additional cases. In the first case, Sternberg v. Johnston, 595 F.3d 937, 944-45 (9th Cir. 2010), the Court of Appeals concluded that an attorney violated the automatic stay by defending a state court order of sanctions against the debtor, when the debtor petitioned the state appellate court to vacate the stay. The court determined that the attorney's conduct violated the automatic stay, because the attorney did not alert "the appellate court to the obvious conflicts between the order and the stay." However, Sternberg is not on point, because no sanctions were sought against Mr. Kenoyer in violation of the stay, and there have been no efforts to collect -- monetarily -- from Mr. Kenoyer in violation of the automatic stay.

Mr. Kenoyer also relies upon Bihari v. DDJ Capital Mgmt., LLC, 306 B.R. 336 (E. D. Cal. 2004), but Bihari does not elucidate the issue at hand. In Bihari the plaintiff filed a case against the defendant for compensation for overtime, but the defendant, an LLC, filed for bankruptcy and the case was stayed, so the plaintiff then filed a second, separate lawsuit against the shareholders, officers, and directors of debtor for compensation for overtime. Id. at 337. The court found that "[r]eview of the complaints evidences that Plaintiff's filing of the Second Action Complaint is an attempt to avoid the stay issued in the first action." Id. at 338. The court explained that "[b]ecause 'there is such identity between the debtor and [Defendants] that the debtor may be said to be the real party defendant and that a judgment against [Defendants] will in effect be a judgment or finding against the debtor,' Plaintiff's filing of the Second Action Complaint violated the stay of the first action." Id. at 338 (quoting A.H. Robins

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Co., Inc. v. Piccinin (In re A.H. Robins Co., Inc.), 788 F.2d 994, 999 (4th Cir. 1986)).

In citing Bihari, it appears that Mr. Kenoyer counsel may be trying to apply the "unusual circumstances" doctrine adopted in other circuits which:

> arises when there is such identity between the debtor and the third-party defendant that the debtor may be said to be the real party defendant and that a judgment against the third-party defendant will in effect be a judgment or finding against the debtor. An illustration of such a situation would be a suit against a third-party who is entitled to absolute indemnity by the debtor on account of any judgment that might result against them in the case.

A.H. Robins Co., Inc. v. Piccinin, 788 F.2d 994, 999 (4th Cir. 1986). However, the unusual circumstances doctrine typically is not used to extend the automatic stay to actions against non-debtors under § 362, but instead is used to obtain an injunction under § 105. See Chugach Timber Corp. v. Northern Stevedoring & Handling Corp. (In re Chugach Forest Products, Inc.), 23 F.3d 241, 247 n.7 (9th Cir. 1994). In Chugach Forest Products, Inc., the Ninth Circuit declined to extend the stay under the unusual circumstances doctrine, noting that the "typical 'unusual circumstances' cases" involved prospective requests for an injunction. Id. (citing Patton v. Bearden, 8 F.3d 343 (6th Cir. 1993)). Similarly, in Patton, 8 F.3d at 349, the Sixth Circuit stated that "extensions" under the "unusual circumstances" doctrine, "although referred to as extensions of the automatic stay, were in fact injunctions issued by the bankruptcy court after hearing and the establishment of unusual need to take this action

to protect the administration of the bankruptcy estate[.]".[16]

Nevertheless, even if the "unusual circumstances" doctrine could apply, the Bihari case is distinguishable. Ms. Cardinale did not file a second case against new defendants to avoid the stay in Mr. Kenoyer's bankruptcy case. More importantly, Mr. Kenoyer has not alleged that continuation of Ms. Cardinale's state court case against Mr. Kenoyer's co-defendants violated the automatic stay, or that Mr. Kenoyer and his co-defendants shared such an "identity" that a judgment against the co-defendants would serve as a judgment against Mr. Kenoyer.[17] Quite to the contrary: Mr. Kenoyer is not bound by the jury's verdict against the non-debtor defendants.

