

SIGNED.

Dated: September 7, 2011



*Michael S. McManus*

Michael S. McManus, Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF ARIZONA

11	In re	)	Case No. 2:09-bk-31388-SSC
12	MARK KALA BRIGGS and WENDY	)	
13	GERLACH BRIGGS,	)	Chapter 7 Case
14		)	
15	Debtors.	)	
16	_____	)	Adv. No. 2:10-ap-00364-SSC
17	SOUTHWESTERN BUSINESS FINANCING	)	
18	CORPORATION, as agent for UNITED	)	
19	STATES SMALL BUSINESS	)	
20	ADMINISTRATION, the real party	)	Date: July 20, 21, 22,
21	in interest,	)	2011
22	Plaintiffs,	)	
23	vs.	)	
24	MARK KALA BRIGGS and WENDY	)	
25	GERLACH BRIGGS,	)	
26	Defendants.	)	
27	_____	)	

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The Court conducted a bench trial of this adversary proceeding on July 20, 21, and 22, 2011. Having received and

1 reviewed the evidence and arguments of the parties, as well as  
2 their proposed findings and conclusions, the Court now makes its  
3 findings of fact and conclusions of law pursuant to Rule 7052 of  
4 the Rules of the Bankruptcy Procedure.

5  
6 Findings of Fact

7 1. This proceeding involves a Small Business  
8 Administration ("SBA") loan personally guaranteed by the debtors  
9 Mark and Wendy Briggs (the "Briggs" or the "Debtors"). Plaintiff  
10 Southwestern Business Finance Corporation ("SWBF") is a lender  
11 that makes SBA loans.

12 2. In the Spring and early Summer of 2007, Mark Briggs  
13 negotiated to purchase a Scottsdale bar and restaurant known as  
14 Sugar Daddy's, as well as the real estate on which Sugar Daddy's  
15 was located.

16 3. In early 2007, Mr. Briggs began working with Choice  
17 Bank as one of the potential lenders for the purchase.

18 4. On July 12, 2007, Mr. Briggs caused Sugar Real Estate,  
19 LLC ("Sugar Real Estate"), Sugar Management, LLC ("Sugar  
20 Management"), and Sugar Operations, LLC ("Sugar Operations") to  
21 be formed.

22 a. Sugar Real Estate was formed to borrow the money to  
23 purchase the real property. It would repay that loan. The  
24 members of Sugar Real Estate were: Sugar Investment Group,  
25 LLC ("Sugar Investment"), 5%; Shari Davis, 65%; Jacqui  
26 Allen, 15%; and Mark Briggs, 15%.

27 b. Sugar Operations would operate Sugar Daddy's and rent  
28 the real property from Sugar Real Estate. The members of

1 Sugar Operations, and the percentage of their equity  
2 interests, were identical to their equity interests in Sugar  
3 Real Estate.

4 c. Sugar Management would manage Sugar Real Estate and  
5 Sugar Operations.

6 d. The membership of Sugar Investment would consist of  
7 investors. At the time the loan transaction described below  
8 was negotiated and consummated, there were no investors.  
9 Once subscriptions were sold, the investors were to receive  
10 a preferred return of their investment from profits of Sugar  
11 Real Estate, and then profits would be divided among all  
12 members in accordance with their equity interests.

13 These entities are collectively referred to as the "Sugar  
14 Entities."

15 5. In early August 2007, Mr. Briggs was introduced to Ross  
16 Kohl of SWBF by Choice Bank's loan officer, Marcus Di Fiore, for  
17 the purpose of exploring a loan to finance Sugar Real Estate's  
18 acquisition of the restaurant real property. Mr. Di Fiore  
19 introduced Mr. Briggs to Mr. Kohl because he understood that the  
20 project might be eligible for Section 504 financing from the SBA.  
21 SWBF provided such financing. Neither Mr. Briggs nor Mr. Di  
22 Fiore had prior experience in Section 504 financing.

