

JAN 29 2014

SUSAN M. SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

ORDERED PUBLISHED

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No.	CC-13-1137-PaKuBa
)		
JORDAN WANK,)	Bk. No.	SV 12-11628-MT
)		
Debtor.)	Adv. No.	SV 12-01156-MT
_____)		
)		
JORDAN WANK; BRUCE WANK,)		
)		
Appellants,)		
)		
v.)	O P I N I O N	
)		
DANIEL GORDON; BASIL SIMONA; A&S)		
INVESTMENT, LLC; ATHAR SIDDIQI;)		
MARK FERGUSON; GEORGE TSOUPAKIS,)		
)		
Appellees.)		
_____)		

Argued and Submitted on November 21, 2013
at Pasadena, California

Filed - January 29, 2014

Appeal from the United States Bankruptcy Court
for the Central District of California

Hon. Maureen Tighe, U.S. Bankruptcy Judge, Presiding

Appearances: Lincoln Browning Quintana argued for appellants
Jordan Wank and Bruce Wank. David Paul Bleistein
argued for appellees Daniel Gordon, Basil Simona,
A&S Investment, LLC, Athar Siddiqi, Mark Ferguson
and George Tsoupakis.

Before: PAPPAS, KURTZ and BALLINGER¹, Bankruptcy Judges.

¹ The Honorable Eddward Ballinger, Jr., United States
Bankruptcy Judge for the District of Arizona, sitting by
designation.

1 PAPPAS, Bankruptcy Judge:

2

3 Chapter 7² debtor Jordan Wank ("Wank")³ appeals the summary
4 judgment of the bankruptcy court determining that a portion of a
5 judgment debt owed by Wank to appellees Daniel Gordon, Basil
6 Simona, A&S Investment, LLC, Athar Siddiq, Mark Ferguson and
7 George Tsoupakis (together, "the Appellees") is excepted from
8 discharge under § 523(a)(2)(A). We VACATE the summary judgment
9 and REMAND this matter to the bankruptcy court for further
10 proceedings.

11

FACTS⁴

12

13 Wank is a California attorney who filed a chapter 7
14 bankruptcy petition. The Appellees are creditors who assert that
15 their claim against Wank should be excepted from discharge under
16 various provisions of § 523(a). They assert that Wank induced
17 each of them to invest in a fraudulent currency speculation scheme

18

19 ² Unless otherwise indicated, all chapter, section and rule
20 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
21 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.
22 Civil Rule references are to the Federal Rules of Civil Procedure
23 1-86.

24

25 ³ Bruce Wank, who is apparently a creditor in the bankruptcy
26 case and son of the debtor Jordan Wank, joined in the notice of
27 appeal, and appears in the caption of the parties' briefs.
28 However, it is not clear in the record what his interest in this
litigation and the appeal may be. As near as we can tell, he was
not a plaintiff or defendant in the adversary proceeding in the
bankruptcy court. Therefore, in this decision we refer only to
the principal appellant, the debtor Wank.

29

30 ⁴ This dispute ultimately concerns two declarations executed
31 by Wank, one signed in 2009 in connection with state court
32 proceedings, and a second, later declaration filed in this
33 litigation in 2013 in which Wank either repudiates the earlier
34 factual assertions, or attempts to explain them in context. We
35 discuss here only those facts we believe to be uncontroverted by
36 either party.

1 known as the European Investment Structure ("EIS").⁵ Basil Simona
2 resides in Michigan and is the managing member of A&S Investments,
3 LLC, an entity that invested \$125,000. Althar Siddiqui resides in
4 Michigan and invested \$400,000. Mark Ferguson resides in Los
5 Angeles and invested \$150,000. George Tsoupokis and Daniel Gordon
6 reside in Colorado, and they invested \$100,000 and \$50,000
7 respectively.

8 Jerry Neidich ("Neidich") is a friend and neighbor of Wank.
9 Neidich, along with Daniele Romer ("Romer"), solicited the
10 Appellees to invest in EIS. There is no evidence in the record,
11 nor any contention by the Appellees, that Wank knew, or
12 communicated with, any of the Appellees before the first contact
13 was made with them regarding the investments. Wank concedes,
14 however, that he received funds by wire transfer from each of the
15 Appellees, and that he in turn transmitted all \$825,000 of the
16 money they sent him, plus \$25,000 of his own funds, to UNIFICO
17 Holdings, LLC, and its principal, Kurshid Shah ("Shah"), in care
18 of a bank account in London, United Kingdom, to invest that money
19 in currency speculation. Wank entered into written contracts (the
20 "EIS Agreements") with each of the Appellees regarding the
21 investments, although these contracts have not been included in
22 either the appellate record or the docket of the bankruptcy court
23 adversary proceeding. The parties agree that there is no evidence
24 that UNIFICO Holdings, LLC, or Shah made any trade with the funds;
25 they also agree that the Appellees and Wank never received the

26
27 ⁵ EIS is the descriptive name for the investment scheme; it
28 does not appear to be a formal organization or entity. Wank
alleges, and Appellees do not dispute, that he sent all of the
funds he received from Appellees to the bank account of UNIFICO
Holdings, LLC, in London, United Kingdom, to be invested in EIS.

1 anticipated profits from their investment nor, indeed, any return
2 of their invested funds.

3 Having lost their investments, in May 2007 the Appellees sued
4 Wank, Neidich, Romer, Shah, EIS, UNIFICO Holdings, LLC, and
5 UNIFICO Trading, Ltd. (apparently a d/b/a of UNIFICO Holdings,
6 LLC) in Los Angeles Superior Court. Gordon v. Wank, case no.
7 BC 371 999 (the "State Court Action"). A First Amended Complaint,
8 filed on September 11, 2009, in the State Court Action, contained
9 twenty causes of action, including false promise, fraud and
10 conspiracy to defraud, against all defendants.

11 On December 28, 2009, Wank, Neidich and Romer entered into a
12 settlement agreement and stipulated judgment with the Appellees
13 (collectively, the "Settlement Agreement") concerning the state
14 court action. Under the terms of the Settlement Agreement,
15 Neidich, Romer and the Appellees mutually released each other from
16 all claims on condition that Wank pay the Appellees the total sum
17 of \$750,000. If Wank failed to pay the Appellees by March 15,
18 2010, he stipulated that a judgment could be entered against him
19 by the state court for the full amount of the Appellees' claim of
20 \$1,100,000. Of critical interest in this appeal, however, was the
21 following provision in the Settlement Agreement:

22 THIS JUDGMENT SHALL BE EXEMPT FROM DISCHARGE IN
23 BANKRUPTCY

24 The Parties agree that the obligations arising from this
25 Settlement Agreement shall be non-dischargeable under
26 the provisions of the Bankruptcy Code. Mr. Wank has
27 also executed his attached Declaration in Support of the
28 factual basis of why his obligation under this Agreement
29 should not be discharged in Bankruptcy (Exhibit E).

30 As part of the settlement, the Appellees required Wank to
31 sign a declaration under penalty of perjury on December 30, 2009,

1 a copy of which was attached to the Settlement Agreement (the
2 "First Declaration"). It included the following statements:

3 The purpose of this Declaration is to provide a factual
4 basis to further the intention of the Plaintiffs and
5 Defendants in this litigation to ensure that if I do not
6 pay any or all of the Judgment on a timely basis and
7 declare bankruptcy that the amounts due Plaintiffs for
8 their investment in the [EIS], plus interest, of
9 \$1,100,000 shall not be discharged in bankruptcy. First
10 Declaration at ¶ 1.

