relevant. Id. A creditor's mistaken belief that the creditor has the right to act can still be a willful violation of the stay. See United States v. Bulson (In re Bulson), 117 B.R. 537, 539 (B.A.P. 9th Cir. 1990).

At the heart of this case is the juxtaposition between a creditor's affirmative duty to seek relief from the automatic stay, and a debtor's right to seek an injunction when the automatic stay provides no protection. The Court must determine whether the automatic stay -- which arose upon the filing of Mr. Kenoyer's bankruptcy petition -- prohibited enforcement of the Subpoena by requiring Mr. Kenoyer to testify at trial or the presentation of any evidence concerning Mr. Kenoyer at the state court trial.

Mr. Kenoyer's Amended Complaint in this adversary proceeding is based on 11 U.S.C. § 362(k)(1), which provides, "an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages." The burden of proving a violation of the automatic stay is on the debtor. See Dawson v. Washington Mut. Bank, F.A. (In re Dawson), 390 F.3d 1139, 1149 (9th Cir. 2004); Eskanos & Adler, P.C. v. Roman (In re Roman), 283 B.R. 1, 7-8 (B.A.P. 9th Cir. 2002). Thus, within the context of a motion for summary judgment, the burden of production also lies with the debtor. See Celotex Corp., 477 U.S. at 322-23.

A. Alleged Violation of § 362(a)(1)

The state court action -- in which Mr. Kenoyer was a defendant -- commenced before Mr. Kenoyer filed his bankruptcy petition.

Therefore, the first issue this Court must address is whether there was a continuation of the state court action against Mr. Kenoyer, "including the issuance or employment of process," after Mr. Kenoyer filed for bankruptcy, in violation of § 362(a)(1).

Mr. Kenoyer filed his bankruptcy petition on April 13, 2011, and the automatic stay went into effect at that time. Any continued prosecution of the claims asserted in the state court action against Mr. Kenoyer clearly would have violated the stay. In apparent recognition of this, counsel for Ms. Cardinale swiftly and promptly moved to sever Mr. Kenoyer from the state court action, ceasing the assertion of claims against Mr. Kenoyer. However, counsel for Ms. Cardinale continued to insist upon enforcement of the Subpoena, which had been served on Mr. Kenoyer prior to the bankruptcy filing. The question this Court must answer is whether continued enforcement of the Subpoena violated the stay. As to this issue, there is surprisingly little case law, and the Court has found nothing on all fours.

It is a serious concern that a debtor seeking a fresh start in bankruptcy would bear the burden and related costs of contesting the enforcement of a trial subpoena. Imposition of such a burden on a debtor is of crucial importance when such debtor was a severed party-defendant, when information obtained from the debtor might well be used to build a case against the debtor in a later trial, and when the circumstances show that a subsequent trial against the debtor is almost certain to occur. Such a debtor would in all likelihood need to hire and pay for counsel to provide representation and to defend the debtor's interests, i.e., to object to objectionable questions and to ensure that the main

purpose of the testimony is not to build a case against the debtor in the context of a case in which the debtor is not a party. This need to hire and pay for an attorney in one or more fora outside the Bankruptcy Court undermines the purposes of the automatic stay. One can easily envision circumstances in which a state court plaintiff pursues minor claims against minor defendants in order to garner evidence to be used against the main debtor-defendant in a post-bankruptcy trial, thereby thwarting the purposes behind the automatic stay.

However, as discussed below, there is much persuasive authority for the proposition that it does not violate the automatic stay to enforce a subpoena served on a debtor for purposes of obtaining discovery against non-debtor defendants. Such decisions are also supportive of a debtor's right to seek injunctive relief to prohibit enforcement of such subpoenas. Thus, on balance, most courts have opted to place the onus on the debtor to obtain injunctive relief rather than on the creditor to seek relief from the stay.

The Miller Case

The decision in Groner v. Miller (In re Miller), 262 B.R. 499 (B.A.P. 9th Cir. 2001), which is persuasive authority for this Court only, is instructive. The Bankruptcy Appellate Panel (the "BAP") concluded in Miller that the issuance of a deposition subpoena on a debtor, who had been a defendant in state court litigation but for whom the litigation was stayed, for the purpose of pursuing claims against a co-defendant, did not violate § 362(a)(1).

Factually, Miller is distinguishable from Mr. Kenoyer's case

because the Miller subpoena was a discovery subpoena, not a trial subpoena. The Miller subpoena was framed as a third-party witness subpoena and not as a party witness subpoena. By contrast, the Subpoena served on Mr. Kenoyer was a trial subpoena originally served on Mr. Kenoyer in his role as a defendant and party to the state court case.