23 6. Mr. Briggs, in his capacity as a manager of Sugar  
24 Management on behalf of Sugar Real Estate, prepared the original  
25 loan application to SWBF with the assistance of Mr. Kohl, who was  
26 the business development officer and underwriter for SWBF. Mr.  
27 Kohl was Mark Briggs' point of contact with SWBF during the  
28 application, structuring, and approval process of the loan

1 transaction. Mr. Kohl provided Mr. Briggs with information about  
2 the Section 504 loan eligibility, application, and approval  
3 process. Mr. Briggs conferred with Mr. Kohl when organizing the  
4 Sugar Entities.

5 7. Typically, SBA Section 504 loans require the borrower  
6 to make a contribution (the "borrower contribution") in  
7 connection with the loan. The loan application signed by Mr.  
8 Briggs as Manager of Sugar Management on behalf of Sugar Real  
9 Estate, identifies the source of Sugar Real Estate's borrower  
10 contribution as a "capital contribution from owners."

11 8. In connection with the loan application process, the  
12 Briggs and the other individual (i.e., non-entity) owners of  
13 Sugar Real Estate provided SWBF with personal financial  
14 statements and tax returns. The Briggs' personal financial  
15 statement disclosed over \$10.2 million in contingent liabilities.

16 9. On or about August 30, 2007, SWBF prepared an internal  
17 memorandum for its loan committee summarizing the Sugar Real  
18 Estate loan transaction (the "Loan Committee Memorandum").  
19 According to the Loan Committee Memorandum, the funding for the  
20 Sugar Real Estate transaction would consist of three components:  
21 (a) a loan by Choice Bank in the amount of \$2,519,000 secured by  
22 a first position deed of trust on Sugar Real Estate's real  
23 property; (b) a \$1,670,000 loan by SWBF (the SBA) secured by a  
24 second deed of trust on Sugar Real Estate's real property; and  
25 (c) a borrower contribution by Sugar Real Estate of \$569,904.<sup>1</sup>

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26  
27 <sup>1</sup> As discussed in more detail below, the actual amounts loaned  
28 were slightly different than the amounts discussed in the Loan  
Committee Memorandum. The actual amounts were: (1) \$2,265,800

1           10. The Loan Committee Memorandum further indicated that  
2 Sugar Operations would receive a Section 7A loan, another type of  
3 SBA loan, from Choice Bank to fund the purchase of Sugar Daddy's  
4 operating business assets, and that the Briggs, Todd Allen,  
5 Jacqui Allen, and Shari Davis (collectively, the "Guarantors")  
6 would personally guarantee the loan.

7           11. The Loan Committee Memorandum also discussed the  
8 capitalization of Sugar Real Estate indicating that: "[t]he  
9 borrowers [Sugar Real Estate] will also payback [sic] money to  
10 the investors which own Sugar Investment Group, LLC the 5% owner  
11 of the business as warranted by net profits. Once the owners  
12 [Sugar Investment Group] are paid their initial investment, they  
13 will be paid profits based on their ownership interest. It is  
14 set up as a pure investment; therefore there is no set payback  
15 schedule or note payable to the investors."

16           12. The respective operating agreements for the Sugar  
17 Entities were provided to SWBF. Consistent with the Loan  
18 Committee Memorandum, Sugar Real Estate's operating agreement  
19 provides that it would receive a \$600,000 capital contribution  
20 from Sugar Investment, and that Sugar Investment would receive a  
21 preferred return on its capital in addition to an ongoing 5%  
22 percentage interest in Sugar Real Estate.

23           13. In September 2007, Mr. Di Fiore informed Mr. Briggs  
24 that Choice Bank would not be able to provide the proposed  
25 Section 7A financing for Sugar Operations. As a result, Sugar  
26

27 \_\_\_\_\_  
28 from Choice Bank; (2) \$1,717,000 from SWBF; and (3) a borrower  
contribution of \$511,388.

1 Operations asked the seller of the restaurant/real property to  
2 finance a portion of the sale by carrying back a note in the  
3 amount of \$550,000. Mr. Briggs disclosed this development to Mr.  
4 Kohl prior to the transaction closing date. His disclosure is  
5 referred to in SWBF's internal credit memorandum prepared by Mr.  
6 Kohl and reviewed by SWBF's CEO and President, Robert McGee.