Interestingly, the Court's own research shows that while § 362(a) is not violated by pursuing discovery as to non-debtor defendants, it is appropriate for a debtor to seek injunctive relief under 11 U.S.C. § 105 to prevent the pursuit of such discovery from the debtors and any harm to such debtors. See Lane v. Philadelphia Newspapers, LLC (In re Philadelphia Newspapers, LLC), 423 B.R. 98 (E. D. Pa. 2010) (upholding the bankruptcy court's extension of the automatic stay to the debtor's employee and injunction under § 105(a) against pursuit of discovery from the debtor's employee); In re Residential Capital, LLC, 480 B.R. 529,

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[16] The BAP recently stated in an unpublished decision that "any extension of the automatic stay to nondebtors does not occur automatically but requires the filing of an adversary proceeding requesting the bankruptcy court to act under § 105(a)." In re Ripon Self Storage, LLC, Slip Op., Case No. 2011 WL 3300087, *6 (B.A.P. 9th Cir. 2011) (citing Boucher v. Shaw, 572 F .3d at 1093 n. 3).

[17] To the Court's knowledge, none of the non-debtor defendants have sought indemnity from Debtor, and since Debtor has already received his discharge, any of those potential unfiled claims may also have been discharged.

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536-37 (Bankr. S. D. N. Y. 2012) ("There is surprisingly little authority whether the automatic stay applies to discovery from a debtor in a third-party action in which the debtor is not a party. . . . The Court accepts [the plaintiff's] argument that section 362(a) does not, standing alone, protect the Debtors from discovery in third-party actions [against the debtors' affiliates]. . . . [But] the Court is extending the protection of the stay pursuant to section 105(a) to anyone seeking discovery from the Debtors absent further order of the Court."); see also Miller, 262 B.R. at 506-07 (discussing Occidental Chemical Corp. v. Johns-Manville Corp. (In re Johns-Manville Corp.), 41 B.R. 926 (S.D.N.Y. 1984), and noting that in Johns-Manville a stay had been granted under § 105 because § 362 did not prevent the discovery sought from the debtor) ("Johns-Manville does not stand for the proposition that the automatic stay prevents discovery of a debtor in furtherance of a claim against a non-debtor[.]").

Thus, consistent with Miller, the generally accepted view is that § 362(a) does not prevent third-party discovery from a debtor which is directed to the claims asserted against non-debtor parties. However, the bankruptcy court has the power under § 105(a) to prevent such discovery, when such relief is affirmatively requested. This logic certainly applies also to trial subpoenas, i.e., if § 362(a) does not prevent enforcement of a trial subpoena served on a debtor but directed at claims against non-debtors, then the bankruptcy court has the same power under § 105(a) to enjoin such testimony.

Validity of the Subpoena

The BAP's decision in Miller and the weight of authority from other courts suggest that it does not violate the automatic stay to require a debtor to comply with a subpoena for which the purpose is to prosecute claims against non-debtors. Such cases also suggest that the default approach should be to require a debtor to seek an injunction to halt enforcement of a subpoena. As discussed above, this Court has reservations about whether such a subpoena would never violate the automatic stay, particularly given the policies underlying the stay. However, under the undisputed facts of this particular case, the Court concludes that reasoning in Miller, Mahurkar, Hillsborough, Richard B. Vance, United Nat. Funding, LLC, and Yates should apply.

The Subpoena served on Mr. Kenoyer was valid pre-petition, at the time when the Subpoena was served. However, upon Mr. Kenoyer's filing for bankruptcy protection, the original Subpoena -- left unaltered -- would have led to a stay violation. This is because the Subpoena sought production of various documents pertaining to Mr. Kenoyer's liability on the claims asserted against Mr. Kenoyer in the state court.

