factors other than the election." (ALJ Decision at 7).

8. "The Governor's approval of the EDC agreement was also not the final milestone along the way to implementation of the benefits. The Respondent failed to show any reason, other than the upcoming election, why yet-to-be-finalized benefits had to be announced immediately after the Governor signed the EDC agreement." (ALJ Decision at 7).

9. "At the trial, Henry was unable to say with specificity when the new 401(k) plan would be implemented. . . ." (ALJ Decision at 7).

10. "Under similar circumstances the Board, in *Audubon Regional Medical Center*, found an employer's pre-election announcement of benefits was coercive. . . ." (ALJ Decision at 7).

11. "[T]he Respondent's failure to explain why it decided to announce the yet-to-be-finalized 401(k) benefit on July 11, rather than waiting until a time close to the implementation, undercuts its defense here." (ALJ Decision at 8).

12. "The Respondent has failed 'to show that its announcement was reasonably timed as a sequential step in, and a byproduct of, a chronology of conception, refinement, preparation, and adoption, so as to lead one reasonably to conclude that the announcement would have been forthcoming at the time made even if there were no union campaign . . . Rather the record evidence leads me to conclude that the Respondent rushed to announce the yet-to-be-finalized benefits on July 11 and 12 in the hopes that such knowledge would influence how employees voted on July 13." (ALJ Decision at 8).

13. "The Respondent's effort to tie the July 11 announcement to the Governor's approval of the EDC agreement is further undermined by the fact that the language of the agreement did not actually trigger an obligation on the part of the Respondent to implement the new benefits." (ALJ Decision at 8).

14. "[T]he agreement signed by the Governor, on its face, did not require the Respondent to do anything unless and until the Respondent exercised its option to commence tax benefits under the new agreement." (ALJ Decision at 8).

15. "[I]t is still not clear that the newly finalized EDC agreement would mandate any significant change in the 401(k) benefit since the agreement's language only requires employer contributions of "*up to* 2 percent" . . . ." (ALJ Decision at 8).

16. "[I]mplementation of the 2 percent contribution to employees' 401(k) plans is, at best, rather loosely tethered to the EDC agreement." (ALJ Decision at 8).

17. "The Respondent's contention that it would have made the announcement of benefits on July 11 based on the Governor's action regarding the EDC agreement, even absent the upcoming election, would be more persuasive if the Respondent had shown that it made such announcements immediately after the Governor approved the EDC agreements that took effect in 1996 and 1999." (ALJ Decision at 8).

18. "I consider it telling that Henry never specifically denied that he accelerated the announcement of the yet-to-be-finalized benefits in an effort to influence the election or that the reason he thought it was important that employees be informed about those benefits on July 11 and 12 was that such information might encourage employees to vote against union representation." (ALJ Decision at 8).

19. "I conclude that the Respondent has failed to rebut the inference that its pre-election announcement of the new benefits was coercive. Indeed, the evidence persuades me that, to the contrary, the Respondent rushed to announce the improved 401(k) plan, and other new benefits, on July 11 and 12 in the hopes that doing so would influence how employees voted in the July 13 election." (ALJ Decision at 8).

20. "I find that the Respondent interfered with, restrained and coerced employees in violation of Section 8(a)(1) of the Act when it announced the new 401(k) benefit plan during the final 2 days before the scheduled July 13 representation election." (ALJ Decision at 8).

21. "In January 2007, Dixon returned from her vacation, but after she had worked for about 3 hours she was placed on a leave of absence by the Respondent's housekeeping director." (ALJ Decision at 9).

22. "Although Henry testified that this meant that Dixon's employment had been terminated, the evidence showed that the Respondent . . . [did not place] anything in its records stating that her employment had ended." (ALJ Decision at 10).

23. "Indeed, a work schedule that the Respondent posted and distributed for the week of the July 13 election included Dixon's name, although it did not list any work hours for her." (ALJ Decision at 10).

24. "The copy of this schedule that was introduced at trial had a line through Dixon's name, but there was credible testimony that the line did not appear when the schedule was posted." (ALJ Decision at 10 n.11).

25. "Under the well-established Board standard, an employee on sick or disability leave is presumed to be eligible to vote absent an affirmative showing that the employee has resigned or been discharge." (ALJ Decision at 10).

26. "In this case, Dixon was on a leave of absence due to her disability and the Respondent has failed to make the necessary affirmative showing that she had resigned or been discharge." (ALJ Decision at 10).

27. "I find that testimony to be unworthy of credence in light of the facts, discussed above, that the Respondent never told Dixon she was terminated, never documented the supposed termination, and continued to list Dixon as an employee on work schedules." (ALJ Decision at 10).