11 In later Summer and Fall of 2004, I entered into written
12 agreements with [the Appellees] in which I agreed to act
13 as a "primary investor" to invest their moneys that I
14 received from each of them in the [EIS] which was
15 operated by Mr. Kurshid Shah. Id. at ¶ 2.

16 I advised each of the [Appellees] (and set forth in the
17 EIS Agreements) that before any trade was made, the
18 trading group in England would have an "exit buyer" in
19 place, with a built in profit for each transaction, and
20 that the profits from each trade would be deposited into
21 the account for distribution on a monthly basis. In
22 fact, there was no such "exit buyer" and, as mentioned,
23 all of the [Appellees] and others who invested lost
24 their entire investments. Id. at ¶ 3(e).

25 I communicated to the [Appellees] that they could expect
26 monthly returns of 30 to 50 percent. Id. at ¶ 3(f).

27 I made representations to the [Appellees], which were
28 false, to induce them to place their funds in my trust
account, and to permit me to act as their "primary
investor," and to permit me to transfer [Appellees']
funds to EIS. Id. at ¶ 4.

I communicated to the [Appellees] that investing in the
[EIS] would be a safe investment, and that I was an
attorney with expertise in such matters. Under the
terms of the EIS Agreements, the [Appellees'] funds were
to be returned to the [Appellees] in 45 days if no
foreign currency trades were executed. However, I knew
at the time I executed the contracts and accepted the
wire transfers for the [Appellees'] funds that there was
a possibility that the funds could be lost. I did not
so inform the [Appellees]. Id. at ¶ 5.

By entering into the EIS Agreements with the Plaintiffs,
I did not comply with the following [California Rules of
Professional Conduct]: (a) [Rule] 3-110 by failing to
act competently; (b) Rule 3-500, keeping clients
informed of a situation in which I was acting for them;
and (c) Rule 4-100 failing to preserve identity of
client funds. Id. at ¶ 14.

1 The Settlement Agreement provided that the signed, original
2 First Declaration would be kept in a sealed envelope by an escrow
3 agent. If Wank failed to make the \$750,000 payment as provided in
4 the Settlement Agreement, and later filed for bankruptcy
5 protection, the Settlement Agreement provided that the First
6 Declaration would be unsealed and submitted to the bankruptcy
7 court. The parties also executed a Stipulation to Judgment
8 providing that, if Wank failed to pay the required \$750,000 by
9 March 15, 2010, the state court would be requested to enter
10 judgment in the amount of the full claim of \$1,100,00.

11 Wank did not pay the required \$750,000 by the March 15, 2010
12 deadline and, at the Appellees' request, the state court, on June
13 18, 2010, entered the stipulated judgment against Wank and in
14 favor of the Appellees in the total amount of \$1,100,000.

15 Wank filed a chapter 7 bankruptcy petition on February 20,
16 2012. On Schedule F, Wank listed a noncontingent, liquidated,
17 undisputed unsecured nonpriority claim of \$1,250,000 for the five
18 Appellees.

19 On May 5, 2012, Appellees filed an adversary complaint
20 against Wank and his former spouse, Toby Wank, in the bankruptcy
21 court.⁶ Thereafter, the complaint was amended, seeking a
22 declaration by the bankruptcy court that the \$1,100,000 judgment
23 debt owed to the Appellees by Wank was excepted from discharge
24 under §§ 523(a)(2), (4), (6) and (19).⁷ The Appellees' first

25
26 ⁶ Although Toby Wank was named as a co-defendant in the
27 complaint initiating this adversary proceeding, the requested
relief was only directed against Wank.

28 ⁷ We need not, and do not, discuss the parties' arguments
regarding the Appellees' claims for an exception to discharge
(continued...)

1 claim, the one at issue in this appeal, sought an exception to
2 discharge for fraud under § 523(a)(2)(A), and alleged that
3 (1) Wank "stole" \$825,000 from Appellees and did so "deliberately
4 and stipulated as much in the Settlement Agreement," (2) Wank lied
5 to the Appellees when asked about the "stolen funds," (3) Wank
6 lied to the Appellees when he sent their invested funds to EIS,
7 and (4) Wank stipulated that he committed fraud against the
8 Appellees in the First Declaration and Settlement Agreement.

9 Although Wank's answer to the Appellees' amended complaint
10 contained a general denial of the allegations, he admitted the
11 paragraph which quoted the text of the First Declaration noted
12 above, and the paragraph acknowledging that he signed the First
13 Declaration under penalty of perjury.

14 During the pendency of the litigation, Appellees filed a
15 Motion for Summary Judgment on December 31, 2012. After
16 discussing the general requirements for an exception to discharge
17 under § 523(a)(2)(A), the motion summarized the Appellees'
18 argument in a single paragraph:

19 Here, the admissions of Mr. Wank in his prejudgment
20 declaration meet these standards. He admitted that the
21 EIS was a fraud. He admitted that the [Appellees] lost
22 all of the \$825,000 they invested in the EIS. Mr. Wank
admitted to making false statements to induce the
[Appellees] to invest in the EIS.

23 Notably, the Appellees did not argue that Wank knew at the time of
24 making any representations to them that they were false, nor that
25 the Appellees justifiably relied on those representations.

26
27 ⁷(...continued)

28 under § 523(a)(4), (6) and (19) because the bankruptcy court's
summary judgment on appeal was based solely on § 523(a)(2)(A), and
the Appellees did not cross-appeal the court's judgment.

1 Wank opposed the summary judgment motion, stating that the
2 the First Declaration, and the statements he made in it, were
3 inherently unreliable and inadmissible as evidence in the
4 adversary proceeding because the First Declaration was intended to
5 defeat his right to obtain the protections of a discharge in
6 bankruptcy. Further, Wank pointed out, the Appellees failed to
7 either argue or provide any evidence that they justifiably relied
8 on any alleged misrepresentations of Wank to their detriment, and
9 thus they failed to establish an essential element of exception to
10 discharge under § 523(a)(2)(A).

11 Attached to Wank's opposition to the summary judgment motion
12 was the Declaration of Jordan Wank (the "Second Declaration"). In
13 the Second Declaration, in addition to explaining his position and
14 certain arguments in the opposition, Wank addressed the
15 circumstances giving rise to his execution of the First
16 Declaration. Wank insisted that he had signed the First
17 Declaration under duress and while he was under the influence of
18 anxiety medication. Wank alleged that he had objected to the
19 Appellees' counsel at the time he executed the First Declaration
20 that some of its content was "false and untrue." While Wank
21 acknowledged that he made false statements to the Appellees that
22 he knew to be untrue, he noted that his sole incentive in signing
23 the First Declaration was because "[the Appellees'] counsel agreed
24 to a settlement satisfaction in the amount of \$750,000, a large
25 discount from the damages alleged in the suit, and the settlement
26 allowed me negotiated terms and time to pay." He also stated that
27 he believed that his statements in the First Declaration could not

28

1 be enforced against him.⁸

2 In the Second Declaration, Wank also specifically addressed
3 several of the statements he made in the First Declaration. As
4 noted above, the First Declaration provided:

5 In later Summer and Fall of 2004, I entered into written
6 agreements with [Appellees] in which I agreed to act as
7 a 'primary investor' to invest their moneys that I
8 received from each of them in the [EIS] which was
9 operated by Mr. Kurshid Shah.

10 First Declaration at ¶ 2. In the Second Declaration, Wank
11 confirms this statement is true, but explains it:

12 I advised each of the [Appellees] (and set forth in the
13 EIS Agreements) that before any trade was made, the
14 trading group in England would have an "exit buyer" in
15 place, with a built in profit for each transaction, and
16 that the profits from each trade would be deposited into
17 the account for distribution on a monthly basis. In
18 fact, there was no such "exit buyer" and, as mentioned,
19 all of the [Appellees] and others who invested lost
20 their entire investments.