7 14. At approximately the same time, Mr. Briggs informed Mr.  
8 Kohl that Sugar Investments had not yet raised capital from  
9 investors to fully fund the borrower contribution and the other  
10 capital needs of Sugar Real Estate and Sugar Operations.  
11 Therefore, to close the transactions Sugar Investment was  
12 planning to borrow a large portion of the funds that it would be  
13 investing in Sugar Real Estate.

14 15. Mr. Kohl testified that he did not recall Mr. Briggs  
15 informing him of Sugar Investment's plans to obtain outside  
16 investors or to borrow capital to fund its initial investment in  
17 Sugar Real Estate. The Court, however, finds that he was so  
18 informed. Other than Mr. Kohl's testimony at trial, there was no  
19 persuasive evidence contradicting Mr. Briggs' testimony about the  
20 structure and source of Sugar Real Estate's borrower  
21 contribution.

22 16. In September 2007, Sugar Investment provided an  
23 offering memorandum to certain qualified investors about an  
24 opportunity to invest in Sugar Investment. That offering  
25 memorandum made plain that Sugar Daddy's was intended to operate  
26 as a bar and restaurant. But, it also made plain that the Sugar  
27 Daddy's real estate held a long-term potential for later  
28 redevelopment. Mr. Briggs discussed this potential with Mr. Kohl

1 as well as the possible early payoff of the loan. Mr. Kohl  
2 admitted that he discussed the prepayment penalties associated  
3 with a prepayment with Mr. Briggs.

4 17. On September 26, 2007, Mr. Briggs, in his capacity as  
5 manager of Sugar Management, signed an 'acceptance' of the  
6 "Authorization for Debenture Guarantee" that SWBF prepared for  
7 the SBA. The Authorization amounts to a loan agreement between  
8 SWBF/SBA and Sugar Real Estate. The Authorization provides that  
9 the funding for the Sugar Real Estate transaction would have  
10 three components: (1) the loan from Choice Bank, which amounted  
11 to \$2,265,800; (2) the SWBF/SBA loan of \$1,717,000; and (3) the  
12 Sugar Real Estate borrower contribution of \$511,388. The  
13 Authorization provided that the borrower contribution "may come  
14 from Borrower's own resources, CDC [SWBF], or another source."  
15 The Guarantors and Sugar Operations guaranteed the Sugar Real  
16 Estate loans from Choice Bank and SWBF/SBA. Sugar Investment did  
17 not guarantee those loans.

18 18. Also on September 26, 2007, Mr. Briggs, as manager of  
19 Sugar Management, on behalf of Sugar Real Estate and Sugar  
20 Operations, and individually as guarantor, signed a Loan and  
21 Assistance Agreement which included certain representations and  
22 warranties. These included a representation that there had been  
23 no material adverse changes in the financial status of Sugar Real  
24 Estate, Sugar Operations, or the Guarantors since the August 9,  
25 2007 loan application. Wendy Briggs and the other Guarantors  
26 also signed this document.

27 19. In September 2007, Sugar Investment capitalized Sugar  
28 Real Estate. To do this, Sugar Investment borrowed \$560,000 from

1 Valley Films, LLC which it had borrowed from Castle Valley Films,  
2 LLC. Valley Films is a member and Manager of Castle Valley  
3 Films. Mr. Briggs was the co-manager of Valley Films, along with  
4 Christopher LaMont.

5 a. On September 28, 2007, Valley Films caused Castle  
6 Valley Films to transfer \$560,000 to Sugar Operations'  
7 account for the benefit of Sugar Investment. Sugar  
8 Operations, once again for the benefit of Sugar Investment,<sup>2</sup>  
9 wired a portion of these funds, \$483,000, to the title  
10 company.<sup>3</sup>

11 b. Although the money referred to in subparagraph (a)  
12 flowed from Castle Valley Films directly to Sugar Operations  
13 rather than to Sugar Investment, the documentation for the  
14 loans indicated that Sugar Investment borrowed the funds  
15 from Valley Films which had borrowed the funds from Castle  
16 Valley Films.

