

SETTLEMENT AGREEMENT

I. Recitals

A. Diamond Ventures, LLC ("Diamond") is the Plaintiff and the U.S. Small Business Administration ("SBA") is the Defendant in *Diamond Ventures v. Karen Mills*, No. 03-1449 (GK) (D.D.C. filed June 30, 2003), and they now hereby agree to settle and resolve this litigation by entering into this Settlement Agreement.

B. In 2003, Diamond sought preliminary approval to pursue a license from the SBA to operate as a Small Business Investment Company ("SBIC"), by filing a Management Assessment Questionnaire ("MAQ"). Under the SBA's procedures, if the SBA approved the MAQ, it would issue a "Go Forth letter" to the applicant, and the applicant would then have a specified time to raise the necessary minimum capital commitments and prepare and file with the SBA a formal licensing application. In this case, the SBA rejected Diamond's MAQ and declined to issue a Go Forth letter, effectively denying Diamond's application at the preliminary stage.

C. Diamond sued the SBA under the Equal Credit Opportunity Act ("ECOA"), claiming that it was qualified to receive a Go Forth letter and that the SBA discriminated against Diamond on the basis of the race of its principal owners in denying Diamond a Go Forth letter. The SBA avers that it denied the Go Forth letter because the MAQ did not support the statutorily required assessment that Diamond was likely to succeed and profit if licensed as an SBIC. SBA moved for summary judgment but in March 2010 the District Court denied the motion and found sufficient evidence that the case could proceed to trial. The District Court later set the case for trial to begin on February 17, 2011.

D. Diamond recently submitted to the SBA a Revised Business Plan, modifying its business strategies and proposing ownership and management teams consisting of [REDACTED]. The SBA now refers to Go Forth letters as "Green Light" letters.

In settlement of this litigation, Diamond and the SBA agree to the following terms:

II. Payment by SBA to Diamond.

A. The SBA shall pay Diamond the total sum of one million six hundred twenty five thousand dollars (\$1,625,000.00). Diamond and the SBA agree that, at least in large part, the funds are intended to cover Diamond's attorneys' fees and costs to date, both for this litigation and the related SBIC licensing process, and for projected expenses associated with the remaining licensing application process, as described herein.

B. This payment shall be made by an electronic transfer of funds directly to Diamond's account, as specified in instructions that counsel for Diamond separately provided to counsel for SBA. Payment shall be made as promptly as practicable, within a reasonable time, consistent with the normal processing procedures followed by the Department of Justice and the

Department of the Treasury. Diamond and its counsel shall co-operate with counsel for SBA to insure that all documentation required to process this payment is complete and accurate. The parties understand that such payments typically take up to one to two months for the Department of Treasury to process. Diamond and Diamond's counsel shall be responsible for the distribution of the payment among themselves.

III. SBIC Licensing Application Process

A. Structure of Diamond Ventures, LLC and SBIC. Diamond's proposed structure, management and ownership teams, and business plan, for purposes of the Green Light letter, are reflected in its Revised Business Plan, dated August 12, 2010, as supplemented by its counsel's letter to SBA dated September 8, 2010, and emails of October 4, 2010, and October 7, 2010. Consistent with its Revised Business Plan, Diamond commits to raise a minimum of \$15 million in legally binding, unencumbered capital commitments that meet the definition of Regulatory Capital and otherwise comply with statutory and regulatory requirements.

B. Green Light Letter. (1) Within one business day of the execution of this Settlement Agreement, SBA will issue a standard "Green Light" letter to Diamond, that will be substantially similar to any other "Green Light" letters that it issues to SBIC applicants and shall make no reference to this litigation or Settlement Agreement. (2) Within one business day of the execution of this Settlement Agreement, SBA shall issue to Diamond a separate letter, with format and wording as in the Attachment hereto, including the following language:

This is to confirm that under the new formula set forth in the American Recovery and Reinvestment Act of 2009, upon issuance of an SBIC license by SBA, Diamond--like other Section 301(c) SBIC licensees--would be eligible, once it meets the requirements in 13 C.F.R. §107.1150, to apply for leverage from the SBA in the form of a commitment of up to 300 percent of Diamond's Regulatory Capital, or \$150 million, whichever is less. Like any other Section 301(c) licensee, upon approval of the commitment by SBA, Diamond would be eligible to draw SBA leverage based only on the "paid in" portion of Regulatory Capital at the time the draw is requested.

