

Legal expenses incurred by Acrewood to act on behalf of the Fund should be covered, per the original HCR Value Fund Limited Partnership Agreement, from the Partnership's Assets. The Receivership Estate should pay its pro rata share (by capital contribution) of 1.25% of those costs. Acrewood, as 98.75% holder of HCR Value Fund Series B, would cover the remainder.¹ Legal expenses incurred by Acrewood acting on its own behalf to protect its own interests should be borne by Acrewood alone. Thus, the Commission respectfully requests that the Acrewood Motion be allowed in part and denied in part in the manner set forth below. The Commission has provided a summary table of its recommendations at the end of this Response.

The ARCO Does Not Justify Acrewood's Claim for Indemnification

If this case were never filed, who would have paid for the expenses detailed in the Acrewood Parties' motion? Acrewood would have paid 98.75% of the expenses, pursuant to their share of Series B of the HCR Value Fund. The other 1.25% would have come from HCR Value Fund, GP.² The HCR Value Fund Limited Partnership Agreement states in Section 11.2: "The General Partner ... shall be indemnified ... by the Partnership (only out of Partnership assets...) against any claim, demand, controversy, dispute, cost, loss, damage, [or] *expense (including attorneys' fees)*..." [emphasis added]. In other words, the assets of the Partnership should be used to cover legal fees and other expenses incurred by the General Partner. If ClearPath still controlled the General Partner, then legal fees and other expenses incurred would be paid from Partnership assets (the invested assets and returns on those investments).

¹ Acrewood states in its Motion that Series A "is close to winding up its affairs" and had returned all capital to its investors. Thus, it does not appear that the expenses detailed in the Acrewood Motion relate to Series A. To the extent that Acrewood can show that its legal expenses did relate to Series A, the Commission would support reimbursement for that portion of the expenses pro rata according to Series A contributions.

² Acrewood acknowledges that it owns 98.75% of Series B of the HCR Value Fund, based on its initial investment of \$19.75 million. HCR Value Fund GP, LLC owns 1.25%, from its investment of \$250,000. Mot., ¶¶ 5-7.

The Acrewood Parties admit that three days after they learned of the SEC’s investigation, they strategized “to obtain control of Series B directly from the Churchville Parties....” Mot. ¶¶ 18. The Commission filed its complaint on May 7 (announcing its intention to seek a freeze order and a receiver). The Acrewood parties then began a rapid negotiation with Defendants’ counsel in this securities fraud case. Mot., ¶¶ 20-21. The Commission filed its Motion for Preliminary Injunction on May 19. Two days later—knowing that Motion was being considered by this Court—the Acrewood Parties signed the Agreement Regarding Continuing Operations of HCR Value Fund (“ARCO.

ARCO purports to reverse the direction of the indemnification of expenses like attorneys’ fees. Before ARCO, expenses were covered by partnership assets, not Churchville and ClearPath. After ARCO (according to Acrewood), Churchville and ClearPath cover all expenses. Knowing of the Defendants’ alleged fraud and the likelihood the Court would impose a preliminary injunction and asset freeze, Acrewood and Churchville agreed to put the Defendants on the hook for expenses they would not previously have had to pay.³

The Acrewood Parties acknowledge that, “the Freeze Order prevented [the Churchville Parties] from signing any agreement which would allow an affiliate of the Acrewood Parties to become General Partner of Series B” and that “the authorization to substitute the general partner came in [this Court’s] July 30 Order” concerning HCR Value Fund. In other words, Acrewood’s ability to assume the role of general partner was controlled by this Court and limited to the terms

³ Though Acrewood’s Motion details the times the Commission consulted or failed to consult Acrewood in the course of the investigation and litigation, Acrewood is curiously silent about the fact that it negotiated and executed the ARCO without calling or emailing counsel for the Commission, who may have taken a different position on the Defendants’ ability to reverse the existing indemnification provisions while the Preliminary Injunction motion was pending.

of that Order. The HCR Value Order of July 30 (Docket No. 17) provided that authorization with a condition:

... such HCR Value investor entities may replace HCR Value Fund GP, LLC as general partner with an entity controlled by the same entity which controls such HCR Value investor entities, and in so doing so may convert any interest of a Defendant in HCR Value to a special limited partner interest, provided that:

a) No financial interest of the Defendants (including but not limited to rights to distributions or payments in respect of any capital contribution, carried interest, or management fees due to or accrued for the benefit of the Defendants) be dissipated or diminished;