21 Second Declaration at ¶ 3(e).

22 In the Second Declaration, Wank also charged that the
23 Appellees had "paraphrased" the EIS Agreements in the First
24 Declaration to suggest that he had made representations to
25 Appellees that he had not:

26 Specifically, the [First Declaration] says: "I advised
27 each of the Plaintiffs that . . ." However, the EIS
28 Agreements presented to each Appellee state, "The
trading group has advised us that" The last
sentence is sheer speculation and conjecture as no one,
including the Plaintiffs or me had any knowledge of the
existence or non-existence of any such "exit buyer."

29 As to the representations in paragraphs 4 and 5 of the First
30 Declaration, quoted above, Wank repudiated them, labeling them

31

32 _____
33 ⁸ In particular, Wank averred in the Second Declaration that
34 "I believed the [First Declaration] was illegal and unenforceable
35 in any case as Plaintiffs' counsel and I both knew the content of
36 the declaration was false." Second Declaration at ¶ 13.

1 "false and untrue."

2 In response to Wank's contention that some of the statements
3 he made in the First Declaration were false and untrue, the
4 Appellees simply noted that he made those statements under penalty
5 of perjury. However, the Appellees did not address Wank's
6 argument that they had not submitted evidence to satisfy the
7 justifiable reliance prong for an exception to discharge under
8 § 523(a)(2)(A). Before the hearing on the summary judgment
9 motion, the bankruptcy court issued a Tentative Ruling, stating,
10 in part, that:

11 In the Settlement Agreement, Debtor admits that he
12 agreed to act as a primary investor to invest
13 Plaintiff's monies, that the funds were wired to
14 Defendant's trust account to be wired to EIS, that the
15 EIS was a fraud, that Defendant advised Plaintiffs that
16 EIS would have an exit buyer in place, but that there
17 was no such exit buyer, that he made representations to
18 Plaintiffs that were false to induce them to place their
19 funds into his trust account and to permit him to act as
20 Plaintiff's primary investor. These stipulated facts
21 are probative and credible evidence of fraud and
22 conversion. Defendant maintains that he signed the
23 Settlement Declaration under duress and undue influence
24 because it was required for purposes of resolution of
25 the State Court Action on the eve of trial wherein
26 Defendant had no legal representation other than
27 himself. Defendant then admits, however, that he
28 believed the document was illegal and unenforceable. He
also believed that he would be able to obtain a personal
loan to pay the stipulated judgment amount so the
Settlement Declaration would never be unsealed.

22 Defendant's reasons for admitting the key facts of the
23 fraud do nothing to deny the admissions previously made.
24 They are excuses that do not suffice to raise any doubt
25 as to the admissions previously made. Thus, plaintiffs
26 have demonstrated that there is no disputed material
27 fact as to the elements of the dischargeability actions.

26 The bankruptcy court made no comment in the Tentative Ruling
27 regarding whether the Appellees had justifiably relied on Wank's
28 statements.

1 After hearing and considering the summary judgment motion,
2 the bankruptcy court stated that it would not consider the
3 Appellees' arguments for an exception to discharge under either
4 §§ 523(a)(6) or (19) because the court had not been given
5 sufficient facts to make a ruling concerning those claims. Hr'g
6 Tr. 20:8-21, February 20, 2013.⁹ Additionally, the court noted
7 that, in making its decisions, it had disregarded the "bankruptcy
8 defeating" clauses in the Settlement Agreement and the First
9 Declaration, and had only considered the factual admissions made
10 by Wank in the First Declaration. Hr'g Tr. 19: 4-9. However,
11 even without considering the bankruptcy defeating provisions, the
12 court determined that Wank's admissions in the First Declaration
13 were sufficient to establish an exception to discharge under
14 § 523(a)(2)(A), and that his explanations and repudiations of
15 those admissions in the Second Declaration did not negate those
16 admissions:

17 The statements [in the Second Declaration] do not
18 dispute the key statements made [in the First
19 Declaration]. They simply try to explain them away or
20 justify them or rationalize them. But the statements
21 that go to the fact that false representations were
22 made, they were made, according to paragraph 4, to
23 induce the Plaintiffs to place funds in Mr. Wank's
24 account, and that there were communications made, and
25 that there was an intent for them to rely on those
26 statements because they were made to induce them and the
27 fact that there was fraud really ha[s] not been disputed
28 with a careful reading of the [Second Declaration].

24 Hr'g Tr. 19:19-20:4.

25 The bankruptcy court granted the Appellees' motion, and on
26 March 13, 2013, the court entered a summary judgment determining

28 ⁹ It is not clear what disposition was made by the
bankruptcy court as to the Appellees' § 523(a)(4) claim. Neither
the court's Tentative Ruling, nor the order or judgment, refer to
that claim.

1 that \$825,000¹⁰ of the debt owed by Wank to the Appellees was
2 excepted from discharge under § 523(a)(2)(A). Wank filed a timely
3 appeal on March 22, 2013.

4 JURISDICTION

5 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334
6 and 157(b)(2)(I). We have jurisdiction under 28 U.S.C. § 158.

7 ISSUE

8 Whether the bankruptcy court erred in granting a summary
9 judgment determining that Wank's debt to the Appellees was
10 excepted from discharge under § 523(a)(2)(A).

11 STANDARDS OF REVIEW

12 We review de novo the bankruptcy court's grant of summary
13 judgment. SNTL Corp. v. Ctr. Ins. Co. (In re SNTL Corp.), 571
14 F.3d 826, 834 (9th Cir. 2009). We also review de novo whether a
15 debt is excepted from discharge under § 523(a)(2)(A). Tsurukawa
16 v. Nikon Precision, Inc. (In re Tsurukawa), 258 B.R. 192, 195 (9th
17 Cir. BAP 2001).

18 DISCUSSION

19 Summary judgment may be granted "if the movant shows that
20 there is no genuine issue as to any material fact and the movant
21 is entitled to judgment as a matter of law." Civil Rule 56(a),
22 incorporated by Rule 7056; Barboza v. New Form, Inc. (In re
23 Barboza), 545 F.3d 702, 707 (9th Cir. 2008). The trial court may
24 not weigh evidence in resolving such motions, but rather
25 determines only whether a material factual dispute remains for

26
27 ¹⁰ Although requested to do so by the Appellees, the
28 bankruptcy court declined to declare the entire amount due under
the state court stipulated judgment was excepted from discharge,
limiting its ruling to the actual amounts invested by the
Appellees. The Appellees did not cross-appeal any aspect of the
court's judgment.

1 trial. Covey v. Hollydale Mobilehome Estates, 116 F.3d 830, 834
2 (9th Cir. 1997). A dispute is genuine if there is sufficient
3 evidence for a reasonable fact finder to hold in favor of the
4 non-moving party, and a fact is "material" if it might affect the
5 outcome of the case. Far Out Prods., Inc. v. Oskar, 247 F.3d 986,
6 992 (9th Cir. 2001) (citing Anderson v. Liberty Lobby, Inc., 477
7 U.S. 242, 248-49 (1986)). The initial burden of showing there is
8 no genuine issue of material fact rests on the moving party.
9 Margolis v. Ryan, 140 F.3d 850, 852 (9th Cir. 1998).

