IN THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA

GRAND VENEZIA COA, INC.,

Plaintiff,

vs. CASE NO. 16-001584-CI

CLEARWATER CAY COMMUNITY DEVELOPMENT DISTRICT, OPPENHEIMER ROCHESTER AMT-FREE MUNICIPAL FUND, OPPENHEIMER ROCHESTER HIGH YIELD MUNICIPAL FUND, OFI GLOBAL ASSET MANAGEMENT, INC., and OPPENHEIMERFUNDS, INC.,

Defendants.
_____/

PLAINTIFF'S MOTION TO REQUIRE GRAYROBINSON, P.A., TO DISGORGE ITS FEES

Plaintiff, GRAND VENEZIA COA, INC. ("Grand Venezia"), by and through its undersigned counsel, files this its Motion to Require GrayRobinson, P.A., to Disgorge Its Fees and states:

1. Inasmuch as GrayRobinson, P.A. ("GrayRobinson"), serves as District Counsel to the Clearwater Cay Community Development District (the "CDD"), the Grand Venezia submits that this Honorable Court has jurisdiction over the GrayRobinson law firm. Moreover, this Honorable Court has the inherent power to enter orders against the firm.

2. In a heavy handed and unconstitutional manner, GrayRobinson, with the naïve CDD's blessing, has unnecessarily caused burdened landowners within the CDD to fund exorbitant attorneys fees paid over to the firm that could have and should have been avoided.

3. Because of the erroneous legal advice rendered by GrayRobinson attorneys, the CDD has incurred hundreds of thousands of dollars in fees defending a lawsuit where the CDD should have simply "stood on the sidelines" or had limited involvement in the litigation. Those fees have been passed on to the burdened landowners.

4. As the Court may recall, it was GrayRobinson who represented F. Davis "Dave" Clark, Jr., and David Schwarz, through their DC703, LLC, entity sought and secured the approval of the establishment of the District from the City of Clearwater. Clark and Schwarz are now doing 40 year times in the federal penitentiary as a result of the massive scam that they perpetrated and which was launched in Clearwater.

5. GrayRobinson has served as District Counsel from the inception of the CDD forward.

6. A unit of "government" ostensibly was created for the purpose of providing infrastructure in this grand "five star resort" development, wherein not one penny of infrastructure was ever constructed.

7. Nevertheless, in looking out for the best interests of the Oppenheimer bondholders rather than the interests of the constituent landowners who fund the government, GrayRobinson has inflicted serious financial harm on those who own land within the District.

8. Shockingly, in the last few years, GrayRobinson has caused the CDD to increase its Operations and Maintenance budgets by an additional $300,000 per year largely for the purpose of providing GrayRobinson with a defense "war chest" to fight its constituent landowners.

9. To date, the undersigned has identified a total of $779,692 (which may include some costs) in GrayRobinson's invoices that have been submitted to, and approved by, the

CDD Board of Supervisors. Attached as composite Exhibit A are pages of the various GrayRobinson's invoices and other documents that reflect the substantial billings.

10. GrayRobinson has led the CDD Board members into thinking that the CDD had no option but to defend this declaratory action filed by the Grand Venezia against the CDD and the Oppenheimer bondholders.

11. At no time has GrayRobinson rendered objective legal advice to the CDD Board regarding the District's options. Instead, GrayRobinson attorneys have not only given erroneous legal advice to the Board but also have undertaken a concerted effort to keep the CDD Board members "in the dark" about the law and pertinent facts germane to this declaratory action.

12. Both before and after this lawsuit was filed, GrayRobinson advised the CDD Board members that, because the CDD's bonds had been validated, the bonds could not be "collaterally attacked." GrayRobinson attorneys further advised that the CDD Board members essentially had no alternative but to keep assessing the unit owners.

13. GrayRobinson attorneys have routinely conflated – intentionally or negligently – a challenge to the validity of bonds versus a challenge to the non-ad valorem special assessments. What became the focus of the Grand Venezia's declaratory action was that the special assessments were unlawful. There was no direct challenge to the validity of the bonds.

14. GrayRobinson further counseled that the CDD had a contractual obligation to continue assessing unit owners under the Indenture with the Trustee for the Oppenheimer bondholders. That was misleading and erroneous advice.

15. Further, CDD Board members were advised that they could be sued, personally, if they did not continue to levy the non-ad valorem special assessments which this Honorable Court has declared unlawful.