The Commission moved for—and the Court approved—Acrewood’s takeover as general partner provided that Acrewood not diminish the capital contributions, carried interest, or management fees due to ClearPath or Churchville

The Commission didn’t have to ask this Court to allow Acrewood to take over management of the HCR Value Fund. The Commission could have included the HCR Value Fund in its Freeze Order and in the Receivership Order, effectively freezing the Fund in place. But, the Commission did not do so because Acrewood’s counsel stated that would harm Acrewood and ClearPath’s economic interests.⁴ Alternatively, the Commission could have asked the Court to a) order Churchville to perform the ministerial functions necessary to keep the HCR Value Fund open; or b) order ClearPath to use a person other than Churchville to perform necessary HCR Value work. Ultimately the Commission backed the plan proposed by Acrewood because Acrewood had the greatest interest (its \$20 million investment) in maintaining the Fund in working order and the greatest knowledge of what would be necessary

⁴ Counsel for Acrewood explained to counsel for the Commission that the Freeze Order and/or the Receivership assignment could trigger default mechanisms that would make the return on the HCR Value Fund investments substantially less. The Commission sought to protect Acrewood as an investor by avoiding that outcome. Acrewood, the Commission submits, agreed to take over as general partner not out of altruism, but out of an effort to protect its \$20M investment.

to do so. Though the Commission realized that Acrewood would bear the administrative costs of doing so, the Commission believes those costs were substantially less than the amounts Acrewood would have lost if the HCR Value Fund was placed into receivership with the rest of the ClearPath Funds.

Acrewood—even bearing their claimed legal costs—has come out ahead. They may be the only current ClearPath investor who can say that.⁵

Pre-ARCO and ARCO Expenses

Acrewood's expenses from a) seeking legal advice as to what the SEC investigation could mean for Acrewood (Mot., ¶ 17) and b) how to obtain control of Series B (*Id.*, ¶ 18) relate to Acrewood's protection of its own interests, not Fund expenses. These expenses would not have been covered by the General Partner or Partnership had there been no Commission action; Acrewood would have paid them. And, because there was no ARCO in place at the time, Acrewood cannot argue that its expectation was that they would be indemnified for these costs. Accordingly, this part of Acrewood's motion should be denied.

Acrewood's expenses related to the negotiation of the ARCO (Mot., ¶¶ 21-22) are a closer call. On the one hand, Acrewood's counsel served only Acrewood in that negotiation against the (at least technically) adverse Defendants. On the other hand, the negotiation of the ARCO assisted the HCR Value Fund in continuing to be managed to the benefit of both the Defendants (in the form of the Receivership Estate) and Acrewood. The Commission believes therefore, that these expenses should be paid from the Partnership Assets, per the Limited Partnership Agreement §11.2. The partners (the Acrewood entities and the HCR Value Fund

⁵ Moreover, no other ClearPath investor will likely be able to recoup expenses incurred to try to protect their investment after being victimized by the Defendants' fraud.

GP) should bear those costs pro rata, according to their capital contributions. Thus, the Commission respectfully suggests that the Court allow Acrewood to be reimbursed 1.25% of these expenses (the HCR Value Fund GP pro rata share) from the HCR Value returns otherwise due to the Receivership Estate.

Bank Fees and Expenses

Acrewood details two categories of expenses here. The first is the Fox Chase Bank \$20,000 fee which Acrewood reports has been paid out of Fund assets. (Mot., ¶ 31). The Commission supports this approach as consistent with the Limited Partnership Agreement. However, the Commission questions why the HCR Value Fund GP bore 21% of this fee. The Commission respectfully requests that the Court inquire as to the allocation of this fee among the HCR Value Fund partners.

The second category is legal expenses incurred to negotiate with Fox Chase Bank. The Commission agrees that these expenses were for the benefit of the Fund as a whole. Accordingly, the Commission recommends that these expenses be paid from partnership assets, pursuant to the Limited Partnership Agreement, pro rata based on capital contribution (98.75% Acrewood, 1.25% Defendants/Receivership Estate).