10 Under § 523(a)(2)(A), a debt for money obtained by the debtor
11 under "false pretenses, a false representation, or actual fraud"
12 may be excepted from discharge. The Ninth Circuit has held that
13 summary judgment is proper in considering an exception to
14 discharge under § 523(a)(2)(A) if the proponent is able to show
15 that there is no genuine issue of material fact as to each of the
16 five elements of exception to discharge under that provision: (1)
17 misrepresentation, fraudulent omission or deceptive conduct by the
18 debtor; (2) knowledge of the falsity or deceptiveness of his
19 statement or conduct; (3) an intent to deceive; (4) justifiable
20 reliance by the creditor on the debtor's statement or conduct; and
21 (5) damage to the creditor proximately caused by its reliance on
22 the debtor's statement or conduct. Turtle Rock Homeowners Ass'n
23 v. Slyman (In re Slyman), 234 F.3d 1081, 1085 (9th Cir. 2000).

24 Based upon our de novo review of the record, we conclude that
25 the Appellees have not shown that there are no genuine issues of
26 material fact such that they are entitled to an exception to
27 discharge under § 523(a)(2)(A) as a matter of law. Before
28 examining the deficiencies in the Appellees' attempt to establish

1 the elements required for a fraud exception to discharge, we first
2 address Wank's argument that the bankruptcy court erred in
3 granting the summary judgment based solely¹¹ on the First
4 Declaration for reasons of public policy.

5 I.

6 **The bankruptcy court should not have relied so on Wank's**
7 **statements made in the First Declaration as the sole**
8 **basis for granting summary judgment to the Appellees.**

9 In Bank of China v. Huang (In re Huang), 275 F.3d 1173 (9th
10 Cir. 2002), in a detailed prepetition settlement agreement, the
11 debtor agreed he would not file for bankruptcy protection, and
12 that, if he did, the debt in favor of the bank evidenced by the
13 settlement agreement would not be dischargeable. Id. at 1176-77.
14 In refusing to enforce the terms of the agreement when the debtor
15 nonetheless sought bankruptcy protection, the Ninth Circuit held
16 that "it is against public policy for a debtor to waive the
17 prepetition protection of the Bankruptcy Code." Id. at 1177
18 (quoting Hayhoe v. Cole (In re Cole), 226 B.R. 647, 651-54 (9th
19 Cir. BAP 1998)). As the Ninth Circuit explained: "This
20 prohibition of prepetition waiver has to be the law; otherwise,
21 astute creditors would routinely require their debtors to waive."
22 Id.

23 This Panel's opinion in In re Cole, cited in In re Huang,

24 ¹¹ The bankruptcy court made it clear that it was ruling
25 solely on the basis of the First Declaration. In its Tentative
26 Ruling, it stated, "The Stipulated Facts within the [First]
27 Declaration are probative evidence of nondischargeability under
28 §§ 523(a)(2) and (a)(6) for fraud and conversion." Tentative
Ruling at 5, February 20, 2013. At the hearing on February 20,
2013, the court observed, "I've just looked at the material
disputed facts. And the material disputed facts in this [First
Declaration] are sufficient to prove up a [§] 523(a)(2) fraud
nondischargeability judgment for \$825,000." Hr'g Tr. 19:14-17.

1 provides further explanation of the reasons for this policy:

2 First, pursuant to § 523(c), bankruptcy courts have
3 exclusive jurisdiction to determine the dischargeability
4 of claims arising under § 523(a)(2). See Seven Elves,
5 Inc. v. Eskenazi (In re Eskenazi), 6 B.R. 366, 368-69
6 (9th Cir. BAP 1980) [citing Brown v. Felsen, 442 U.S.
7 127, 138 (1979)]. . . . Second, there is no recognized
8 exception to discharge for prepetition waivers of
9 discharge or dischargeability. Section 727(b) states
10 that all debts are dischargeable in bankruptcy unless
11 specifically excepted under § 523. Section 523
12 enumerates the exceptions to discharge, but does not
13 except from discharge those debts that the debtor has
14 agreed prepetition not to be discharged in bankruptcy
15 (citations omitted). If bankruptcy courts enforced
16 prepetition waivers of discharge, they would effectively
17 be creating an exception to discharge that Congress had
18 not enumerated (citations omitted). . . . Finally, an
19 exception to discharge impairs the debtor's fresh start
20 and should not be read more broadly than necessary to
21 effectuate policy[.] (citations omitted).

22 In re Cole, 226 B.R. at 653-54.

23 In re Huang and In re Cole continue to be good law.
24 Continental Ins. Co. v. Thorpe Insulation Co. (In re Thorpe
25 Insulation Co.), 671 F.3d 1011, 1026 (9th Cir. 2012) (in
26 reaffirming its holding in In re Huang, and again citing with
27 approval to In re Cole, the Ninth Circuit observes "it is against
28 public policy for a debtor to waive the prepetition protection of
the bankruptcy code."). Bankruptcy courts in this circuit have
acknowledged the prohibition against prepetition waivers of
bankruptcy discharge rights announced in In re Huang and In re
Cole. In re Ashworth, 2012 WL 4596217, at *15 (Bankr. C.D. Cal.
Oct. 1, 2012) (citing In re Cole for the proposition that
"prepetition waivers of a discharge are contrary to public policy
and unenforceable"); In re Jennings, 306 B.R. 672, 675 (Bankr. D.
Or. 2004) ("As a matter of public policy, an agreement in advance
of a bankruptcy case that a particular claim is not subject to

1 discharge is not enforceable."). And courts in other circuits
2 have also declined to enforce prepetition discharge waivers.
3 Lichtenstein v. Barbanel (In re Lichtenstein), 161 Fed. Appx. 461,
4 467-68 (6th Cir. 2005) (agreeing with In re Cole, the Sixth
5 Circuit held that "waiving a debtor's right to obtain a discharge
6 of a specific debt in a future bankruptcy case is void because it
7 offends the public policy of promoting a fresh start for
8 individual debtors")¹²; Klingman v. Levinson, 831 F.2d 1292, 1296
9 n.3 (7th Cir. 1987) ("For public policy reasons, a debtor may not
10 contract away the right to a discharge in bankruptcy."); First Ga.
11 Bank v. Halpern (In re Halpern), 50 B.R. 260, 262 (Bankr. N.D. Ga.
12 1985), aff'd, 810 F.2d 1061 (11th Cir. 1987) ("Policy
13 considerations dictate that dischargeability questions cannot be
14 predetermined either by a state court or by agreement of the
15 parties prior to or in anticipation of the possible filing of a
16 bankruptcy case."). Hillmeyer v. Deller (In re Deller), 2009
17 Bankr. Lexis 5556, at *24 (Bankr. W.D. Pa. 2009) (citing both In
18 re Huang and In re Cole for their holding that "A prepetition
19 waiver of the dischargeable debt is contrary to public policy.").

20 The prohibition on prepetition waivers of discharge for
21 public policy reasons predates the Bankruptcy Code. Fallick v.
22 Kehr, 369 F.2d 899, 904 (2d Cir. 1966) ([A]n advance agreement to
23 waive the benefits of the [Bankruptcy] Act would be void."); In
24 re Weitzen, 3 F. Supp. 698 (S.D.N.Y. 1933) (same). One bankruptcy
25 court recently explained the basis for this policy:

26

27
28 ¹² 6th Cir. R. 28(g), in effect at the time of the
Lichtenstein opinion, permitted citation to unpublished opinions
as persuasive authority.

1 Congress . . . provided in the Bankruptcy Code just two
2 methods through which a debtor could effectuate a waiver
3 on matters concerning discharge. First, § 727(a)(10)
4 permits debtors to waive their discharge entirely by
5 executing a postpetition written agreement and having
6 that agreement approved by the bankruptcy court. Second,
7 after the commencement of the bankruptcy case, a debtor
8 may waive the dischargeability of a particular debt by
9 complying with the requirements for reaffirmation
10 agreements as set forth in § 524(c). In either case,
11 however, a debtor is under the protection of the
12 bankruptcy court, an important commonality which is
13 lacking when a debtor executes a prepetition waiver of
14 their discharge.