This factual distinction, however, lacks legal significance. The Subpoena served on Mr. Kenoyer was issued under California law, and California law draws no distinction between trial and discovery subpoenas. California Code of Civil Procedure § 1985 defines a "subpoena" and a "subpoena duces tecum" as follows:

> (a) The process by which the attendance of a witness is required is the subpoena. It is a writ or order directed to a person and requiring the person's attendance at a particular time and place to testify as a witness. It may also require a witness to bring any books, documents, or other things under the witness's control which the witness is bound by law to produce in evidence. . . .
>
> (c) The clerk, or a judge, shall issue a subpoena or subpoena duces tecum signed and sealed but otherwise in blank to a party requesting it, who shall fill it in before service. An attorney at law who is the attorney of record in an action or proceeding, may sign and issue a subpoena to require attendance before the court in which the action or proceeding is pending or at the trial of an issue therein, or upon the taking of a deposition in an action or proceeding pending therein; the subpoena in such a case need not be sealed. An attorney at law who is the attorney of record in an action or proceeding, may sign and issue a subpoena duces tecum to require production of the matters or things described in the subpoena.

Cal. Civ. Proc. Code § 1985. Whether a subpoena requires a person to appear at a trial or a deposition, the essential purpose of the subpoena is to require the subpoenaed person "to testify as a

witness."[13] Therefore, this Court will treat a deposition subpoena and trial subpoena as being equivalent litigation tools.

The Miller decision bears some procedural similarities to the case at bar. In both Miller and in this case, the plaintiffs did not obtain relief from the automatic stay before serving the subpoena. Understandably, regarding the Subpoena served on Mr. Kenoyer, this was not possible; when the Subpoena was served, Mr. Kenoyer had not yet filed a bankruptcy petition, and there was no automatic stay.

The Miller case is also similar insofar as it involved the enforcement of a subpoena for purposes of pursuing claims against a non-debtor. In Miller, the plaintiff sued the debtor, and the debtor cross-complained against plaintiff and then filed a chapter 13 petition. Id. at 501. The state court action was stayed, and the plaintiff subsequently amended the complaint to add the debtor's husband, who had not filed for bankruptcy, as a defendant. Id. The debtor's first bankruptcy case was dismissed, but the debtor filed a second chapter 13 petition. Id. The plaintiff continued her case against the debtor's husband and served the debtor with a deposition subpoena because the debtor was a key witness with respect to the plaintiff's claims against the debtor's husband. Id.[14] The debtor did not comply with that subpoena or the

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[13] The most noticable difference between giving trial and deposition testimony is that a judge presides over the trial testimony and can prevent the examination from eliciting testimony that would violate the stay. By contrast, at a deposition, an attorney can instruct a client not to answer a question which may violate the stay.

[14] Debtor's counsel incorrectly states in her opposition brief that the present case is factually different from Miller because (continued...)

next three that were served on her, and the plaintiff filed a motion to compel and for sanctions. Id. The debtor then dismissed her cross-complaint against the plaintiff, and the state court denied the motion to compel. Id. Subsequently, the debtor filed a motion for an order of contempt in the bankruptcy court, arguing that plaintiff's counsel violated the automatic stay by serving the subpoenas and filing the motion to compel. Id.

On appeal, the BAP in Miller considered whether issuance of the subpoenas -- which sought discovery pertaining only to claims against non-debtor co-defendants -- violated the automatic stay. Id. at 504. The BAP concluded that the subpoenas, themselves, were not a violation. Id. at 503, 507. Because § 362(a)(1) only applies to debtors, and the action against the debtor's husband was not stayed, the BAP determined that the plaintiff was free to pursue that action. Id. at 503-04. The BAP stated that it "believes that section 362(a) does not preclude generation of information regarding claims by or against a non-debtor party, even where that information could eventually adversely affect the Debtor." Id. at 505. The BAP found that:

> **to the extent that [the plaintiff] was eliciting Debtor's testimony for purposes other than to continue the prosecution of her claims against Debtor, the proposed discovery did not violate the automatic stay,** unless the issuance of subpoenas itself constitutes "issuance or employment of process" against Debtor or a "judicial proceeding" against Debtor. If this were true, a debtor could never be called as a

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[14](...continued)
Miller involved the taking of a deposition of a third party who was **not** the debtor. This is simply not true. It was the debtor who was subpoenaed in Miller: "[A]ppellant...personally served Debtor with a third-party subpoena to appear as a deposition witness." Id. at 501.

