

Hon. John C. Coughenour

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON

LACEY CARROLL,

Plaintiff,

v.

DAVID SETH KOTKIN a/k/a DAVID  
COPPERFIELD,

Defendant.

No. C09-1076 JCC

DAVID COPPERFIELD'S RESPONSE  
TO MOTION TO LIFT STAY ORDER  
AND OTHER RELIEF

**ORAL ARGUMENT REQUESTED**

## I. INTRODUCTION

1  
2 The Court should lift the stay. On January 12, 2010, the government officially  
3 declined to prosecute David Copperfield for any crime. The government's declination came  
4 immediately after Bellevue police determined that plaintiff Lacey Carroll made yet another  
5 false claim of rape, this time against a Seattle-area businessman in December 2009.  
6 Copperfield wants this litigation to proceed to expose Carroll's lawsuit for what it is – a  
7 fraudulent effort to obtain money from him.

8 In Carroll's motion to lift the stay, she asks the Court to enjoin the U.S. Department  
9 of Justice in its handling of evidence and investigative reports and other materials relating to  
10 its closed criminal investigation. Carroll's request for an injunction against the government is  
11 devoid of any merit. Carroll fails to articulate any legal basis for the extraordinary remedy of  
12 enjoining a *nonparty* from returning property to a person who has a *procedural right* to its  
13 return. Carroll also cannot show that she is likely to succeed in her efforts to obtain the  
14 documents she seeks from the government, as they are private third-party materials, and as  
15 her alleged right to such materials is based on the suspect assertion that the government's  
16 decision to drop its investigation was based on "jurisdictional" issues. In sum, Carroll's  
17 attempt to make the government her storage closet for easy discovery to pursue her fraudulent  
18 civil claim should be rejected.

19 Carroll bundles other discovery requests with her motion to lift the stay. She asks,  
20 for example, to be permitted to issue subpoenas upon the lifting of the stay. The Court should  
21 deny these discovery-related requests. These requests should be addressed at the conference  
22 required by Federal Rule of Civil Procedure 26(f), which must be conducted 21 days prior to  
23 the Court's initial status conference, currently scheduled for March 23, 2010. Because no  
24 Rule 26(f) conference has been held, and there has been no effort by Carroll to confer with  
25 Copperfield relating to the discovery issues raised by her motion, the requests should be  
26 denied without prejudice to raising them after the parties have conferred.

## II. BACKGROUND

On August 3, 2007, Lacey Carroll returned to her home in Seattle, Washington, from David Copperfield’s private island in the Bahamas, where she had been invited by Copperfield and his staff to spend several days as a guest. Upon her return, Carroll concocted a series of egregious lies centering on allegations that, when she arrived at the island, she found herself “alone” with Copperfield and that, under Copperfield’s constant watch, she was repeatedly raped and assaulted by him over a period of two days, during which she was a captive with no way to contact the outside world for help. *See generally* Complaint (Dkt. No. 1). Carroll’s allegations against Copperfield are, and will be proven to be, totally false and absurd by numerous witnesses and documentary evidence, including telephone records.

As a part of her scheme, after returning from the Bahamas, Carroll consulted with Rebecca Roe, a prominent personal injury lawyer in Seattle. Declaration of Angelo J. Calfo (“Calfo Decl.”) ¶ 2. Carroll also filed a report with the Seattle Police Department and had a rape examination performed at Harborview Medical Center. Compl. ¶ 2.18. She eventually met with the Federal Bureau of Investigation and the United States Attorney’s Office for the Western District of Washington (“USAO”) to pursue criminal charges against Copperfield to lend credibility to the civil action she was planning to file. Calfo Decl. ¶ 2.