15 Double v. Cole (In re Cole), 428 B.R. 747, 753 (Bankr. N.D.
16 Ohio 2009).

17 In light of the strong public policy declining to enforce
18 prebankruptcy discharge waivers, Wank contends that the bankruptcy
19 court erred when it elected to ignore the bankruptcy-defeating
20 clause in the Settlement Agreement, but then considered his
21 apparent admissions in the First Declaration as evidence that he
22 committed fraud, and as the sole basis for granting summary
23 judgment in favor of the Appellees. In response, the Appellees
24 argue that while agreements that a debt will not be dischargeable
25 in bankruptcy are unenforceable, parties are free to stipulate to
26 the facts giving rise a debt, which facts can then be considered
27 by the bankruptcy court in a later dischargeability action. In
28 this position, the Appellees quoted a passage from this Panel's
29 decision in In re Cole:

30 We have already concluded that the portion of the
31 Stipulated Judgment that purported to waive Appellee's
32 right to obtain a discharge of the Debt was
33 unenforceable as against public policy. However, if the
34 parties stipulated to the underlying facts that support
35 a finding of nondischargeability, the Stipulated
36 Judgment would then be entitled to collateral estoppel
37 application.

1 226 B.R. at 653.¹³

2 While we do not here attempt to address all possible
3 scenarios, we agree with Wank that, given the circumstances
4 surrounding his execution of the First Declaration in this case,
5 and when viewed in light of the strong public policy prohibiting
6 debtors from contracting with creditors to forego the protections
7 of a bankruptcy filing, Wank's statements in the First Declaration
8 must, at a minimum, be viewed with great skepticism. As a result,
9 and considering the other facts in the record, we believe it was
10 inappropriate for the bankruptcy court to grant a summary judgment
11 to the Appellees based solely on Wank's statements made in the
12 First Declaration.

13 There can be no doubt about the purpose for the First
14 Declaration; it was drafted by the Appellees' counsel with a
15 singular goal in mind.¹⁴ The First Declaration not intended to
16 evidence that Wank was indebted to the Appellees - that goal was
17 effectively accomplished by the terms of the Settlement Agreement.
18 The First Declaration was also not designed to be effective for
19 use by the Appellees in state court.¹⁵ Instead, the introductory
20

21 ¹³ Of course, unlike in In re Cole, Wank's admissions in the
22 First Declaration were not "stipulated," nor were they referenced
23 in the state court's stipulated judgment. Instead, as discussed
24 below, the First Declaration was a standalone document, executed
only by Wank, not submitted for consideration by the state court,
and then sealed, to be used by the Appellees only in a bankruptcy
proceeding.

25 ¹⁴ Counsel for the Appellees, at oral argument, confirmed
26 that his law firm drafted the First Declaration.

27 ¹⁵ In the Second Declaration, Wank states, and the Appellees
28 have not sought to dispute, that: "In approximately May or June
2010, the Superior Court held hearings to enter the stipulated
judgment. Plaintiffs' counsel had attempted to introduce the

(continued...)

1 paragraph of the First Declaration reveals the true intention of
2 the drafters regarding Wank's statements:

3 The purpose of this Declaration is to provide a factual
4 basis to further the intention of the Plaintiffs and
5 Defendants in this litigation to ensure that if I do not
6 pay any or all of the Judgment on a timely basis and
7 declare bankruptcy that the amounts due Plaintiffs for
8 their investment in the [EIS], plus interest, of
9 \$1,100,000 shall not be discharged in bankruptcy.

10 First Declaration at ¶ 1.

11 Given the reasons for Wank's execution of the First
12 Declaration, we think the reliability of the factual statements
13 that follow are potentially tainted by the Appellees' motives.
14 The document was solely intended to ensure that Wank could not
15 obtain effective relief in bankruptcy.¹⁶ While, perhaps, some of
16 Wank's factual statements could be trusted, to do so would require
17 the bankruptcy court to weigh the credibility of those statements
18 against the circumstances under which the First Declaration was
19 executed. And while the bankruptcy court could properly evaluate
20 the First Declaration in the context of a trial, it is a far
21 different matter for the court to rely exclusively on Wank's
22 "admissions" in the First Declaration as the sole basis for
23 granting Appellees a summary judgment that Wank committed fraud.

24 ¹⁵(...continued)
25 [First Declaration]. In personal, in-court testimony to Judge
26 Rosenfield of the Superior Court and with Plaintiffs' counsel
27 present, I specifically recanted the truth of the contents of the
28 [First Declaration] and objected to its use. Plaintiffs' counsel
then withdrew the document." Second Declaration at ¶ 20.

29 ¹⁶ Of course, the First Declaration was intended to support
30 an exception to discharge of only the Appellees' debt. But even
31 without knowing the details of Wank's other debts, it is doubtful
32 that, if he emerged from bankruptcy burdened by the Appellees'
33 \$825,000 judgment, Wank would enjoy much of a "fresh start" via
34 his discharge of other debts.

1 In our view, to grant a summary judgment in this fashion, and
2 without a trial, undermines the Ninth Circuit's concern about
3 giving effect to agreements motivated by a creditor's desire to
4 insulate debts from discharge in bankruptcy, and encourages the
5 sort of routine inclusion of such factual statements in settlement
6 agreements the court was attempting to discourage.¹⁷

7 Besides the bankruptcy-defeating clauses, there are other red
8 flags suggesting that Wank's statements in the First Declaration
9 were untrustworthy. Wank stated later, in the Second Declaration,
10 and without contradiction by the Appellees, that he executed the
11 First Declaration because he felt compelled to do so, at a time
12 when he was taking prescription medications, and because he did
13 not believe he could physically withstand the rigors of a trial.
14 Wank, a lawyer, also stated that he believed his factual
15 statements in the First Declaration would be unenforceable against
16 him. While the bankruptcy court was understandably reluctant to
17 allow Wank to create fact issues by arguing with himself, Wank's
18 later observations, considered in context with the other
19 circumstances surrounding his execution of the First Declaration,
20 were entitled to some consideration, and should have given the

21 _____
22 ¹⁷ There is evidence in the First Declaration that there may
23 have been another, ulterior motive for the document. As noted
24 above, in it, Wank concedes that, in his dealings with the
25 Appellees, he failed to abide by several provisions of the
26 California Rules of Professional Conduct. If Wank's statements
27 are indeed true, avoiding the consequences of bar discipline would
28 also constitute a strong incentive for him to sign the declaration
and perform the Settlement Agreement. Of course, as the parties
agreed in their settlement, the information about Wank's
transgressions as a California attorney would be held in
confidence unless he filed a bankruptcy petition. We are also
uncomfortable with this strategy, adding to our reluctance to
endorse the "facts" recited in the First Declaration via a
summary judgment.

1 bankruptcy court pause before adopting the First Declaration as
2 the sole basis for determining the material facts in this action.

3 We acknowledge that the bankruptcy court attempted to clarify
4 that it would not consider the bankruptcy-defeating provisions of
5 the Settlement Agreement and the First Declaration, and would rely
6 solely on the factual matters addressed in Wank's declaration:

7 THE COURT: The fact that there was a stipulation that
8 it would not be dischargeable in bankruptcy is to be
9 excised out of the declaration and is – cannot be
10 considered and is not the law. Therefore, I've only
11 considered actual statements and whether or not there's
12 a reasonable disputed facts as to the statements made.