16. For example, CDD Board member Gerald Lancaster was deposed on February 22, 2018. The following exchange took place:

> Q. Do you understand that I asked the CDD to stand on the sidelines and not incur hundreds of thousands of dollars? (referring to hundreds of thousands of dollars in attorneys' fees)
>
> A. I understand that, and on advice of our attorneys they said we shouldn't stand on the sidelines, we could be sued individually.

T. p. 15.

17. Under the threat that the CDD Board members could be sued, individually, if they did not continue levy the non-ad valorem special assessments, GrayRobinson did not advise the same Board members that they could be sued, personally, if they levied unlawful assessments.

18. That the bonds were validated and that there was an Indenture between the Trustee and the CDD did not obligate the CDD to protect the interests of the Oppenheimer bondholders where the assessments were unlawful and unenforceable.

19. Contrary to what GrayRobinson repeatedly and erroneously stated, the CDD Board had the absolute right to undertake a reassessment procedure on its own. As this Honorable Court is well aware, non-ad valorem special assessments that are arbitrary, irregular, defective, and grossly unfair are unlawful.

20. In a similar vein, the CDD did not have the affirmative obligation to defend the lawsuit aggressively, if at all.

21. Pursuant to Section 816 of the Indenture, the CDD Board had the power to deem the non-ad valorem special assessments unenforceable. That power was also given to the CDD Board in Section 170.14 of the Florida Statutes and in Section 197.3632(4) of the Florida Statutes.

22. Moreover, the bond offering memorandum itself had language in it to the effect that improper assessments can be judicially vacated where they are defective. So, too, did the CDD's own assessment methodology reports.

23. Digressing, it was not the Oppenheimer mutual fund defendants that funded the initial expenditures by the CDD back in 2005. Rather, the disbursements, millions of dollars which the Grand Venezia contend were improper, were funded by a $30,650,000 Bond Anticipation Notes offering. The $33,840,000 Capital Improvement Revenue Bond offering funded in 2006 served primarily to refinance the one year Bond Anticipation Notes.

24. As confirmed by both the deposition and trial testimony of Rene Vecka, an Oppenheimer Vice President who not only served as Oppenheimer's corporate representative in this lawsuit but also participated in the decisions back in 2006 and 2007 wherein Oppenheimer decided to acquire all of the CDD's bonds, Oppenheimer did virtually no due diligence before deploying its mutual fund shareholders dollars in purchasing these high yield, high risk "junk" bonds. For example, Oppenheimer made no effort to undertake any investigation of Clark's creditworthiness, never looked at any financial statements of Cay Clubs, never contacted the City of Clearwater with regard to permitting status and did not make any onsite visits before purchasing the bonds. Deposition of Rene Vecka taken on December 13, 2017, T. 7-10; 19; 22-23.

25. Oppenheimer went so far as to buy more of the CDD's bonds in October of 2007, months after $9.6 million in capital improvements were to have been completed. As the Court is well aware, the only thing that transpired was the demolition of the strip center, with not one penny of the BAN capital improvements being constructed.

26. Again, the bond offering memorandum itself was replete with risk warnings, including risk that both the CDD Board and a court of competent jurisdiction have the

power to order a reassessment.

27. Notwithstanding these compelling facts and the pertinent law, GrayRobinson, in a self-serving manner, essentially made the decision that the CDD would align itself with the Oppenheimer bondholders to the detriment of the constituent landowners.

28. The Court may recall that even prior to the filing of the lawsuit, GrayRobinson, with no authorization whatsoever from the CDD Board, started "circling the wagons" with Oppenheimer's counsel. Shortly after the lawsuit was filed, the undersigned, by letter dated April 6, 2016, to Thomas A. Cloud, Esq., of GrayRobinson, the undersigned asked that the CDD act as a "neutral bystander in the dispute, thereby minimizing its attorneys' fees and costs." A copy of that correspondence is attached as Exhibit B.

29. In actuality, GrayRobinson attorneys had already begun strategizing with Oppenheimer's counsel for the purpose of colluding with each other, to the detriment of the constituent landowners. The GrayRobinson invoices reflecting time entries for the months of March and April of 2016, copies of which are attached as Exhibits C and D, confirm that GrayRobinson counsel took it upon themselves to explore a "joint defense" agreement with Oppenheimer and its counsel.

30. Disturbingly, the CDD Board did not even meet until May 18, 2016, pursuant to Section 286.011(8) of the Florida Statutes to discuss whether the CDD would even be defending the lawsuit. Prior to that "shade" meeting, the "fix" was already in with respect to how GrayRobinson was going to advise the CDD Board.