Assistant U.S. Attorney (“AUSA”) Susan Roe headed the federal grand jury investigation of Copperfield. *Id.* ¶ 4. (To our knowledge, AUSA Roe is not related to Rebecca Roe; however, they were at one time colleagues at the King County Prosecutor’s Office in its Sexual Assault Unit. *Id.*)<sup>1</sup> AUSA Roe’s investigation into Carroll’s false allegations lasted for nearly two and a half years, at an untold cost to taxpayers. *Id.* On about

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<sup>1</sup> It was material to the criminal investigation whether Carroll had retained a personal injury lawyer and whether she intended to file a civil complaint for damages. An alleged victim’s desire to sue for money damages is most certainly a factor in evaluating bias or improper motive. Despite Rebecca Roe’s involvement in the case from the beginning, on December 2, 2008, the USAO represented to Copperfield’s counsel during the investigation that, “to the best of [their] knowledge,” Carroll had not retained counsel and remained unrepresented. Calfo Decl. ¶ 3.

1 January 7, 2010, AUSA Roe emailed Carroll’s lawyers, advising that the decision to drop the  
2 investigation was based on jurisdictional grounds: that “[n]o indictment was presented to the  
3 Grand Jury as no federal criminal statute directly addresses the facts presented to it.” *Id.* ¶ 5.  
4 AUSA Roe stated that she intended to file a notice with this Court explaining that this was the  
5 sole basis of the declination. *Id.*

6 Surprisingly, AUSA Roe refused to acknowledge – and continues to refuse to  
7 acknowledge – that the Bellevue Police Department’s recent investigation of Lacey Carroll,  
8 for making a false claim of rape against a *different* man, had any bearing on the USAO’s  
9 decision to drop the federal investigation of Copperfield. Based on the content of the  
10 Bellevue Police report of the investigation, and the timing of its disclosure to the USAO,  
11 AUSA Roe’s claim is puzzling if not lacking in credibility. According to Bellevue police, on  
12 December 2, 2009, Carroll told the police that she had “blacked out” during a rendezvous  
13 with a Seattle-area business businessman whom she met at a bowling alley. Calfo Decl. ¶ 10,  
14 Ex. C. She claimed that she awoke half-naked in a hotel room to find the man “pinning” her  
15 down to the bed. *Id.* (Carroll’s use of the word “pinning” is reminiscent of her fabricated  
16 allegation against Copperfield in her complaint in this case at paragraph 2.16). Evidence  
17 detectives obtained from hotel security cameras and statements from hotel personnel and  
18 other witnesses exposed Carroll’s story as categorically false. In fact, Carroll had enticed the  
19 man to rent a hotel room for them, performed fellatio on him, then demanded \$2,000 for  
20 sexual intercourse. *Id.* ¶ 9, Ex. B. When the man declined to pay Carroll for sex, she left the  
21 hotel room and went to the lobby, where she began complaining that the man had assaulted  
22 her. *Id.* Carroll later called “911” to report the alleged rape. *Id.*

23 After Carroll made her “911” call, Bellevue police interviewed her, and then asked  
24 her to submit to a medical examination, or “rape kit.” *Id.* ¶ 10, Ex. C. After submitting to the  
25 examination, Carroll had an abrupt change of heart; she told Bellevue police that she did not  
26 want to pursue the case or cooperate with their investigation because she had another case “in

1 the works” against “a celebrity” that was “more important.” *Id.* Carroll refused to provide  
2 the results of her medical examination to Bellevue police; as a result, detectives obtained a  
3 search warrant directed at the hospital for the information. *Id.* & Ex. A. The police report  
4 recommends that Carroll be prosecuted for making a false rape claim and for prostitution. *Id.*  
5 ¶ 9, Ex. B.

6 It is hard to imagine that information as material as that contained in the Bellevue  
7 police report would not have affected the USAO’s decision to decline to proceed with  
8 Carroll’s “other rape case” being handled by the USAO. This is particularly true because the  
9 USAO’s criminal prosecution would have relied almost exclusively if not exclusively on  
10 Lacey Carroll’s uncorroborated testimony, thus making Carroll’s credibility the most  
11 significant factor in bringing the case. Moreover, AUSA Roe received the Bellevue police  
12 report on or about December 17, 2009, and announced her decision to drop the investigation  
13 of Copperfield to counsel on January 7, 2009. *Id.* ¶ 8 & 5. AUSA Roe had previously  
14 claimed to Copperfield’s counsel that her investigation would not be completed until at least  
15 April 1, 2010 (which formed the basis of the Court’s stay through that approximate date). *See*  
16 *Id.* ¶ 17 & Dkt. No. 12-2 at 9. An investigation that was going to take months was dropped  
17 by the USAO in just weeks, once the Bellevue report was issued.