13 Hr'g Tr.19:4-9, December 19, 2012. However, in this statement,
14 the court incorrectly described the provenance of the First
15 Declaration. The First Declaration was never part of the
16 stipulated judgment. The First Declaration was attached to the
17 Settlement Agreement, and sealed by the parties and deposited with
18 an escrow company, only to be opened if Wank filed a bankruptcy
19 petition, then to be submitted to the bankruptcy court. As
20 discussed above, in our view, the First Declaration does not fall
21 under the exception to prohibition of waivers articulated in In re
22 Cole, where a court may sever from a stipulation for judgment a
23 bankruptcy-defeating clause, while giving effect to the other
24 facts included in the stipulated judgment. 226 B.R. at 655. By
25 its terms, the First Declaration was a standalone document that
26 was sealed by the parties and only to be used in the event of a
27 bankruptcy filing to provide grounds for an exception to
28 discharge.

29 All things considered, we think the First Declaration falls
30 within the public policy prohibition on waivers of bankruptcy

1 protection articulated in In re Huang. The bankruptcy court,
2 under these unique circumstances, should not have relied
3 exclusively on Wank's statements in the First Declaration in
4 awarding the Appellees a summary judgment.

5 **II.**

6 **The bankruptcy court made credibility determinations,**
7 **weighed evidence and drew inferences in favor of the**
8 **moving party, which are inappropriate in considering a**
9 **motion for summary judgment.**

10 Even assuming the bankruptcy court's reliance upon the First
11 Declaration in granting summary judgment to the Appellees did not
12 transgress the public policy against enforcing prepetition
13 agreements to waive bankruptcy protections, the court's decision
14 must nonetheless be vacated.

15 It is a basic tenet that "[c]redibility determinations, the
16 weighing of the evidence, and the drawing of legitimate inferences
17 from the facts' are inappropriate at the summary judgment stage."
18 Oswalt v. Resolute Indus., 642 F.3d 856, 861 (9th Cir. 2011)
19 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255
20 (1986)). Contrary to this admonition, an analysis of the
21 bankruptcy court's ruling demonstrates that it necessarily made
22 credibility findings, weighed Wank's various sworn statements, and
23 drew inferences in favor of the Appellees in granting them a
24 summary judgment.

25 It is important to note that the bankruptcy court did not
26 strike the Second Declaration as a "sham," nor otherwise discount
27 it as patently unreliable.¹⁸ Indeed, we agree that the Second

28 ¹⁸ In Yeager v. Bowlin, 693 F.3d 1076, 1081 (9th Cir. 2012),
(continued...)

1 Declaration was properly before the court for its consideration in
2 resolving the summary judgment motion. We disagree with the
3 court, however, that it was free to credit the contents of the
4 First Declaration when the Second Declaration clearly called those
5 statements into question.

6 In its Tentative Ruling, the bankruptcy court explained,
7 In the [First] Declaration, [Wank] admits that he agreed
8 to act as a primary investor to invest [Appellees']
9 monies, that the funds were wired to the EIS, that the
10 EIS was a fraud, that [Wank] advised [the Appellees]
11 that EIS would have an exit buyer in place, but that
12 there was no such exit buyer, that he made
representations to Plaintiffs which were false, to
induce them to place their funds in his trust account
and to permit him to act as [Appellees'] primary
investor. These stipulated facts¹⁹ are probative and
credible evidence of fraud and conversion.

13 Tentative Ruling at 6.

14 Then, at the hearing, the bankruptcy court continued,
15 The statements that are disputed or the additional
16 statements [in the Second Declaration] do not dispute
the key statements made. They simply try to explain

17 _____
18 ¹⁸(...continued)
the Ninth Circuit examined the "sham affidavit" rule, which allows
19 a trial court to make a credibility determination on summary
judgment by rejecting a second sworn statement from a witness that
20 conflicts with his or her earlier deposition testimony. The
rationale for the rule is that depositions are adversarial in
21 nature where the witness is subject to examination and cross-
examination and, therefore, deposition testimony may be deemed
22 inherently more reliable than self-serving affidavits. Id.;
Darnell v. Target Stores, 16 F.3d 174, 179 (7th Cir. 1994).
23 However, the Yeager court noted that the sham affidavit rule must
be applied with caution, because evaluating two conflicting
24 statements from the same party necessarily involves determining
credibility, and "the [trial] court is not to make credibility
25 determinations when making or denying summary judgment." Yeager,
693 F.3d at 1080. Of course, this appeal presents a conflict
26 between Wank's two declarations, not a deposition, so the sham
affidavit exception to the prohibition on credibility
27 determinations in summary judgment does not apply.

28 ¹⁹ Again, these were not "stipulated facts"; they were Wank's
statements in the First Declaration.

1 them away or rationalize them. But the statements that
2 go to the fact that false statements were made, they
3 were made, according to paragraph four, to induce the
4 [Appellees] to place funds in Mr. Wank's account, and
5 that there were communications made, and that there was
6 an intent for them to rely on those statements because
7 they were made to induce them, and the fact that there
8 was fraud really have not been disputed with a careful
9 reading of the subsequent declarations. They're sort of
10 explained further, and they're supplemented, and they're
11 rationalized, but they're just not materially disputed.

12 Hr'g Tr. 19:18-20:7.

13 As can be seen, in evaluating Wank's statements in the First
14 Declaration, the bankruptcy court made a credibility
15 determination. Indeed, the bankruptcy court describes Wank's
16 statements in the First Declaration as constituting "credible
17 evidence." To measure the value of the statements in the First
18 Declaration against Wank's statements in the Second Declaration
19 required the bankruptcy court to assign them weight. This cannot
20 be done in the context of summary judgment. Dominquez-Curry v.
21 Nevada Transp. Dep't, 424 F.3d 1027, 1036 (9th Cir. 2005) (At
22 summary judgment, "the judge does not weigh disputed evidence with
23 respect to a disputed material fact. Nor does the judge make
24 credibility determinations with respect to statements made in
25 affidavits, answers to interrogatories, admissions, or
26 depositions."); SEC v. M&A W., Inc., 538 F.3d 1043, 1054-55 (9th
27 Cir. 2008) ("This Court, and others, have long recognized that
28 summary judgment is singularly inappropriate where credibility is
at issue. Only after an evidentiary hearing or a full trial can
these credibility issues be appropriately resolved The
district court's assessment of [] credibility may ultimately be
correct, but such an assessment may only be made after a full
evidentiary hearing, and is inappropriate at the summary judgment

1 stage.") (citations and internal quotation marks omitted). While
2 the bankruptcy court characterized Wank's statements in the Second
3 Declaration as explaining away, supplementing or rationalizing the
4 statements he made in the First Declaration, in doing so, the
5 court was necessarily required to weigh the value of those later
6 statements, to credit some of them, and to reject others. This
7 process was not appropriate without a trial.

8 Moreover, we disagree with the bankruptcy court's
9 characterization of the statements in Wank's Second Declaration as
10 merely explaining or rationalizing the statements in the First
11 Declaration. As to key elements of exception to discharge under
12 § 523(a)(2)(A), the Second Declaration flatly contradicts, not
13 explains or rationalizes, the statements in the First Declaration.

14 For example, the Appellees were required to prove that Wank
15 made representations to them. In the Second Declaration, Wank
16 flatly denies that he made any representations to the Appellees.
17 Second Declaration at ¶ 4. Instead, Wank reminds the court that
18 his "representations" were made via the EIS Agreements, documents
19 which were not submitted to the bankruptcy court. Wank's denial
20 that he made "statements" to the Appellees therefore raises an
21 issue of material fact sufficient to require a trial.