However, the Subpoena was narrowed in two ways. First, after receiving notice of Mr. Kenoyer's bankruptcy case, Ms. Caron informed Ms. Diemer by letter that it was Ms. Caron's intention, consistent with Miller, to have Mr. Kenoyer testify against the non-debtor co-defendants in the state court trial. The April 16 Letter makes it clear that Ms. Caron did not intend to pursue the claims against Mr. Kenoyer in the state court proceeding; to the contrary, Ms. Caron filed a motion on behalf of Ms. Cardinale to

sever Mr. Kenoyer from the case. The April 16 Letter characterized Mr. Kenoyer as an "indispensable witness" against the remaining defendants. Under Miller, it was not a violation of the stay for Ms. Caron to call Mr. Kenoyer as a witness against the remaining, non-debtor defendants, and to ask questions pertaining to the liability of the non-debtor defendants. In fact, under Miller, 262 B.R. at 505, it would not have been a stay violation to elicit evidence from Mr. Kenoyer which might have been harmful to him in a subsequent proceeding, as long as the purpose of eliciting the evidence was to build a case against the non-debtor defendants, without prejudice to Mr. Kenoyer's right to seek a § 105 injunction. Also, as discussed above, Mr. Kenoyer has offered no evidence to suggest that the sole or even the primary purpose of prosecuting the action against the non-debtor defendants was to obtain information to be used against Mr. Kenoyer in a later trial. Quite to the contrary, the undisputed facts show that the state court verdict of more than $3 million obtained against the non-debtors was potentially lucrative to Ms. Cardinale without respect to any potential liability on the part of Mr. Kenoyer.

The second narrowing of the Subpoena was even more dramatic; Mr. Kenoyer was never called to testify. Thus, Ms. Caron never asked any questions of Mr. Kenoyer, nor required Mr. Kenoyer to produce any documents, which could have implicated Mr. Kenoyer in any way. The decision in Miller hints that if Mr. Kenoyer had been called to testify solely for purposes of obtaining information to be used against Mr. Kenoyer in a later proceeding, this would have been improper. However, because Mr. Kenoyer was never called to testify, no improper questions were ever asked.

Therefore, Ms. Caron's insistence that Mr. Kenoyer comply with the Subpoena in the action against the non-debtor defendants did not violate the automatic stay. Defendants are entitled to summary judgment on Mr. Kenoyer's claim that Defendants violated § 362(a)(1).

B. Alleged Violation of § 362(a)(6)

Mr. Kenoyer also contends that Defendants violated § 362(a)(6), because Mr. Kenoyer's alleged involvement in the tortious conduct was discussed during the state court trial. Relying upon Lewis, supra, Mr. Kenoyer argues that although Defendants did not call Mr. Kenoyer to testify at the state court trial, Defendants nonetheless violated the automatic stay by eliciting information from state court witnesses about Mr. Kenoyer during the trial and by then using that information against Mr. Kenoyer in Ms. Cardinale's non-dischargeability complaint against Mr. Kenoyer.[18] The Court rejects these contentions for several reasons.

Put simply, there was no "act to collect, assess, or recover a claim" against Mr. Kenoyer in the state court action. See 11 U.S.C. § 326(a)(6). Mr. Kenoyer was severed from the state court trial and was not bound by the jury's verdict against the non-debtor defendants. The fact that other witnesses may have mentioned Mr. Kenoyer at the trial or his involvement in the alleged conspiracy did not violate the stay. Mr. Kenoyer's conduct

[18] At the December 13, 2012 hearing, Ms. Diemer argued that the later nondischargeability action brought against Mr. Kenoyer supports the interrelated nature of the claims likening the present case to Lewis.

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was relevant to the claims against the alleged co-conspirators, and absent an injunction from this Court, could be the subject of inquiry -- not just an inquiry of the witnesses who actually testified, but also of Mr. Kenoyer, had he been called to the stand.