28. "The provision Henry says triggered Dixon's discharge was part of a proposed labor contract that the Respondent never ratified, and which even Henry did not claim the Respondent followed in its entirety." (ALJ Decision at 10).

29. "Thus even assuming that the Respondent adheres to the provision regarding termination of seniority rights after a 6-month absence from work, that would not mean that Dixon's employment had terminated." (ALJ Decision at 10-11).

30. "[Henry] appeared uncertain on the subject of Dixon's supposed termination. For example, he did not state that the Respondent had a clear policy of automatically terminating anyone who did not work for 6 months. . . ." (ALJ Decision at 11).

31. "Even assuming the existence of such a policy, that would only mean that the Respondent was *allowed* to terminate Dixon, not that the Respondent actually did so." (ALJ Decision at 11).

32. "Indeed, the lack of documentation for Dixon's supposed termination, and Dixon's inclusion on the employee work schedules indicates that any policy on the subject was not applied to terminate Dixon's employment prior to the election." (ALJ Decision at 11).

33. "Moreover, if the Respondent had actually terminated Dixon's employment prior to the election, one would expect that Henry, its general manager, would be able to say when precisely that termination occurred. However, Henry could do no better than to provide two dates – June 14 and July 4 – on which he said the termination would have occurred given his understanding of the Respondent's policy." (ALJ Decision at 11).

34. Based on Henry's demeanor and testimony regarding Dixon, and the record as a whole, I do not credit Henry's claim that Dixon['s] employment was terminated prior to the election. Any weight that testimony deserves is outbalanced by the evidence showing that the Respondent had not actually terminated Dixon's employment." (ALJ Decision at 11).

35. "[T]he challenge to Dixon's ballot is overruled and her ballot must be opened and counted." (ALJ Decision at 11).

36. "In this case, Henry announced a significant new benefit during the final two days before the election." (ALJ Decision at 12).

37. "The announcement of a significant new benefit to so many of the eligible voters during the final 2 days before the election clearly could have an effect on that election, especially since the election will be decided by only a few votes . . . Thus, the Respondent's conduct was not de minimus in the context of the election." (ALJ Decision at 12).

38. "The Union's objection based on the Respondent's announcement of a new 401(k) plan benefit (Union Objection 4) is sustained. In the event that the Respondent prevails after all valid votes are counted, the election should be set aside, and a second election directed." (ALJ Decision at 12).

39. "Blackman consistently attributed the comments to a group of other employees – none of whom she identified by name. She never testified that Edward made the comments that the Respondent argues were objectionable. In fact, Blackman testified she never had a conversation with Edward regarding the Union. . . ." (ALJ Decision at 13).

40. "Blackman did not claim that she knew that the reason Edward was present at the polling place was to serve as a Union observer." (ALJ Decision at 13).

41. "I conclude that the evidence does not show that Edward, or anyone else the Respondent claims was the Union's agent, made the statements that Blackman says she considered threatening." (ALJ Decision at 13).

42. "At any rate, I found Blackman's recollection about the specifics of the supposed threats to be a bit of a muddle . . . Blackman's recollection of the specifics of the allegedly threatening statements was not, in my view, reliable." (ALJ Decision at 13-14).

43. "To the extent employees other than Edward made comments to the banquet department workers as they went to lunch, the record does not establish with any certainty the specific language that was used." (ALJ Decision at 14).

44. "I do not consider Blackman's testimony reliable regarding the specifics of what other employees said to the banquet workers." (ALJ Decision at 14).

45. "I conclude that such statements were not threatening, much less so aggravated as to create a general atmosphere of fear and reprisal rendering a fair election impossible." (ALJ Decision at 14).

46. "On its face, 'we will see' is a benign statement . . . ." (ALJ Decision at 14).

47. "It was not shown that any employee who was ma[king] such statements had evidenced a propensity for violence or had the ability to negatively affect the employment of the banquet department employees. (ALJ Decision at 14).

48. "The record does not, in my view, provide a reasonable basis for believing that the statement 'we will see' what happens after the election, meant anything more than that employees would see how working conditions were affected by the election outcome." (ALJ Decision at 14).

49. "Such a statement, especially when made by a non-agent, is even more innocuous than Henry's comment that 'everything would be all right' if employees voted against the Union." (ALJ Decision at 14).

50. "I conclude that the evidence does not substantiate Respondent Objections 1 and 2, and those objections are overruled." (ALJ Decision at 14).

51. "She [Edward] testified confidently and with certainty about the matters at issue." (ALJ Decision at 15).

52. "Nevertheless, nothing that occurred during Edward's cross examination shook her certainty regarding the matters at issue or impeached her denial of the alleged threat in a significant way." (ALJ Decision at 15).