> witness (even in actions where the debtor is not a party) without relief from the stay. Such an interpretation of section 362(a) defies common sense and the spirit of the Code. **Information is information, and we believe the discovery of it as part of the development of a case against non-debtor parties is permissible, even if that information could later be used against the party protected by the automatic stay.**

Id. (Emphasis added).

This language is ambiguous to some degree. Under one interpretation, the BAP may have meant that it is permissible for a plaintiff to elicit testimony from a debtor if the testimony would serve the purpose of building a case against a non-debtor, only. After all, the Miller case factually involved a request for discovery which pertained "only" to the claims against non-debtors. Id. at 504. However, the more plausible interpretation is that it is permissible for a plaintiff to elicit testimony from a debtor which not only is relevant to claims asserted against a non-debtor, but also may be damaging to the debtor in a subsequent proceeding, as long as one purpose -- out of perhaps many -- of eliciting the testimony is to build a case against a non-debtor. This latter interpretation appears to be what the BAP contemplated in its remarks about "information" being "information" which could later be used against a debtor. A key problem in Mr. Kenoyer's case, and perhaps in many cases, is that it is difficult to ascertain whether the attorney is seeking the testimony solely (or primarily) for an improper purpose, or to know for certain what the attorney's strategy is with regard to the testimony being sought.

The BAP in Miller also noted that the interpretation of § 362(a) which would not allow a debtor to ever be called as a witness without relief from stay would be "inconsistent with

interpretations of a similar clause contained in section 524." Id. at 506. Section 524 states that a debtor's discharge "operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor[.]" The panel elaborated that "courts have held that the discharge injunction does not shield a debtor from testifying in an action against his insurer where the recovery against him personally is enjoined." Id. (discussing Patronite v. Beeney (In re Beeney), 142 B.R. 360, 363 (B.A.P. 9th Cir. 1992) ("allowing [the plaintiff's] suit to proceed merely leaves [the debtor] in the position of a witness who would appear at trial"), and In re Traylor, 94 B.R. 292, 293 (Bankr. E.D.N.Y. 1989) ("the debtor, whether discharged or not, is under the same obligations as would be any witness, regardless of the inconvenience to him, to attend any trial that may take place if the relief is granted")). Presumably, the discharge injunction leads to this result because a debtor who received a discharge would be free from liability.[15]

At the December 13, 2012 hearing, Mr. Kenoyer's counsel, Ms. Diemer, argued that the Court should not follow Miller, because in Miller the risk was to the debtor's husband -- a non-filer who did not benefit from the stay -- whereas when there is an intertwined issue and the harm goes to the debtor himself, there is a violation of the stay. Ms. Diemer argued that in Miller, there was never any actual risk to the debtor, but in Mr. Kenoyer's case, particularly

[15] However, it is arguable that a discharged debtor also should not be saddled with the associated risks or costs of providing such testimony (e.g., needing to hire an attorney to represent the discharged debtor's interests).

because of the non-dischargeability action which followed, there was a risk to Mr. Kenoyer.

This argument is somewhat compelling, at least as a policy matter. If the continued prosecution of Ms. Cardinale's state court case against the non-debtor defendants was solely or primarily for purposes of building a case against Mr. Kenoyer for later trial, then it would at least be arguable that there was a continuation of proceedings against Mr. Kenoyer, despite his severance. However, Mr. Kenoyer has presented no evidence that Ms. Cardinale lacked any independent justification for proceeding against the non-debtor defendants after the severance of claims against Mr. Kenoyer. For instance, Mr. Kenoyer has offered no evidence that the defendants against whom a judgment was obtained -- Daniel R. Miller, Sr., Keith Charles Knapp, or Home Loan Services Corporation dba California Home Loans -- lacked the money to pay a potential judgment, or that such defendants were in any way insignificant. The jury's substantial verdict of more than $3 million against the non-debtor defendants also indicates that the non-debtor defendants were not mere, minor players, and that the trial did not proceed for the sole purpose of building a case against Mr. Kenoyer.

In addition, the Court reads Miller differently than Ms. Diemer. Both Miller and the state court case from which Mr. Kenoyer was severed involved state fraud actions initially naming debtors as defendants and then staying the actions against the debtors to allow for pursuit of the claims against non-debtor parties. The risk that evidence would be offered against the non-debtor parties that could later implicate the debtor in separate

litigation was not only real, but was expressly addressed and approved by the BAP. Additionally, while it appears that a nondischargeability action was never filed in the Miller debtor's underlying Chapter 13 case, the potential threat for a creditor to file such an action existed.