C. After issuance of the Green Light letter, Diamond shall have eighteen months, starting from the date of disbursement of the payment in II. above, to raise the necessary Regulatory Capital commitments, consistent with statutory requirements and Diamond's Revised Business Plan, and prepare and file a formal licensing application for an SBIC license. If Diamond does submit a formal licensing application, the application shall be consistent with its Revised Business Plan and Diamond shall make best efforts to submit a complete and persuasive application.

D. Consideration of Diamond's Formal License Application. If Diamond submits a timely formal licensing application, the SBA shall review it and promptly decide whether to grant Diamond an SBIC license, according to the following terms:

1. SBA shall waive any and all application fees for Diamond's formal licensing application.
2. SBA will issue its decision before the later of: (a) 90 days of receipt of Diamond's complete application, or (b) ten business days of receipt of the results of the FBI background checks (referenced below).
3. Substantive Standards. The SBA's review shall apply its customary standards in assessing whether:
 - a. Diamond has obtained the necessary legally binding Regulatory Capital commitments, totaling at least \$15 million, consistent with both Diamond's Revised Business Plan and the statutory and regulatory standards in 15 U.S.C. §§ 681-82 and at 13 C.F.R. §§ 107.100 through 107.160 and 107.200 through 107.250;
 - b. Diamond's application includes the appropriate legal documents governing its formation and corporate governance, consistent with both Diamond's Revised Business Plan and the applicable statutory and regulatory standards, as well as the SBA's model Limited Partnership Agreement (available on SBA website) current at the time of Diamond's application;
 - c. The business plan and ownership and management teams reflected in Diamond's formal licensing application are either consistent with those in Diamond's Revised Business Plan or, if inconsistent, do not materially undermine Diamond's probability of successful and profitable operations if licensed as an SBIC;
 - d. FBI background checks of Diamond's ownership and management team reveal no materially adverse information not previously disclosed in writing to SBA by Diamond; and
 - e. The investment performance track records of each of Diamond's proposed ownership and management team members have not materially worsened in the time since issuance of the Green Light letter, so as to materially undermine probability of Diamond's successful and profitable operations if licensed as an SBIC.
4. During its review, SBA shall make best efforts to provide Diamond early opportunity to cure any perceived defects or weaknesses in its formal licensing application that might materially affect Diamond's chances of approval. Diamond shall make best efforts to respond promptly to any issues SBA calls to its attention during SBA's review. SBA and Diamond agree to work in good faith to resolve any such issues informally.

IV. Dispute Resolution Regarding Diamond's Formal Licensing Application

If the SBA denies Diamond's formal licensing application, the parties agree to use the following dispute resolution procedures in lieu of litigation.

A. If SBA denies Diamond's formal licensing application, SBA will provide Diamond a written explanation of its reasons at the time it issues its decision.

B. At the option of Diamond, the SBA and Diamond shall promptly return to mediation and make best efforts therein to agree on appropriate changes in particular parts of Diamond's formal licensing application, or the SBA's assessment thereof, or both. At the option of Diamond, the parties agree to use [REDACTED] as their mediator. Otherwise, the mediator shall be mutually agreed upon by Diamond and the SBA. The costs of mediation shall be split evenly by the parties.