17 c. The documentation for these loans (notes and personal  
18 guarantees) was not prepared contemporaneously with the  
19 funding of the loans. The documents were drawn up in  
20 February 2008 but provided they were effective in September  
21 2007. Mr. Briggs testified that the loans were approved by  
22 the other manager of Valley Films, Mr. LaMont, and that

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23  
24 <sup>2</sup> A possible explanation for the flow of money to and through  
25 Sugar Operations rather than Sugar Investment, may be the fact  
26 that Sugar Operations, as the operating entity, was the one with  
27 a bank account in September 2007.

28 <sup>3</sup> The total amount of the borrower contribution under the Sugar  
Real Estate loan was \$511,388. The difference between \$511,388  
and \$483,000 was made up by funds contributed by the Briggs and  
the other owners on behalf of Sugar Real Estate.



1 Valley Films had the authority under the Castle Valley Films  
2 operating agreements to make the loans. Mr. Briggs also  
3 testified that the Briggs personally guaranteed the Valley  
4 Films loan to Sugar Investment. There was no persuasive  
5 contrary evidence.

6 20. Consistent with their not being the borrower of the  
7 \$560,000, neither Sugar Operations nor Sugar Real Estate repaid  
8 the \$560,000 to Valley Films. Rather Sugar Investment, as the  
9 borrower and without financial assistance from Sugar Real Estate  
10 or Sugar Operations, repaid the \$560,000 to Valley Films. Valley  
11 Films in turn repaid Castle Valley Films.

12 21. Contemporaneously with the purchase of the real estate,  
13 Sugar Operations closed on its purchase of the Sugar Daddy's  
14 operating assets, financing the purchase in part with the seller  
15 carry-back financing in the amount of \$550,000. The Guarantors  
16 all personally guaranteed the seller carry-back financing.

17 22. At about the time of the closing, Mr. Briggs and Jacqui  
18 Allen executed an option to purchase part of Shari Davis'  
19 interest in Sugar Operations and Sugar Real Estate (32% of the  
20 total project). This option was never exercised.

21 23. Around December 3, 2007, Mark Briggs, in his capacity  
22 as Manager of Sugar Management, signed a certification indicating  
23 that there had been no material adverse changes in the financial  
24 condition of Sugar Real Estate or Sugar Operations. In  
25 connection with that certification, Mr. Briggs signed a balance  
26 sheet for Sugar Real Estate, which had been prepared by Mr. Kohl,  
27 indicating that Sugar Real Estate had \$511,388 in equity. On  
28 that same date, Robert McGee signed a certification on behalf of

1 SWBF indicating that Sugar Real Estate had made the borrower  
2 contribution.

3 24. On December 4, 2007, SWBF's legal counsel issued a  
4 closing compliance opinion letter. SWBF's legal counsel had  
5 reviewed a number of documents, including the Sugar Entities' and  
6 Sugar Investment's respective operating agreements. SWBF's legal  
7 counsel stated, ". . . we have been engaged by the CDC [SWBF] as  
8 counsel, no information has come to our attention that has given  
9 us actual knowledge or actual notice or reasonably would lead us  
10 to conclude that anything in this letter or in any of the  
11 documents referred to in this letter on which we have relied  
12 (including SBA Form 2101 the CDC certification) is misleading or  
13 inaccurate or that further inquiry is appropriate." SWBF's  
14 compliance counsel concluded that it had found "no fraud" in  
15 connection with the loan.

16 25. To the extent one of the above findings of fact is a  
17 conclusion of law, the Court adopts it as one of its conclusions.  
18 Similarly, to the extent one of the below conclusions of law is a  
19 finding of fact, the Court adopts it as one of its findings.

20  
21 Conclusions of Law

22 1. This proceeding is pursuant to 11 U.S.C. § 523(a)(2)(B)  
23 and (a)(6). It is a core proceeding over which the Court has  
24 subject matter jurisdiction. 28 U.S.C. §§ 1334(b) and  
25 157(b)(2)(J).