53. "However, the fact that the two declarations use exactly the same language, word-for-word, detracts somewhat from their weight. It gives the impression that the declarations are not in the declarants' own voices, but rather were prepared for them without meticulous attention to the details of how each declarant described what she had seen and heard." (ALJ Decision at 16).

54. "In addition, although both declarants state that they believed Edward 'meant that she wanted to shoot openly anti-Union employee(s)," neither was shown to have taken any action consistent with such a belief." (ALJ Decision at 16).

55. "Finally, since neither witness took the stand, there was no opportunity to address the possibility that, as employees of the Respondent, they felt pressured to sign declarations that were favorable to the Respondent." (ALJ Decision at 16).

56. "In short, I am presented with two conflicting accounts, neither of which in my view is highly credible." (ALJ Decision at 16).

57. "Even had I concluded, contrary to the above, that Edward made the statement alleged, that statement would not warrant overturning the election results." (ALJ Decision at 16).

58. "I conclude that Edward was not shown to be an agent of the Union . . . Although Edward was a union election observer on July 13, her alleged conduct on July 12 did not occur while she was serving in that capacity. . . ." (ALJ Decision at 16).

59. "I find that the conduct described in the declarations does not approach the standard of being 'so aggravated as to create a general atmosphere of fear and reprisal rendering a fair election impossible.'" (ALJ Decision at 16).

60. "To start with, the declarations do not show that Edward's alleged statement had anything to do with the election or the Union . . . [t]herefore, even assuming that Edward made the statement described in the declarations, there is insufficient record evidence to link that statement to the representation election." (ALJ Decision at 16).

61. "The proximity of the election, and Edward's support for the Union, are not enough to show that Edward's alleged expression of anger would reasonably be understood by other employees to relate to the election, rather than to any one of the many other subjects about which individuals become angry at work." (ALJ Decision at 16-17).

62. "A single statement, even one threatening violence, that did not mention or allude to the Union or the upcoming election, and which was not shown to be made to persons because of their views regarding the upcoming election, cannot reasonably be seen as conduct that 'create[d] a general atmosphere of fear and reprisal rendering a fair election impossible.'" (ALJ Decision at 17).

63. "In addition, there was nothing in the record to suggest that employees would have a reasonable basis for believing that Edward meant that she was actually prepared to engage in gun violence against other employees." (ALJ Decision at 17).

64. "Although both declarants, in identical language, stated a belief that Edward meant that she wanted to shoot openly anti-Union employees such a subjective interpretation by employees is irrelevant to the question of whether the statement was objectionable conduct." (ALJ Decision at 17).

65. "At any rate, the record here undercuts the declarants' claim that they felt subjectively threatened or coerced by Edward." (ALJ Decision at 17).

66. "The accounts of the declarants were also lacking in details that would be necessary, under the circumstances present here, to find that Edward's alleged statements were coercive." (ALJ Decision at 17).

67. "There is no way of knowing whether Edward was addressing a friend, a group of friends, a person or persons known to oppose the Union, or everyone in the employee dining room." (ALJ Decision at 17).

68. "[E]ven assuming the record showed that Edward engaged in the conduct described in the declarations submitted by the Respondent, the conduct would not be a sufficient basis upon which to sustain Respondent Objections 3 and 4." (ALJ Decision at 17).

69. Divi excepts to Paragraphs 3, 4, 6, 9, 10 and 11 in the "Conclusions of Law." (ALJ Decision at 17-18).

70. Divi excepts to the "Remedy," "Order," and "Direction" of the ALJ. (ALJ Decision at 18-19).

71. The ALJ failed to note, consider, and give proper weight to record evidence concerning Divi's election objections.

72. The ALJ failed to note, consider, and give proper weight to record evidence concerning Divi's opposition to the union's election objections and the union's unfair labor practice charge.

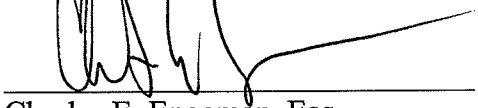
73. The ALJ failed to note, consider and give proper weight to record evidence concerning the challenge to Felicia Dixon's ballot.

Divi respectfully requests permission to present oral argument in support of its exceptions.

Dated: March 21, 2008

Respectfully submitted,

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, LLC



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CERTIFICATE OF SERVICE

I do hereby certify that on this 21st day of March 2008, a true and correct copy of the foregoing document was served by electronic filing with the NLRB's Office of Executive Secretary and have notified the following by telephone of the filing and have placed one (1) copy of the same in the United States Express Mail, postage prepaid, addressed to:

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