At least two rules can be derived from Miller. First, it does not violate the automatic stay for a debtor to be compelled to testify in a proceeding against a non-debtor when the debtor has been severed from the proceeding and the purpose of eliciting the testimony is to prosecute a claim against the non-debtor. Second, such testimony is permitted even if the elicited information could later be used against the debtor -- as long as the debtor is compelled to testify for purposes other than prosecuting claims against the debtor.

Other Cases

Other courts have reached conclusions similar to those of the BAP in Miller. In the case of In re Mahurkar Double Lumen Hemodialysis Catheter Patent Litigation, 140 B.R. 969 (N. D. Ill. 1992) (Mahurkar), which the Miller court discussed, the district court concluded that the automatic stay did not protect the debtor, which was a company and a defendant in a multi-defendant patent infringement case, from responding as a non-party to discovery requests calculated to lead to admissible evidence against another defendant. Id. at 977. The automatic stay also did not prevent the debtor's former and current employees from being deposed about information bearing on the litigation against another defendant but not the debtor. Id. at 978-79. In fact, the court ordered that "[d]iscovery and all other proceedings shall continue in the

litigation among [the non-debtor parties] as if [the debtor] were an interested non-litigant," but all "discovery and other proceedings against [the debtor] and its experts are stayed until the lifting or modification of the automatic stay." Id. However, the Mahurkar court came to the conclusion that the debtor must participate in the proceedings as a non-party but not as a party because the debtor's counsel had "conceded that the automatic stay does not affect discovery regarding [the other defendant], and that [the debtor] is obliged to participate to the extent it would be as a non-party." Id. at 977. The court stated that it believed that the debtor's concession "correctly states the law (although there are no cases on point)." Id.

A similar result was reached in the case of In re Hillsborough Holdings Corp., 130 B.R. 603, 605 (Bankr. M. D. Fla. 1991), also discussed by Miller. In Hillsborough, the court concluded that a co-defendant of the debtor could depose the employees of the debtor so that the co-defendant could discover facts that would aid its defense against the plaintiff. The Hillsborough court explained:

> At first blush, it would appear that the proposed action by American Pipe, that is to conduct discovery in order to prepare its defense against the suit filed by the City, is not prohibited by the automatic stay. This is so because there is no question that American Pipe does not seek relief from the automatic stay in order to undertake any action against U.S. Pipe or against any property of U.S. Pipe in order to enforce a pre-petition claim against U.S. Pipe, which action would clearly be within the specific provisions of § 362(a) of the Bankruptcy Code. Based on the undisputed facts, it is clear that a literal reading of § 362(a) leaves no doubt that the automatic stay would not prevent American Pipe from conducting the proposed discovery to be used for its defense in the suit filed by the City.

Id. However, the Hillsborough court, "assuming but not conceding"

that the automatic stay was broader than the court believed it to be, granted relief from the automatic stay to allow the co-defendant to proceed with the discovery. Id. at 606. Specifically, the court ordered "that in the event the automatic stay applies, the same is modified to authorize [the co-defendant] to proceed with its plan of discovery with a provision that any material obtained through discovery is not to be binding on [the debtor] in any proceeding involving the liquidation or estimation of a claim against [the debtor]." Id. at 607. The court also noted that the debtor could pursue an injunction under § 105 "if discovery would seriously impact its ability to proceed to rehabilitate under Chapter 11." Id.

The case of In re Richard B. Vance & Co., 289 B.R. 692, 697 (Bankr. C. D. Ill. 2003) -- decided after Miller -- observed that although "there are valid arguments to the contrary, it is now generally accepted that discovery pertaining to claims against the bankrupt's codefendants is not stayed, even if the discovery requires a response from the debtor, and even if the information discovered could later be used against the debtor." The Vance court cited Miller, Mahurkar, and Hillsborough for this proposition but did not elaborate on any of the "valid arguments to the contrary." The Richard B. Vance court did cite to Burdett v. Manown (In re Manown), 213 B.R. 411 (Bankr. N.D. Ga. 1997), for the contrary position; however, Manown is a decision with little factual discussion that appears to have dealt with the situation where a plaintiff was seeking relief from the automatic stay to prosecute an action against the debtor, and thus the discovery sought was aimed at building a case against the debtor and not

against a non-debtor co-defendant. Manown, 213 B.R. at 412 (stating that "[w]ithout a clear understanding of the interrelationship of the state court proceeding with Debtor's bankruptcy case, this court cannot determine the merits of Movant's motion for relief from the automatic stay"). Therefore, the possible applicability of Manown to the situation at hand is unclear.