26 2. In order to prevail on its claim under section  
27 523(a)(2)(B), SWBF must prove by a preponderance of the evidence  
28 that:

- 1 a. The debtors obtained the loan from SWBF;
- 2 b. through the use of a statement in writing;
- 3 c. respecting the debtors' financial condition;
- 4 d. that was materially false;
- 5 e. made with the intent to deceive SWBF; and
- 6 f. upon which SWBF reasonably relied to its detriment and
- 7 loss.

8 In re Everett, 364 B.R. 711 (Bankr. D. Ariz. 2007) (citing In re  
9 Candland, 90 F.3d 1466, 1469 (9<sup>th</sup> Cir. 1996)).

10 3. SWBF's pleadings failed to specifically allege the  
11 misrepresentations made by the Briggs. During its closing  
12 argument at trial, SWBF identified two alleged  
13 misrepresentations:

- 14 a. the Briggs misrepresented the source and nature of
- 15 Sugar Real Estate's borrower contribution; and
- 16 b. the Briggs concealed their intention to develop the
- 17 restaurant real estate for a use unrelated to the operation
- 18 of a restaurant.

19 4. Even though not mentioned during closing argument, SWBF  
20 alluded to three other misrepresentations during its presentation  
21 of evidence.

- 22 a. the Briggs had misrepresented their financial condition
- 23 on September 26, 2007 by not disclosing their personal
- 24 guarantees of Sugar Operations' seller carry-back loan or
- 25 the Sugar Investment loan from Valley Films;
- 26 b. the Briggs had failed to disclose the existence of
- 27 Sugar Operations' seller carry-back financing; and
- 28 c. the Briggs misrepresented the ownership structure of

1 Sugar Real Estate and Sugar Operations.

2 5. The Briggs truthfully disclosed how Sugar Real Estate  
3 would be obtaining its borrower contribution for the SWBF loan.

4 a. Sugar Real Estate was capitalized by an equity  
5 investment from Sugar Investment. This is disclosed in  
6 Sugar Real Estate's operating agreement and in SWBF's Loan  
7 Committee Memorandum.

8 b. SWBF, however, argued that it did not know that Sugar  
9 Investment would be borrowing the funds to make its equity  
10 investment in Sugar Real Estate. Mr. Briggs, however,  
11 disclosed to Mr. Kohl that Sugar Investment would be  
12 borrowing the funds for its equity investment in Sugar Real  
13 Estate. While Mr. Kohl testified that he believed the funds  
14 for Sugar Real Estate's borrower contribution would be  
15 coming solely from the personal assets of the Guarantors,  
16 the Court does not believe his testimony.

17 i. The personal financial statements of the  
18 Guarantors given to SWBF and Mr. Kohl did not include  
19 sufficient liquid assets to fund a \$511,388 borrower  
20 contribution. The liquid assets of the Guarantors  
21 were: Ms. Davis, \$4,500; the Allens, \$21,400; and the  
22 Briggs, \$58,000.

23 ii. Further, the Court notes that Mr. Kohl's  
24 recollection of the transaction was contradicted in  
25 another particular. Mr. Kohl testified that he had no  
26 knowledge of seller carry-back financing, but SWBF's  
27 own underwriting memorandum, prepared by him, proves  
28 otherwise.

1 c. Because the money for the borrower contribution was  
2 transferred directly from Castle Valley Films to Sugar  
3 Operations, SWBF asserted that Sugar Operations or Sugar  
4 Real Estate, not Sugar Investment, borrowed the money for  
5 capital contribution. If true, this would be problematic  
6 for the Briggs. Sugar Real Estate was the SWBF borrower and  
7 Sugar Operations was a guarantor for the loan. If either  
8 had borrowed the funds for the borrower contribution, this  
9 would have been a material change in their financial  
10 condition that was not disclosed to SWBF prior to the close  
11 of the loan transaction.

12 d. However, Sugar Investment, which was not a SWBF  
13 borrower or guarantor, borrowed and repaid the funds to  
14 Valley Films. Neither Sugar Operations nor Sugar Real  
15 Estate made any payments to Valley Films or Castle Valley  
16 Films.