C. Arbitration. In the event the SBA denies Diamond's formal licensing application, Diamond may elect to submit the SBA's denial to binding arbitration as described herein. Arbitration under this paragraph shall follow these provisions:

1. Composition of Arbitration Panel. The parties shall select three mutually agreed upon arbitrators, based on the following:
 - a. No member of the panel may be an employee or independent contractor of Diamond or SBA, an SBIC, or firms that have represented an SBIC, for the past ten years.
 - b. No member of the Panel may be a witness, lawyer, magistrate, mediator or judge in the litigation.
 - c. Each arbitrator, Diamond, and the SBA will agree that for 12 months after the conclusion of the arbitration, none of the arbitrators will be hired by Diamond or the SBA as either employees or independent contractors for purposes of performing any work for Diamond or the SBA, provided that, in the event the Panel decides that Diamond should be licensed, the Panel members and SBA may communicate regarding the Panel's findings, in order for the SBA to receive constructive criticism of its handling of Diamond's application and/or the SBIC program more generally.
2. Selection Process of Arbitration Panel:
 - a. Diamond and SBA shall each select one member of the three-member arbitration panel.
 - b. The third member of the arbitration panel shall be selected by agreement

of the two members selected by the parties.

3. Qualifications of the arbitration panel members. Panel members must meet one or more of the following criteria:

- a. Active member of the American Arbitration Association or JAMS;
- b. A retired federal district, circuit or bankruptcy judge;
- c. A person whose qualifications are otherwise acceptable to both parties, provided that if either party rejects the qualifications of a particular person suggested by the other party, the rejecting party must, upon the suggesting party's request, explain its reasons for the rejection.

4. Costs of retaining the arbitration panel will be borne entirely by SBA and/or the U.S. Department of Justice, provided that the SBA, Diamond, and the arbitrators agree in advance to a specific dollar cap on the arbitration costs, in order to comply with Government procurement standards.

5. The SBA shall submit to the Arbitration Panel a complete copy of Diamond's formal licensing application, Diamond's Revised Business Plan, SBA's letter explaining its reasons for rejecting the application, and correspondence between SBA and Diamond reflecting any attempted action to cure identified issues in the formal licensing application (per III.D.4. above). The Panel is not to hear live testimony, but it may, at its discretion, request that each party submit a single memorandum, not to exceed ten pages, summarizing its position.

6. Based solely on the information in the preceding paragraph, the Panel shall decide, *de novo*, whether Diamond's formal licensing application meets the Substantive Standards set forth in III.D.3. above.

7. The Arbitration Panel shall issue a decision within 30 days of receipt of the materials described in paragraph 5. above. The panel shall decide by a majority of at least two out of three members.

8. Binding nature of the arbitration. There shall be no appeals from the decision of the Arbitration Panel, absent grounds for vacating the Panel's decision as set forth in 9 U.S.C. § 10(a), and SBA and Diamond agree to be bound by the determinations of the Arbitration Panel. If the arbitration reverses the SBA, the agency shall issue an SBIC license to Diamond within 15 days.

9. Except for the costs of the retaining the arbitration panel explained above in 4, each side shall bear its own costs and attorney's fees associated with the arbitration.

V. SBA Leverage Commitment

If Diamond is licensed, either by SBA in the first instance or as a result of arbitration as described above, the SBA will make available Leverage as follows:

A. Diamond will be eligible for a Leverage Commitment by SBA of up to twice its Regulatory Capital, in accordance with SBA's standard requirements in effect at the time Diamond applies for leverage. Diamond may request up to the full amount of such commitment within thirty days of licensing and such request will be granted, provided Diamond is in compliance with SBA's regulatory standards in effect at the time regarding eligibility for leverage.

B. If Diamond requests less of a commitment than two tiers of Leverage within the thirty day period, Diamond may submit additional requests for the balance. In that event, Diamond shall be subject to the same review process as all other commitment applicants. Diamond will be obligated to pay all fees associated with commitment requests and Leverage draws.

C. As with all newly licensed SBICs, before Diamond can draw more than one half of one tier of Leverage, Diamond will have to undergo a regulatory examination by SBA to ensure they are in compliance with the Regulations.