Significantly, none of the jury's findings can be given preclusive effect against Mr. Kenoyer, because Mr. Kenoyer was not a party when the case went to trial. Because the underlying verdict comes from state court, California law governs whether there can be issue preclusion. Robi v. Five Platters, Inc., 838 F.2d 318, 322 (9th Cir. 1988). Under California law, "[a] party is collaterally estopped from relitigating an issue previously adjudicated if: (1) the issue necessarily decided in the previous suit is identical to the issue sought to be relitigated; (2) there was a final judgment on the merits of the previous suit; and (3) the party against whom the estoppel is asserted was a party, or in privity with a party, to the previous suit." In re Russell, 76 F.3d 242, 244-45 (9th Cir. 1996). A person is in privity when that person is "so identified in interest with a party to former litigation that he represents precisely the same right in respect to the subject matter involved." In re Hansen, 368 B.R. 868, 879 (B.A.P. 9th Cir. 2007) (quoting Headwaters Inc. v. U.S. Forest Serv., 399 F.3d 1047, 1052-53 (9th Cir. 2005)). Even if the requirements for issue preclusion are satisfied, a court should not apply the doctrine unless it would comport with fairness and public policy. See Smith v. Exxon Mobil Oil Corp., 153 Cal. App. 4th 1407, 1414 (2007) (discussing the equitable nature of collateral estoppel). Because the case against Mr. Kenoyer was severed due to

the automatic stay, and his rights, even as an alleged employee of the state court defendants, are not the same as those parties, the Court will not treat Mr. Kenoyer as being in privity with any defendant in the state court action for the purposes of issue preclusion.

The use of information from the state court trial to support a summary judgment brief in a non-dischargeability action was not improper. As discussed above, the BAP in Miller, 262 B.R. at 505, expressly contemplated that information obtained from a debtor and used against a non-debtor defendant might be used against the debtor in a later proceeding. The information, itself, is not off limits. Moreover, the trial testimony used to support the non-dischargeability action was not obtained from Mr. Kenoyer.

As for Mr. Kenoyer's reliance on Lewis, the Court has already explained why Lewis is not applicable. The unique way in which damages are determined under CERCLA, and the ancillary claims that arose in Lewis, made severance of those debtors impossible. By contrast, in the case against Mr. Kenoyer's former co-defendants, the jury was able to return a verdict that did not address Mr. Kenoyer's liability. Additionally, Mr. Kenoyer's argument assumes, incorrectly, that Mr. Kenoyer could not have been called as a witness at trial. Logically, because Mr. Kenoyer could have been called to testify against the non-debtor defendants, Mr. Kenoyer could also have been compelled to testify about his own actions to the extent necessary to establish the liability of the remaining defendants.

Therefore, Defendants are entitled to summary judgment on Mr. Kenoyer's claim that Defendants violated § 362(a)(6).

C. Request for an Injunction

Although the Court has concluded that it was permissible, under Miller and other persuasive cases, to subpoena Mr. Kenoyer to testify, there is a separate request by Mr. Kenoyer for an injunction to prevent Defendants from enforcing the Subpoena. This Court does have the authority to enjoin testimony under 11 U.S.C. § 105(a). However, the request for injunctive relief is now moot. The state court action has concluded and Mr. Kenoyer was not asked to testify or produce documents during trial.

V. Conclusion

Based upon the undisputed facts, the Court concludes that under Miller, its predecessors, and its progeny, the Defendants did not violate the automatic stay by attempting to enforce the Subpoena, nor by eliciting testimony or offering evidence about Mr. Kenoyer's conduct during the state court trial. Therefore, Defendants are entitled to a judgment as a matter of law in their favor as to the first and third causes of action in the Amended Complaint. Furthermore, because the state court trial has been completed, Mr. Kenoyer's second cause of action seeking an injunction prohibiting Defendants from enforcing the Subpoena is moot. Therefore, Defendants' motion for summary judgment is granted. Counsel for Defendants shall prepare a form of judgment.

IT IS SO ORDERED.

Dated: 3/20/13

ARTHUR S. WEISSBRODT
UNITED STATES BANKRUPTCY JUDGE

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