18 After receiving AUSA Roe’s proposed notice to this Court stating that the  
19 declination was due to jurisdictional issues with the case, Copperfield’s counsel advised the  
20 USAO in writing of their concern that the notice, as then drafted, would potentially be  
21 misleading to this Court and to the public. Calfo Decl. ¶ 16. Thereafter, AUSA Roe filed a  
22 notice with this Court stating that the investigation had been concluded, but omitted any  
23 reference to the basis of its declination. *See* Dkt. No. 22. In a letter to Copperfield’s counsel,  
24 however, AUSA Roe continued to maintain that the sole basis for dropping the criminal case  
25 against Mr. Copperfield was that federal statutes did not apply to the facts. Calfo Decl. ¶ 16.

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1 Copperfield’s counsel is concerned that AUSA Roe framed the declination in a  
 2 manner that would make it more likely that Carroll’s lawyers would receive internal  
 3 investigative materials from the federal government that would assist Lacey Carroll in  
 4 pursuing her civil lawsuit. These are the same investigative materials that Carroll’s lawyers,  
 5 on this motion, have asked the Court to assist her in obtaining. It is no coincidence that  
 6 immediately upon being told that the declination was based on jurisdictional issues, Carroll’s  
 7 lawyers submitted a Freedom of Information Act request to the U.S. Department of Justice  
 8 stating that it was their “understanding that grand jury proceedings regarding the investigation  
 9 are concluded and no indictment will issue because of the absence of applicable federal  
 10 criminal laws.” *See* Declaration of Amanda Lee, Ex. A at 5. At about the same time,  
 11 Carroll’s lawyers also announced to the press that the declination was based on jurisdictional  
 12 grounds, and that they expected to receive internal government investigative materials to  
 13 assist them in prosecuting their civil claims against Copperfield. Calfo Decl. ¶ 18. But  
 14 despite these assertions by Carroll’s counsel, Department of Justice guidelines permit it to  
 15 deny disclosure of such internal investigative materials where to do so would not further the  
 16 public interest, such as where a litigant seeking the materials is making a false claim.  
 17 Copperfield submits that Carroll’s right to investigative materials will be affected by the  
 18 fraudulent and false nature of her claim against Copperfield, as discussed below.

### 19 III. DISCUSSION

#### 20 A. PLAINTIFF’S REQUEST FOR AN INJUNCTION AGAINST THE UNITED 21 STATES DEPARTMENT OF JUSTICE TO PREVENT RETURN OF 22 PROPERTY TO COPPERFIELD IS PROCEDURALLY INAPPROPRIATE, WITHOUT LEGAL BASIS, AND UNNECESSARY.

23 Carroll asks the Court to issue an order directing federal agencies to maintain  
 24 possession of materials seized from Copperfield during the criminal investigation, as Carroll  
 25 intends to issue subpoenas for such information. Plf.’s Mot. at 1–2. This is nothing less than  
 26 a request for the issuance of an injunction against the U.S. Department of Justice from doing  
 what it may otherwise be required to do under the law – namely, return Copperfield’s

1 property now that the criminal investigation is concluded. *See* Fed. R. Crim. P. 41(g); *United*  
 2 *States v. Martinson*, 809 F.2d 1364, 1369 (9th Cir. 1987) (holding that when government  
 3 abandoned its investigation, person from whom property was seized “is presumed to have a  
 4 right to its return, and the government has the burden of demonstrating that it has a legitimate  
 5 reason to retain the property”).<sup>2</sup> Carroll’s request should be denied.