31. GrayRobinson's advice that the CDD Board aggressively defend the lawsuit was strictly self-serving. For one thing, if GrayRobinson were to admit that the non-ad valorem special assessments were flawed, GrayRobinson would have been subjecting itself to liability in

that the law firm steadfastly insisted that the assessments had to continue to be levied. Further, by proactively defending the lawsuit, GrayRobinson could run up substantial fees. GrayRobinson has done just that.

32. GrayRobinson went so far as to run up fees opposing mediation and also opposing the Grand Venezia's motion to amend its complaint.

33. As the Court knows, by 2015, the "Commonwealth" lands became owned by a special purpose entity created for the benefit of Oppenheimer. Those lands were sold to the Flournoy apartment developer in December 2016.

34. Given that significant event, after the Grand Venezia had updated its pleading to reflect that conveyance, the Grand Venezia firmly believed that a reassessment procedure should unfold. The Grand Venezia was naively hoping that the CDD would accommodate its request that the CDD undertake a reassessment process.

35. To that end, by letter dated April 3, 2017, to Robert E. Johnson, Esq., of GrayRobinson, a copy of which is attached as Exhibit E, the Grand Venezia requested that the CDD include on its agenda for the upcoming CDD Board meeting a discussion item regarding a new assessment procedure." The undersigned further offered to hold a workshop with the CDD Board members and counsel so that the CDD Board could hear why it was that the Grand Venezia felt that a new assessment or reassessment procedure should be undertaken.

36. A copy of the Agenda for the April 19, 2017, meeting of the CDD Board is attached as Exhibit F. The Grand Venezia's request that the assessment or reassessment procedure did not even make it to the Agenda.

37. Instead, by letter dated April 19, 2017, Brian A. Crumbaker, Esq., of Hopping Green & Sams, counsel to Oppenheimer, sent a letter to the CDD Board of Supervisors

for the purpose of addressing the "misrepresentations of facts and law contained within Mr. Barnes' letter with the intent that it stem the proliferation of falsehoods concerning the District, the Bonds and the assessments levied against benefiting property that serve as security for the Bonds." Mr. Crumbaker added that "[c]atering to the requests in Mr. Barnes' letter will not obviate the need for a court to serve as the ultimate arbiter with respect to these issues. . . . Those wheels have long been set in motion."

38. Attached as Exhibit G is a copy of the Minutes of Meeting Clearwater Cay Community Development District Board for the meeting held on April 19, 2017. In attendance at the meeting from GrayRobinson was Robert E. Johnson, Esq. As reflected on the bottom of page 4 of the minutes, Mr. Johnson acknowledged that he had received the letter from Mr. Crumbaker of Hopping Green & Sams, setting forth the Bondholders position regarding the Grand Venezia's argument for a reassessment.

39. Rather than objectively advising the CDD Board members that they did, in fact, have the power – through the statutes and the CDD's own documents – to deem the assessments unenforceable with a new assessment or reassessment procedure to follow, the Minutes reflect that Mr. Johnson opined:

> This is a matter that needs to be resolved by the Judge but it does not look like the Grand Venezia has a claim in enforcing the Board to do a reassessment.

40. In other words, GrayRobinson yet again decided that the CDD needed to continue align itself with the Oppenheimer bondholders, notwithstanding the financial harm that was being inflicted on the burdened landowners. That harm was not only in the form of the continued levying of the special assessments that were central to the lawsuit but also the additional assessments being levied to pay GrayRobinson's fees.

41. On February 21, 2018, Thomas A. Cloud, Esq., of GrayRobinson, was deposed. Notwithstanding the fact that Mr. Cloud repeatedly informed the CDD Board members and others in attendance at meetings over the years that the CDD had to keep assessing the unit owners, Mr. Cloud was unable to identify and quantify the direct, special benefits that should have been flowing to the unit owners in connection with the substantial non-ad valorem debt service assessments the owners had been paying. T. 126.

42. Further, Mr. Cloud ultimately admitted that, just because bonds have been validated, it does not follow that assessments cannot be challenged. T. 93. Thus, Mr. Cloud essentially admitted prior to the trial that the advice he had been giving to the CDD Board was erroneous.

43. In a letter dated March 12, 2018, from the undersigned to Mr. Johnson, a copy of which is attached as Exhibit H, the Grand Venezia again formally requested that the CDD Board undertake a new assessment or reassessment procedure. Mr. Johnson was further asked to ensure that the agenda for the upcoming March 21, 2018, CDD meeting include that very request. The letter included:

> I urge you to recommend to the CDD Board of Supervisors that they vote in favor of a statutory reassessment procedure, and I further urge the Board of Supervisors to do just that. A favorable vote by the CDD Board would moot significant aspects of the lawsuit and the trial, resulting in a substantial savings of time and resources for all parties.