17 e. The underwriting documentation, operating agreements,  
18 bank account records, tax returns, and the testimony of Mr.  
19 Briggs all support the conclusion that Sugar Real Estate and  
20 Sugar Operations did not borrow the borrower contribution.

21 f. While it is true that the loans from Castle Valley  
22 Films to Valley Films and then to Sugar Investment were not  
23 contemporaneously documented, the Court discerns nothing  
24 improper or fraudulent in the later documentation of the  
25 loans.

26 g. The 2007 and 2008 tax returns for Sugar Investment and  
27 Sugar Real Estate, as well as their respective operating  
28 agreements, treated the money for the borrower contribution

1 as an equity contribution from Sugar Investment into Sugar  
2 Real Estate.

3 h. The Court concludes that the Briggs did not  
4 misrepresent the source or nature of Sugar Real Estate's  
5 borrower contribution.

6 6. SWBF also failed to establish the materiality of the  
7 fact that Sugar Investments borrowed a portion of the funds used  
8 to invest in Sugar Real Estate.

9 a. The loan documentation provided by SWBF to Sugar Real  
10 Estate provides that the borrower contribution could be  
11 borrowed by Sugar Real Estate (under certain terms and  
12 conditions) or could come from another source, such as Sugar  
13 Investment.

14 b. Sugar Investment was not the "borrower" on the SWBF  
15 loan, nor was it a guarantor of that loan or in any other  
16 contractual relationship with SWBF.

17 c. Moreover, none of SWBF's witnesses testified that had  
18 SWBF known that Sugar Investment was borrowing any of the  
19 money that it was investing in Sugar Real Estate, SWBF would  
20 not have made the loan.

21 d. Neither Sugar Real Estate nor Sugar Operations repaid  
22 any money to Castle Valley Films or Valley Films - the money  
23 was treated as a true equity investment.

24 7. For these reasons, the Court concludes that the fact  
25 that Sugar Investment borrowed a portion of the funds it invested  
26 in Sugar Real Estate was not material to SWBF's decision to make  
27 the loan.

28 8. The Briggs did not misrepresent the purpose of the

1 loan. That is, they did not secretly intend to use the SWBF loan  
2 to redevelop the restaurant real property rather than to operate  
3 the restaurant.

4 a. While Mr. Briggs testified that he recognized that the  
5 real property had a potential for later redevelopment, the  
6 entire transaction was used to acquire the real and personal  
7 property that comprised the restaurant and to operate it.

8 b. There was no evidence that the Sugar Entities engaged  
9 in any redevelopment activities for the property.

10 c. The Sugar Investment private placement memorandum sent  
11 to prospective investors prominently indicates that it is a  
12 bar/restaurant operation investment opportunity and makes no  
13 specific mention of redeveloping the property.

14 d. Sugar Operations operated Sugar Daddy's as a bar and  
15 restaurant for approximately 18 months before the business  
16 failed.

17 9. Therefore, the Court concludes that the Briggs did not  
18 misrepresent the intended purpose of the SWBF loan.

19 10. The Briggs did not misrepresent their financial  
20 condition by not disclosing their personal guarantees of the  
21 seller carry-back loan or the Sugar Investment loan from Valley  
22 Films.

23 a. Mr. Briggs told Mr. Kohl about both the seller carry-  
24 back loan and the Sugar Investment loan, as well as the  
25 attendant personal guarantees.

26 i. With respect to the seller carry-back loan, SWBF's  
27 underwriting documents show SWBF anticipated that the  
28 funds to purchase the Sugar Daddy's operating assets

1 would come from the 7A loan from Choice Bank, which  
2 would have been personally guaranteed by the Briggs and  
3 the other Guarantors. SWBF's underwriting documents  
4 also show that SWBF knew about the Sugar Operations'  
5 seller carry-back financing. When the 7A loan could  
6 not be obtained, there was no plausible reason for SWBF  
7 to expect that the Briggs would not be guaranteeing a  
8 replacement loan.