22 In addition, neither of Wank's declarations contain an
23 admission that he knew that the representations he made to the
24 Appellees were false when he made them, another element for a
25 § 523(a)(2)(A) fraud exception to discharge. Wank acknowledges he
26 knew that the Appellees' funds were potentially at risk at the
27 time he signed the EIS Agreements and transferred the funds.
28 However, the bankruptcy court then inferred knowledge of the

1 falsity of his representations at the time they were made from
2 Wank's admission in the Second Declaration that, at a later date,
3 he came to know the representations were false. Drawing such an
4 inference against Wank and in favor of the Appellees was
5 inappropriate in this context of a summary judgment motion.

6 The Appellees were also required to prove that Wank intended
7 to deceive Appellees. To satisfy this requirement, the bankruptcy
8 court relied on Wank's statement in the First Declaration, but
9 apparently discounted his statement in the Second Declaration that
10 not only did he not intend to deceive the Appellees by
11 facilitating their investments, that he in fact invested \$25,000
12 of his own money in the venture. Again, the conflicting
13 statements raise a trial issue of material fact as to Wank's
14 intention to deceive.

15 In sum, while there were obviously aspects of Wank's First
16 Declaration that tended to establish that he intentionally induced
17 the Appellees to invest in a risky scheme, whether he committed
18 the sort of knowing fraud contemplated in § 523(a)(2)(A) was
19 called into legitimate question by the contents of the Second
20 Declaration. Since Wank's two competing statements were the only
21 factual record the bankruptcy court could consider, in granting a
22 summary judgment to the Appellees, it assigned weight to his
23 various admissions and statements, and drew inferences against
24 Wank from those statements. This was error.

25 //

26 //

27 //

28 //

1 III.

2 **The Appellees did not establish that they justifiably**
3 **relied on on Wank's representations.**

4 Even if the First Declaration could be used against Wank, and
5 even if the bankruptcy court did not inappropriately weight the
6 evidence in the record, there remained a glaring hole in the
7 Appellees' proof that compels us to vacate the summary judgment.

8 In considering a request for an exception to discharge under
9 § 523(a)(2)(A),

10 [A] creditor must prove justifiable reliance upon the
11 representations of the debtor. In determining that
12 issue, the court must look to all of the circumstances
13 surrounding the particular transaction, and must
particularly consider the subjective effect of those
circumstances upon the creditor.

14 In re Kirsh, 973 F.2d 1454, 1460 (9th Cir. 1992); see also
15 Citibank (S.D.) N.A. v. Eashai (In re Eashai), 87 F.3d 1082, 1090
16 (9th Cir. 1996) (noting that whether a creditor's reliance on a
17 debtor's representations is justified requires the application of
18 a subjective standard.) As the Supreme Court explained this
19 standard, "[j]ustification is a matter of the qualities and
20 characteristics of the particular plaintiff, and the circumstances
21 of the particular case" Field v. Mans, 516 U.S. 59, 71
22 (1995), citing the Restatement (Second) of Torts § 545A, comment
23 b. (1976).

24 In this case, to be entitled to an exception from discharge
25 under § 523(a)(2)(A), each of the Appellees must show that they,
26 individually, were justified in relying on any false
27 representations made to them by Wank. In his arguments to the
28 bankruptcy court that there were disputed material facts regarding

1 whether the Appellees each justifiably relied on his alleged false
2 statements, Wank repeatedly insisted that "[Appellees] had already
3 made up their minds to invest in the EIS, and, therefore did not
4 rely on his statements." Second Declaration at 9. Instead of
5 relying upon his statements, Wank argued that the Appellees had
6 each arrived at their decision to invest after speaking with
7 Neidich, and after conducting their own chosen due diligence. Id.

8 Wank's uncontradicted statements about the Appellees' lack of
9 reliance depict a plausible scenario which finds other support in
10 the parties' submissions. For example, the Appellees attached as
11 an exhibit to their Motion for Summary Judgment a certified copy
12 of the First Amended Complaint they filed in the State Court
13 Action. Although the Appellees never discussed in the bankruptcy
14 court whether they justifiably relied (or relied at all, for that
15 matter) on Wank's representations, they alleged in the state court
16 complaint that (1) Neidich made the first contact with Sidiqqi "by
17 telephone and extolled the virtues of the [EIS]." ¶ 24; (2)
18 Neidich and Romer had a meeting with Ferguson in June of 2004 in
19 which they "extolled the virtues of the [EIS], which Defendants
20 Neidich and Romer claimed, among other things, paid its investors
21 8% per month, which purported to yield returns of 155% per year,
22 or words to that effect." ¶ 25; (3) in March 2004, Neidich and
23 Romer sent Gordon "an email or emails in which they extolled the
24 virtues of the [EIS]. They also made the same representations
25 regarding an 8% monthly yield and 155% annual yield on the
26 investment." ¶ 26(a); (4) In early 2004, Neidich "solicited Mr.
27 Tsoupakis's investment in the [EIS], which he claimed paid
28 extraordinarily high rates of return." ¶ 27; and (5) in September

1 2004, Neidich contacted A&S Investment and "extolled the virtues
2 of the [EIS]." ¶ 28.²⁰ Collectively, these allegations in the
3 Appellees' state court complaint tend to show that they each were
4 first contacted by either Neidich or Romer, not Wank, and that
5 Neidich and/or Rohmer made glowing and unfounded representations
6 to them concerning the EIS. In short, Appellees' own pleading in
7 state court plausibly support Wank's contention that: "Plaintiffs
8 had already made up their minds to invest in the EIS, and,
9 therefore did not rely on his statements." And as Wank observes,
10 the Appellees have submitted no declarations, nor any documentary
11 evidence (such as the EIS Agreements that they admit they signed
12 in connection with their investments) to show their justifiable
13 reliance on his representations.

14 Moreover, even if they did actually rely upon Wank's
15 statements in investing in the EIS, each of the Appellees must
16 establish that it was justifiable for them to do so, based upon
17 their background, training and experience as investors. The
18 record contains no facts to demonstrate that, assuming they in
19 fact took his word, they lacked other reasons not to appreciate
20 the risks associated with the currency investment. As Wank points
21 out, whether the Appellees could show justifiable reliance was in
22 doubt because at least some of them were arguably sophisticated,
23 educated investors: a mortgage banker, a CPA, an insurance broker,
24 a Porsche dealer, and a medical doctor.

25
26 ²⁰ At oral argument before the Panel, counsel for the
27 Appellees was invited to explain whether the Appellees may have
28 relied on the representations of Neidich and Romer, which they
entered into the bankruptcy court's record, rather than the
alleged representations of Wank. Counsel simply stated, "They
relied on Wank."

1 At best, whether the Appellees each justifiably relied on
2 Wank's representations was disputed; at worst, the record contains
3 no evidence to show such reliance. Because of this, the
4 bankruptcy court erred by determining that the debt Wank owed to
5 Appellees was excepted from discharge under § 523(a)(2)(A).

6 **CONCLUSION**

7 In granting summary judgment to the Appellees, the bankruptcy
8 court should not have relied solely upon a declaration expressly
9 designed to defeat Wank's ability to obtain effective relief under
10 the bankruptcy laws. In light of a contradictory declaration,
11 the bankruptcy court should not have weighed the value of his
12 various statements, determined Wank's credibility, or drawn
13 inferences in favor of the Appellees. Finally, there was nothing
14 in the record to show that the Appellees justifiably relied upon
15 any of Wank's alleged false representations in making their
16 investments. Because genuine issues of material fact remain
17 requiring a trial, we VACATE the bankruptcy court's summary
18 judgment and REMAND this matter for further proceedings.