44. Without any response or explanation, the CDD Board meeting scheduled for March 21, 2018, was cancelled. That was the fourth CDD monthly meeting in a row that was cancelled by the District, thereby depriving the public and constituent landowners their right to be heard pursuant to Section 286.0114(2) of the Florida Statutes.

45. Accordingly, there has been an outright failure and refusal on the part of

GrayRobinson to advise CDD Board members that they should consider voting in favor of a reassessment procedure.

46. On a number of occasions, the undersigned offered to hold a workshop with the CDD Board for the purpose of giving the Board members an overview of the facts and law and why the Grand Venezia maintained that a reassessment procedure was warranted. At no time did GrayRobinson ever recommend to the CDD Board members that they attend such a workshop.

47. Rather, there has been a unilateral, concerted effort on the part of the GrayRobinson lawyers not only to keep the CDD Board members ill-informed about the assessment process but also to cater to the whims of Oppenheimer.

48. As this Honorable Court is well-aware, in the State of Florida, the American Rule is followed with regard to award of attorneys' fees.

49. There was no statutory basis for the CDD to require the burdened landowners to fund the payments of GrayRobinson's excessive invoices during the course of the litigation. Similarly, there was no contractual basis to pass on GrayRobinson's fees to those who fund this unit of "government."

50. Inasmuch as GrayRobinson has been paid some $779,692, GrayRobinson has profited handsomely from its erroneous counsel.

51. Although the lawsuit also involved the dissolution component, the overwhelming majority of time that the parties and their counsel devoted in the case went to the issue of whether the assessments were lawful.

52. Had GrayRobinson given objective advice to the CDD Board members by acknowledging that the assessments were or could be flawed, virtually the entire trial could have been avoided.

53. At no point has this Honorable Court made the determination that the CDD was or is entitled to recover its attorneys' fees from the burdened landowners. At no time has this Honorable Court been asked to weigh in on the reasonableness of such fees. Rather, the CDD, upon GrayRobinson's counsel, made the unilateral decision that fees would be passed on to owners. The CDD Board members further routinely "rubber stamped" the payments of GrayRobinson invoices, paying no attention to whether the time was properly spent and otherwise justifiable. There were instances where objections were raised by unit owners, but those objections were ignored.

54. Thus, rather than asking this Honorable Court to determine entitlement and reasonableness, GrayRobinson attorneys decided that they had the power to make those determinations and have the landowners fund the payment of their fees regardless of the outcome of the case.

55. The Due Process Clause found in the Fourteenth Amendment of the United States Constitution was violated by GrayRobinson, as District Counsel, and by the CDD in that the property of the burdened landowners was taken by the CDD and paid over to GrayRobinson, without any judicial oversight. And, with no judicial determination of entitlement or reasonableness, the burdened landowners were simply required to pay the additional special assessments to fund the defense of a lawsuit which no objective counsel would have aggressively defended.

56. The improper conduct of GrayRobinson and the CDD further violated the due process rights found in Article I, Section 9 of the Constitution of the State of Florida, which reads:

> **SECTION 9. Due process.—**No person shall be deprived of life, liberty or property without due process of law, or be twice put in

> jeopardy for the same offense, or be compelled in any criminal matter to be a witness against oneself.

57. Moreover, units of government "do not have the authority, absence specific authorization, to impose special assessments." *Att'y Gen. Fla. 92-22 (1992).* Article VII, Section 1 of the Constitution of the State of Florida limits a unit of government's power to levy special assessments.

58. What transpired here was unconscionable and otherwise constituted the gross abuse of power. The notion that attorneys for a unit of government be entitled to profit off of their erroneous advice and that the fees paid to them should be non-refundable, notwithstanding an unfavorable outcome, is beyond the pale.

59. As an officer of the Court, the undersigned can represent that Harbourside Grande Crossings, LLC, through one of its Managers, David McComas, joins in this Motion. It is Harbourside Grande Crossings, LLC, that owns the commercial building to the west of the Grand Venezia complex.

60. For the foregoing reasons, GrayRobinson should be ordered to disgorge the fees paid to the firm. Whether that disgorgement be run through the CDD and then paid out pro-rata to the owners or just paid directly to them is of no significance.

s/ Bruce W. Barnes

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of May, 2018, I electronically filed the foregoing with the Clerk of Courts by using the Florida Courts E-filing Portal, which will send notice of electronic filing to counsel of record.

s/ Bruce W. Barnes
Bruce W. Barnes