9 ii. With respect to the guarantee of the Sugar  
10 Investment loan from Valley Films, the Court again  
11 finds no reason to not believe Mr. Briggs's testimony  
12 that he disclosed the guarantee to Mr. Kohl.

13 b. There was no reason to not disclose the guarantees  
14 because they were simply not material.

15 i. The Briggs' financial statement included  
16 approximately \$10.2 million of contingent liabilities  
17 as of August 9, 2007 (before the close of the Sugar  
18 Daddy's transaction). SWBF's Loan Committee Memorandum  
19 listed the Briggs' net worth as approximately \$1.1  
20 million.

21 ii. Once the transaction closed, the Briggs would have  
22 approximately \$15 million of contingent liabilities.  
23 Assuming the Briggs had not signed guarantees of the  
24 Sugar Operations' seller carry-back loan and the Sugar  
25 Investment loan from Valley Film, their net worth would  
26 have been approximately 7.7% of their contingent  
27 liabilities. Adding the Briggs' guarantees of Sugar  
28 Operations' seller carry-back and Sugar Investment



1 loans results in their net worth being approximately  
2 7.1% of their contingent liabilities.

3 iii. Per SBA regulations, the Briggs' liquid assets  
4 constituted 0.41% (with no additional guarantees) or  
5 0.37% (with the two additional guarantees) of their  
6 contingent liabilities.

7 iv. The foregoing demonstrates what the Loan Committee  
8 Memorandum made explicit - the primary basis for  
9 approving the loan was not the amount of the  
10 Guarantors' assets, but rather the historical and  
11 projected cash flows of the business and the value of  
12 the collateral.

13 v. SWBF provided no persuasive evidence that the  
14 Briggs' net worth was a material reason for approving  
15 the Sugar Real Estate loan. None of SWBF's witnesses  
16 testified that if the Briggs' two additional guarantees  
17 had been disclosed that SWBF would have not approved  
18 the loan.

19 vi. The Court concludes that the Briggs' guaranty of  
20 the Sugar Investment loan from Valley Films ended up  
21 having no impact whatever on Sugar Real Estate's  
22 ability to pay back the loan to SWBF or the Briggs'  
23 ability to meet their guaranty obligations to SWBF.  
24 Once Sugar Investment repaid the Valley Films loan in  
25 April 2008, a full year before the Sugar Daddy's  
26 business ceased operating, the Briggs' guarantee of  
27 that loan became irrelevant for purposes of their  
28 obligations to SWBF. The Briggs' guarantee of the

1 Sugar Investment loan did not put SWBF into a worse  
2 economic position vis a vis the Briggs.

3 11. As discussed above, SWBF's internal written  
4 underwriting documentation related to the Sugar Real Estate loan  
5 transaction reveals that SWBF was aware of the seller carry-back  
6 loan taken by Sugar Operations to complete the transaction. SWBF  
7 knew that the 7A financing sought from Choice Bank had fallen  
8 through. Mr. Kohl, who first testified that he did not know  
9 about the seller carry-back financing, ultimately acknowledged  
10 that he knew the seller carry-back financing had replaced the  
11 proposed 7A loan. Therefore, the Court concludes that the Briggs  
12 did not make any misrepresentations regarding the seller carry-  
13 back financing.

14 12. The Court finally concludes that there was no  
15 misrepresentation regarding the ownership of equity in Sugar Real  
16 Estate and Sugar Operations.

17 a. In fact, the equity interests in both of these entities  
18 were as stated in Findings of Fact 4(a) and 4(b). SWBF was  
19 not told the contrary. There was no misrepresentation  
20 regarding the ownership of either entity.

21 b. Around September 26, 2007, Shari Davis gave Mr. Briggs  
22 and Jacqui Allen an option to each purchase up to 32% of  
23 Sugar Real Estate and Sugar Operations from her 65%  
24 ownership interest in those two entities.

25 i. However, this option was never exercised.

26 ii. Mr. Briggs testified that he discussed with Mr.  
27 Kohl the possibility of changing the ownership  
28 percentages of the Sugar Entities in the future.