19
20
21 Ballinger Jr., Bankruptcy Judge, concurring:

22
23 I agree that the bankruptcy court's ruling in this case must
24 be reversed, but not for the reasons announced by the majority.
25 Reversal is warranted only because the bankruptcy court failed to
26 justify its decision to disregard Wank's sworn disavowal of the
27 First Declaration and, therefore, improperly weighed the evidence
28 when considering plaintiffs' request for summary judgment. Had

1 the bankruptcy court found Wank's Second Declaration the self-
2 serving product of a shammer, I would vote to affirm. I
3 respectfully disagree with the panel that the First Declaration,
4 coupled with undisputed material facts, did not establish all the
5 elements requisite to granting relief under Bankruptcy Code
6 section 523(a)(2)(A).

7 A bankruptcy court has the power to disregard sworn avowals
8 meant to defeat summary judgment if it finds them to be conclusor-
9 y, self-serving or to constitute a sham. See F.T.C. v. Pub.
10 Clearing House, Inc., 104 F.3d 1168, 1171 (9th Cir. 1997)
11 (conclusory and self-serving affidavits lacking detailed facts and
12 any supporting evidence are insufficient to create a genuine issue
13 of material fact); Kennedy v. Allied Mut. Ins. Co., 952 F.2d 262,
14 267 (9th Cir. 1991) (to disregard an affidavit as one conjured to
15 avoid summary judgment, the district court must make a factual
16 finding that the contradiction was a sham).

17 In this case, Wank's Second Declaration is clearly self-
18 serving, but not conclusory.¹ Instead of declaring Wank's more
19 recent declaration a sham not to be considered, the bankruptcy
20 court reviewed the Second Declaration and essentially balanced its
21 credibility against the admitted facts contained in the First
22 Declaration. Statements in the Second Declaration contradicted
23 facts essential to plaintiffs' case and created genuine disputes
24 regarding material issues. These disputed issues preclude granting
25 summary disposition and compel us to reverse the bankruptcy

26
27 ¹ The Second Declaration is ten pages long and contains
28 details of Wank's version of the circumstances surrounding creation
of each paragraph of the First Declaration.

1 court's order. But, I respectfully disagree that this result
2 flows from any inherent unreliability with Wank's initial sworn
3 admissions or a public policy concern. I believe there was
4 evidence at the trial court supporting a finding that Wank's debt
5 to plaintiffs should be excepted from his bankruptcy discharge.
6 Section 523(a)(2)(A) excepts from discharge any debt for money,
7 property or credit obtained by false pretenses, false
8 representations or actual fraud. To obtain relief a creditor must
9 establish five elements: 1) the debtor made a representation; 2)
10 the debtor knew at the time the representation was false; 3) the
11 representation was made with the intent and purpose of deceiving
12 the creditor; 4) the creditor justifiably relied on the
13 representation; and 5) the creditor was damaged as a proximate
14 cause of the representation. Ghomeshi v. Sabban (In re Sabban),
15 600 F.3d 1219, 1222 (9th Cir. 2010); Turtle Rock Meadows
16 Homeowners Ass'n v. Slyman (In re Slyman), 234 F.3d 1081, 1085
17 (9th Cir. 2000).

18 In this case, the last element is not disputed; Wank
19 acknowledges that plaintiffs suffered substantial damage as a
20 result of the scheme in which he encouraged them to invest. And
21 the First Declaration, standing alone, provides sufficient
22 evidence that a court could conclude satisfies a number of the
23 other elements of section 523(a)(2)(A). The majority disagrees
24 and finds the First Declaration inherently unreliable. It also
25 concludes the bankruptcy court erred because the record shows
26 plaintiffs did not establish justifiable reliance. With respect
27 to the reliability of admissions found in the First Declaration,
28 the majority discusses the long recognized public policy

1 prohibition against prepetition waivers of Bankruptcy Code
2 discharge rights and finds that this policy dictates that Wank's
3 admissions in the First Declaration be viewed with great
4 skepticism.

5 I disagree that this policy consideration is relevant to this
6 case.² As the panel notes, the bankruptcy judge correctly ruled
7 that she would not consider the "bankruptcy defeating" language
8 found both in the First Declaration and the agreement settling the
9 parties' state court case. The question here is whether the
10 bankruptcy judge incorrectly found that sworn admissions contained
11 in the First (and disavowed in the Second) Declaration established
12

13 ² There is no dispute that the First Declaration contains an
14 improper "bankruptcy-proofing" provision. The bankruptcy court
15 properly held that this term was void and would not be considered.
16 But, case law clearly provides that the bankruptcy court can
17 consider underlying facts contained in materials that include a
18 bankruptcy defeating clause. Hayhoe v. Cole (In re Cole), 226
19 B.R. 647, 651 (9th Cir. BAP 1998), citing Klingman v. Levinson,
20 831 F.2d 1292, 1296 n.3 (7th Cir. 1987). The majority
21 acknowledged, citing Cole, that the Bankruptcy Appellate Panel has
22 drawn a distinction between the public policy against de facto
23 bankruptcy discharge waivers and determinations or stipulations
24 regarding facts that may be relevant to determining if a debt is
25 dischargeable. In Cole, the bankruptcy court ignored a bankruptcy
26 defeating clause contained in a state court judgment, but
27 considered stipulated facts contained therein to determine if
28 collateral estoppel applied. The majority points out that there
are no stipulated facts and judgment in this case. But, Cole and
Levinson do not require that the underlying facts be stipulated
to, nor do those cases require the facts be taken from a judgment.
Here, we have admitted facts in a declaration signed under penalty
of perjury. Whether the facts were stipulated to or are a single
party admission, and whether they were contained in a judgment or
a declaration, should make no difference to a bankruptcy court
tasked with determining if those facts support a claim of non-
dischargeability for purposes of summary judgment. The majority's
conclusion that the public policy against bankruptcy defeating
clauses creates a general skepticism of the admitted facts goes
too far. Cole and Levinson simply allow the court to disregard
the improper language and examine, without a presumption of
suspicion, the underlying facts.

1 elements justifying relief under section 523(a)(2)(A). Reversal
2 is required not because the bankruptcy judge could not give
3 credence to the First Declaration's admissions, but rather because
4 the record lacks a factual finding that the judge deemed the
5 factual contradictions in the Second Declaration unworthy of
6 consideration. Had the bankruptcy court found the Second
7 Declaration a sham, no public policy concern would have prevented
8 it from holding that the admissions contained in the First
9 Declaration conclusively established the following three elements
10 required for relief under section 523(a)(2)(A):

- 11 ● That Wank made false representations to plaintiffs to
12 convince them to transfer hundreds of thousands of dollars to
13 him;
- 14 ● That Wank was aware that most, if not all, of the
15 relevant representations were false when he made them;
16 and
- 17 ● That the false representations constituted deceit.
18 Wank made them to create false impressions in
19 plaintiffs' minds (e.g. that Wank had expertise in the
20 financial scheme they were to invest in and that their
21 money would never be put at risk of loss).

22 The majority also rests its decision on the belief that
23 plaintiffs failed to establish the justifiable reliance needed
24 to obtain a judgment because the Second Declaration contains
25 Wank's assertions that plaintiffs had already decided to
26 invest in the EIS currency speculation scheme prior to meeting
27 with him. This conclusion supports the view that if the
28 bankruptcy judge had memorialized her belief that the Second
Declaration was contrived and bogus, the decision at the trial
court would have to be affirmed. More important are Wank's
sworn acknowledgments in the First Declaration that he made
representations to the Plaintiffs that were false to induce

1 them to place their funds in his trust account, permit him to
2 act as their "primary investor" and transfer their money to
3 EIS. Coupled with the undisputed fact that subsequent to
4 these representations plaintiffs provided large sums to Wank,
5 the bankruptcy court could appropriately decide that
6 plaintiffs established justifiable reliance.

7 Although I respectfully disagree with the majority's
8 reasoning, I concur in the decision to set aside the
9 bankruptcy court's grant of summary judgment.

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28