D. Diamond will be eligible for a third tier of Leverage in accordance with the Small Business Investment Act of 1958 ("the Act"), as amended by the American Recovery Reinvestment Act and the regulations implementing the Act, consistent with the letter in III.B.(2) above.

VI. Release of Claims

A. Within three business days of execution of this Settlement Agreement, Diamond agrees to dismiss its complaint in this litigation, with prejudice, and SBA will stipulate to the dismissal.

B. Diamond, [REDACTED] waive all other claims in this action, including but not limited to claims for attorneys' fees and costs, as well as any claims for damages of any kind, and all forms of injunctive, equitable and/or declaratory relief, under ECOA or any other legal basis. Diamond, [REDACTED] agree not to hereafter assert any claim or institute or prosecute any civil action or other proceeding against the SBA, the United States, its agencies or officials, or its present or former employees or agents, in either their official or individual capacities, with respect to any event complained of in this litigation. Diamond, [REDACTED] hereby fully and forever release and discharge the SBA, and the United States, its agencies and officials, and its present and former employees and agents, in their official and individual capacities, from any and all rights and claims of every kind, nature,

and description, based on evidence presently known or that reasonably should have been known, which they now have or may have arising out of or in connection with any event occurring on or before the date of execution of this Settlement Agreement. [REDACTED] hereby fully and forever releases and discharges the SBA, and the United States, its agencies and officials, and its present and former employees and agents, in their official and individual capacities, from any and all rights and claims of every kind, nature, and description, related to this litigation or Diamond, based on evidence presently known or that reasonably should have been known, which he now has or may have arising out of or in connection with any event occurring on or before the date of execution of this Settlement Agreement.

Consistent with this, other than the payment in Paragraph II.B. above, and the potential costs for arbitration described in paragraph IV.C.4., above, SBA shall not pay additional funds to or on behalf of Diamond, in connection with the settlement of this litigation.

C. The SBA, the United States, its agencies or officials, or its present or former employees or agents, in their official capacities only, hereby release and forever discharge Diamond, [REDACTED], and each of their heirs, executors, administrators, agents, personal representatives, attorneys, predecessors, successors, partners, affiliates, employees, directors, principals, officers, representatives and assigns from any and all claims that could have been brought as compulsory counterclaims in this litigation, based on evidence presently known or that reasonably should have been known, for transactions related to Diamond's licensing process or this litigation, that occurred on or before the date of execution of this Settlement Agreement.

In addition, the SBA, its agencies or officials, or its present or former employees or agents, in their official capacities only, hereby release and forever discharge Diamond, [REDACTED] and each of their heirs, executors, administrators, agents, personal representatives, attorneys, predecessors, successors, partners, affiliates, employees, directors, principals, officers, representatives and assigns from any and all claims that reasonably should have been known, based on evidence presently known or that reasonably should have been known, for transactions related to Diamond's licensing process or this litigation, that occurred on or before the date of execution of this Settlement Agreement.

D. If Diamond is licensed, either by the SBA in the first instance or through arbitration, nothing herein shall be construed to excuse Diamond from having to comply with all legal requirements of a licensed SBIC. Nor does anything herein limit SBA's authority to take enforcement or regulatory actions involving Diamond or any other SBIC licensee, pursuant to SBA's regulatory and statutory authority.

VII. No Admission of Liability.

This Settlement Agreement has been entered into by Diamond and defendant solely for the purposes of compromising disputed claims without protracted legal proceedings and

avoiding the expense and risk of such litigation. Therefore, this Settlement Agreement is not intended and shall not be deemed an admission by either party of the merit or lack of merit of the opposing party's claims and defenses. Without limiting the generality of the foregoing, this Settlement Agreement does not constitute, and shall not be construed as, an admission that defendant, the Agency, or any of the Agency's present or former employees or agents violated any of Diamond's rights or any laws or regulations, or as an admission of any contested fact alleged by Diamond in connection with this case or otherwise. This Settlement Agreement may not be used as evidence or otherwise in any civil or administrative action or proceeding against defendant, the Agency, or the United States or any of its agencies or officials or present or former employees or agents, either in their official or individual capacities, except for proceedings necessary to implement or enforce the terms hereof.