6 **1. Carroll’s request for an injunction against the United States is**  
 7 **procedurally improper.**

8 Plaintiff’s request is procedurally improper. The United States is not a party and  
 9 Carroll has cited absolutely no legal basis for the issuance of an injunction against a nonparty  
 10 in this matter. And, contrary to the clear requirements of Federal Rule of Civil Procedure 65,  
 11 there is no indication that the United States has been given notice of this request for an  
 12 injunction against it. *See* Fed. R. Civ. P. 65(a) (“The court may issue a preliminary injunction  
 13 only on notice to the adverse party.”).

14 Carroll cites Federal Rule of Civil Procedure 1 for the proposition that the Court  
 15 should order the requested injunction. Plf.’s Mot. at 11. Rule 1 says nothing that expressly  
 16 authorizes the injunction requested. In fact, Rule 1 is not a rule of substance, but merely  
 17 explains the scope of the procedural rules and how courts are to interpret the *other* federal  
 18 civil rules of procedure. *See* 4 Charles A. Wright & Arthur R. Miller, FEDERAL PRACTICE &  
 19 PROCEDURE § 1011 (3d 2009). Carroll has not cited a single other procedural rule that  
 20 supports her request. Unsurprisingly, Carroll does not cite, and Copperfield has not found, a  
 21 single case in which a district court has issued an injunction or order of the kind requested by  
 22 Carroll under this rule.

23  
 24  
 25 <sup>2</sup> Carroll also requests an injunction against the government’s destruction of its internal investigative materials.  
 26 This request should be denied for the same reasons that Carroll’s request for an injunction against the  
 government releasing evidence to its owners should be denied and because she has not made a proper Rule 6(e)  
 request for grand jury materials. In any event, Carroll has made no showing that there is any risk that the  
 government will destroy its own internal investigative materials.

1                   **2. A preliminary injunction is not warranted.**

2                   A plaintiff seeking a preliminary injunction must establish that she is likely to  
3 succeed on the merits; that she is likely to suffer irreparable harm in the absence of  
4 preliminary relief; that the balance of equities tips in her favor; and that an injunction is in the  
5 public interest. *Winter v. Natural Resources Defense Council, Inc.*, 129 S.Ct. 365, 374  
6 (2008). Plaintiff has not even attempted to meet these requirements, nor can she.

7                   **(i) Carroll is unlikely to succeed in obtaining investigative materials**  
8                   **from the government.**

9                   It is unlikely that Carroll will succeed in her efforts to obtain many (if any at all) of  
10 the government’s investigatory materials. First, Carroll’s requests for materials made under  
11 the Freedom of Information Act (“FOIA”) (attached to the Declaration of Amanda Lee)  
12 improperly request information about Copperfield.<sup>3</sup> The regulations governing FOIA  
13 generally prohibit disclosure of third-party information unless the requester has written  
14 authorization from the third-party or proof that the third-party is deceased. *See* 28 C.F.R. §  
15 16.3(a); *see also* Department of Justice Freedom of Information Act Reference Guide at 5  
16 (May 2006), *available at* <http://www.justice.gov/oip/referenceguidemay99.htm> (noting that  
17 “files relating to another person regarding a matter the disclosure of which would invade that  
18 person’s privacy,” including “information that would show that someone else ... has ever  
19 been the subject of a criminal investigation,” “ordinarily will not be disclosed” without  
20 consent or proof of death). These regulations make sense given that FOIA exempts from  
21 disclosure information if such disclosure would constitute a “clearly unwarranted invasion of  
22 personal privacy” as well as records compiled for law enforcement purposes where  
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24 \_\_\_\_\_  
25 <sup>3</sup> Carroll’s request is not — as she suggests in her letter to the government — a “*Touhy*” request, but rather a  
26 garden-variety FOIA request, as the United States is not a party to this action and no subpoena, order, or other  
court demand has issued. *See* 28 C.F.R. § 16.21(a) (specifying that DOJ *Touhy* regulations apply in federal and  
state proceedings in which the United States is a party or when a “subpoena, order, or other demand . . . of a  
court or other authority is issued for such material or information”).