SEC Production Expenses

Here, Acrewood requests reimbursement for legal expenses it incurred convincing the Commission not to freeze the assets of HCR Value Fund or put the Fund in receivership. (Mot. ¶¶ 33-39). These efforts served to protect Acrewood's own financial interests by avoiding the reduction in investment returns that would have resulted if the Fund was frozen or placed in receivership. But, the efforts were also in aid of the Commission's efforts to minimize damage

to investors overall and provide for the orderly transition of investment authority away from the Defendants. Thus, the Commission supports reimbursement of these fees pro rata from the partnership assets, per the Limited Partnership Agreements.

“Management Expenses”

Expenses Acrewood characterizes as management expenses break into four categories: 1) expenses related to the HCR Value Fund Order by this Court on July 30, including negotiations with Capiro Partners (Mot. ¶¶ 40-43); 2) general fund management expenses for August, September and October (Mot., ¶ 45); 3) litigation preparation and negotiation of the Settlement Agreement (Mot., ¶ 47); and, 4) expenses related to the Receiver’s Petition for Instructions and this Motion (Mot., ¶ 45).

The Commission believes that expense categories 1-3 relate to activities Acrewood undertook for the benefit of the Fund itself. Moreover, category 3 (preparation of the Settlement Agreement) represents efforts beyond what was contemplated by the HCR Value Order, in the manner of Fund wind-up expenses. Accordingly, the Commission supports pro rata reimbursement to Acrewood for categories 1 and 2, and full reimbursement for category 3 expenses.

The Commission does not believe that Acrewood should be indemnified for the category 4 expenses related to the Petition for Instructions and this Motion. These actions were undertaken by Acrewood’s counsel for Acrewood’s benefit only. Acrewood should bear those costs.

Summary

For the reasons set forth above, the Commission respectfully requests the Court allow in part and deny in part the Motion by Acrewood Parties' for Allowance for Payment of Legal Fees, Costs and Expenses in the manner set forth in the following table:

Expense Description	Described in Motion at	Commission Recommendation	Suggested Amount
Pre-ARCO expenses regarding impact of investigation on Acrewood and controlling Series B	¶¶ 17-18	Deny as pre-ARCO expenses undertaken for benefit of Acrewood alone	\$0
Negotiation of ARCO	¶¶ 21-23	Allow reimbursement of pro rata share from Partnership Assets, per Limited Partnership Agreement	\$125.10 (\$10,008.53 ⁶ * 1.25%)
Fox Chase Bank fees paid from Fund assets	¶ 31	Order from Court to clarify allocation of 21% of fee to the HCR Value Fund GP	n/a
Pre- and Post-ARCO Negotiations with Fox Chase Bank	¶¶ 25-30	Allow reimbursement of pro rata share from Partnership Assets, per Limited Partnership Agreement	\$39.10 (\$3,128.40 ⁷ * 1.25%)
Convincing Commission not to freeze assets of Fund or put Fund in receivership	¶¶ 33-39	Allow reimbursement of pro rata share from Partnership Assets, per Limited Partnership Agreement	\$317.87 (\$25,429.91 ⁸ * 1.25%)
HCR Value Fund Order & Capio Negotiations	¶¶ 40-43	Allow reimbursement of pro rata share from Partnership Assets, per Limited Partnership Agreement	\$289.66 (\$23,172.29 ⁹ * 1.25%)

⁶ Mot., ¶ 24.

⁷ Mot., ¶ 32.

⁸ Mot., ¶ 39.

⁹ Mot., ¶ 44.

August-October Fund Management Expenses	¶ 45 (in part)	Allow reimbursement of pro rata share from Partnership Assets, per Limited Partnership Agreement	1.25% of portion of \$44,667.19 not attributable to Receiver's Petition and Acrewood's Motion for Payment
Settlement Agreement Negotiation and Preparation	¶ 47	Allow in Full	\$28,850.55
Receiver's Petition and Acrewood's Motion for Payment	¶ 45 (in part)	Deny as expenses undertaken for benefit of Acrewood alone	\$0

Respectfully submitted,

SECURITIES AND EXCHANGE COMMISSION
By its attorneys,

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CERTIFICATE OF SERVICE

I, Marc J. Jones, hereby certify that I filed the within document on the 30th day of November, 2015, and that notices will be sent electronically to all counsel who are registered participants identified on the Mailing Information for Case No. 15-cv-00191-S-LDA.

/s/ Marc J. Jones