Defendants have brought to the Court's attention three recent decisions that have followed Miller. In United Nat. Funding, LLC v. JetDirect Aviation, Inc., 2:08-CV-00993-JCM, 2012 WL 2514929, slip op. at 4 (D. Nev. Jun. 28, 2012), the district court concluded that "the automatic stay does not protect [the debtor] from complying with discovery requests in a multi-defendant action where the debtor . . . is a Defendant, but where the requests for discovery pertain to the claims against the other non-debtor Defendants." Id. (citing Miller, 262 B.R. at 504).

Defendants also cite to Green v. Brotman Med. Ctr., Inc. (In re Brotman Med. Ctr., Inc.), BAP.CC-08-1056-DKMO, 2008 WL 8444797, at *7 (B.A.P. 9th Cir. Aug. 15, 2008), which has been designated "not for publication," and is thus not precedential under Fed. R. App. P. 36-3(a), but citation of unpublished cases is permitted by Fed. R. App. R. 32.1. In Brotman, the BAP, citing to Miller, affirmed the bankruptcy court's denial of the plaintiff's motion for relief from stay to pursue claims against the debtor, in part because the plaintiff was allowed to obtain third-party discovery from the debtor, which the plaintiff could then use against the co-defendants. Id.

In Yates v. Delano Retail Partners, LLC, No. C 10-3073 CW,

2012 WL 1094444, slip op. at 1 (N. D. Cal. Mar. 29, 2012), also cited by Defendant, the co-defendant moved to stay the plaintiff's entire case because of the debtor-defendant's bankruptcy filing. The co-defendant argued, among other things, that the case should be stayed because discovery could not be obtained from the debtor. Yates, 2012 WL 1094444, slip op. at 3. The Yates court rejected that argument, stating that "discovery can proceed against a bankrupt defendant to same extent as it can against any other non-party." Id. (citing Miller, 262 B.R. at 504-05).

In support of its conclusion, the Yates court also cited the unpublished decision of Lewis v. Russell, CIV.S-03-2646 WBSKJM, 2009 WL 1260290 (E. D. Cal. May 7, 2009). Yates, 2012 WL 1094444, slip op. at 3. Mr. Kenoyer cites Lewis to support his contention that Defendants' actions violated the stay. However, Lewis involved the recovery of environmental response costs under The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Thus, the claims asserted by the plaintiffs against the debtors/defendants could not meaningfully be severed from the plaintiffs' claims against the other defendants, or from the cross-claims and counter-claims asserted by the debtors, because the trier of fact was required to allocate responsibility among all potentially liable parties in the district court litigation. See 42 U.S.C. § 9613(f). The claims, crossclaims, counterclaims, and third party claims for cost recovery and contribution under CERCLA made up the heart of the district court litigation. Therefore, resolution of the debtors' non-CERCLA offensive claims and the non-bankrupt parties' claims against each other depended on the district court's equitable allocation of response costs among all

the liable parties, including debtors. Severance of the debtor in Lewis simply was not an option.

Importantly, the Lewis court, relying on Miller, noted that "[i]n general, parties may seek discovery from a debtor on matters related to claims against non-debtor parties." Id. at 3. In this instance, though, the interrelated nature of the claims led the Lewis court to determine that nothing could move forward, not even discovery from the non-debtor parties, because of the eventuality that the liability of the debtors would be determined in violation of the automatic stay. Id. at *4. Thus, the Lewis court stayed the entire action until the debtors' bankruptcy case was terminated or until relief from the automatic stay was obtained. Id. at *5. Therefore, Lewis stands for the proposition that discovery aimed at pursuing a co-defendant generally can be propounded on a debtor, unless the nature of the suit mandates allocation of liability among the co-defendants and debtor, in which event the entire case must be stayed.

Therefore, Lewis is distinguishable from the instant case. In Lewis, the polluters were facing the court's allocation of strict liability for violating CERCLA, whereas in the instant case, the underlying state court fraud action involved a claim where joint and several liability could be assigned, and the jury was able to determine the liability of Mr. Kenoyer's co-defendants without regard to Mr. Kenoyer's liability. Thus, Lewis does not support Mr. Kenoyer's position, but instead supports the Defendants' position.

In support of his contention that enforcement of the Subpoena violated the automatic stay, Mr. Kenoyer also relies upon two