VIII. Joint Press Release.

At or near execution of this Settlement Agreement and full payment to Diamond, Diamond and the SBA shall issue a joint press release stating, in substance and effect, at a minimum, that the case has been settled by mutual agreement of the parties and that the parties look forward to future cooperation for their mutual benefit and the ultimate benefit of small businesses serving low to moderate income markets.

IX. Other Provisions.

A. **Entire Agreement.** This Settlement Agreement contains the entire agreement between Diamond and the SBA and supersedes all previous agreements, whether written or oral, between the parties relating to the subject matter hereof. No promise or inducement has been made except as set forth herein, and no representation or understanding, whether written or oral, that is not expressly set forth herein shall be enforced or otherwise be given any force or effect in connection herewith.

B. **Construction.** Diamond and the SBA acknowledge that the preparation of this Settlement Agreement was collaborative in nature, and so agree that any presumption or rule that an agreement is construed against its drafter shall not apply to the interpretation of this Settlement Agreement or any term or provision hereof.

C. **Further Assurances.** Diamond and the SBA agree to take such actions and to execute such additional documents as may be necessary or appropriate to fully effectuate and implement the terms of this Settlement Agreement.

D. **Right to Cure.** If either Diamond or the SBA at any time believes that the other party is in breach of this Settlement Agreement, that party shall notify the other party in writing of the alleged breach. The other party shall then have thirty (30) days to cure the breach or otherwise respond to the claim. The parties shall exercise good faith in complying with all provisions of this Settlement Agreement and make best efforts to resolve any dispute arising from or regarding this Settlement Agreement. Each party retains its legal and equitable remedies

it has to enforce the respective terms and obligations under this Settlement Agreement.

E. **Governing Law.** This Settlement Agreement shall be governed by the laws of the District of Columbia, without regard to the choice of law rules utilized in that jurisdiction, and by the laws of the United States.

F. **Voluntariness.** The principals of Diamond have each read this entire Settlement Agreement, understand all of its terms and conditions, and have had sufficient opportunity to consult with counsel concerning its terms and conditions. Diamond acknowledges that it enters into this Settlement Agreement voluntarily and with the benefit of advice of counsel. Diamond further acknowledges that neither the SBA, the Department of Justice nor anyone else has imposed any undue hardship, duress, or coercion in connection with the execution of this Settlement Agreement.

G. **Company Authorization Resolution.** At the time of execution of this Settlement Agreement, Diamond shall provide SBA with written evidence that Diamond's managing members have authorized [REDACTED] to execute this Settlement Agreement on behalf of Diamond, including a copy of the appropriate resolution.

H. **Counterparts.** This Settlement Agreement may be executed in counterparts, all of which together shall constitute one Agreement. A facsimile or pdf copy of an executed copy of this Settlement Agreement shall be fully as valid and binding as an original signed copy thereof.

I. **Effect of Future Changes in Statutory Authority.** In the event any of the statutory authority for the SBIC program is changed after execution of this Settlement Agreement, nothing in this Settlement Agreement or the letters described in III.B. above shall bind SBA to perform in any manner that is inconsistent with the law as it may be amended. SBA affirms that it has no current knowledge of any proposed legislation or pending regulations that would invalidate or render unlawful any term of this Settlement Agreement.

[Redacted signature]

11-22-10

[Redacted] date
Diamond Ventures
Plaintiff

MICHAEL CHODOS date
Deputy General Counsel
U.S. Small Business Administration
Defendant

[Redacted] date

RONALD C. MACHEN JR.
United States Attorney
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Diamond Ventures
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Deputy General Counsel
U.S. Small Business Administration
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Defendant

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Plaintiff

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