1 production of those records could constitute an unwarranted invasion of personal privacy.<sup>4</sup>  
 2 See 5 U.S.C. § 552(b)(6) & (7); see also *Piper v. United States Department of Justice*, 374 F.  
 3 Supp. 2d 73, 79 (D.D.C. 2005) (noting that private citizens mentioned in investigatory files,  
 4 including suspects, enjoy privacy interest; there is no public interest in disclosure of such  
 5 investigatory files because information sheds no light on agency's performance of its duties);  
 6 *Fisher v. United States Department of Justice*, 772 F. Supp. 7, 12 (D.D.C. 1991) (affirming  
 7 under FOIA Exemption 6 FBI and DOJ refusal to confirm or deny existence of law  
 8 enforcement investigatory files concerning third parties where requester failed to provide  
 9 written authorization for request). Indeed, the current DOJ FOIA Request Form explicitly  
 10 states that "[t]his form cannot be used for Privacy Act requests or requests for information  
 11 about a third party." See [http://foia.fbi.gov/foia\\_request.htm](http://foia.fbi.gov/foia_request.htm) (emphasis added). Curiously,  
 12 the two FOIA requests plaintiff made to the DOJ and the FBI do not contain this particular  
 13 language. See Lee Decl., Ex. A, pp. 7–12.

14 Carroll's motion could lead one to believe that it is only a matter of time before she  
 15 receives the fruits of the USAO's criminal investigation, either through FOIA or through the  
 16 subpoenas she plans to issue. But, in fact, plaintiff cannot assure the Court that any future  
 17 *Touhy* request will likely result in disclosure. Where, as here, the United States is not a party,  
 18 plaintiff's *Touhy* request will likely come in the form of a Federal Rule of Civil Procedure 45  
 19 subpoena to the United States. See 28 C.F.R. § 16.21(a)(2). The United States will have an  
 20 opportunity to object, Fed. R. Civ. P. 45(c)(2)(B), and both the United States and Copperfield  
 21 will have an opportunity to move to quash any such subpoena on various grounds. Fed. R.

22 \_\_\_\_\_  
 23 <sup>4</sup> In the Ninth Circuit, the court evaluates four factors to determine whether disclosure constitutes a "clearly  
 24 unwarranted invasion of personal privacy": (1) the plaintiff's interest in disclosure, (2) the public's interest in  
 25 disclosure, (3) the degree of the invasion of personal privacy, and (4) the availability of alternative means of  
 26 obtaining the requested information. *Prof. Programs Group v. Dep't of Commerce*, 29 F.3d 1349, 1354 (9th  
 Cir. 1994). Plaintiff's FOIA request should be denied, not only because the information she seeks is highly  
 private and (some of it is) available through civil discovery, but also because it serves no public interest. See  
*Baldrige v. Shapiro*, 455 U.S. 345, 360 n.14 (1982) ("The primary purpose of the FOIA was not to benefit  
 private litigants or to serve as a substitute for civil discovery.").

1 Civ. P. 26(c) & 45(c)(3); *see also Exxon Shipping Co. v. United States Dep't of Interior*, 34  
 2 F.3d 774, 779 (9th Cir. 1994) (noting that Court may authorize government not to comply  
 3 with *Touhy* request where request is burdensome or seeks privileged information).<sup>5</sup>

4 The Justice Department has issued guidelines for disclosure of internal investigative  
 5 materials where disclosure is “necessary to pursue a civil or criminal prosecution or  
 6 affirmative relief.” 28 C.F.R. § 16.26(c). In deciding whether to release such information,  
 7 the Justice Department considers (i) the seriousness of the violation or crime involved, (ii) the  
 8 past history or criminal record of the violator or accused, (iii) the importance of the relief  
 9 sought, (iv) the importance of the legal issues presented, and (v) other matters brought to the  
 10 attention of the Deputy or Associate Attorney General. 28 C.F.R. § 16.26(b) & (c). Here,  
 11 where Carroll has already been found by law enforcement to have made a false claim of rape,  
 12 it would seem appropriate for the Justice Department to exercise its discretion to decline to  
 13 provide internal investigative materials. Why should investigative materials from a taxpayer-  
 14 funded investigation be provided to support a civil rape claim made by someone who has a  
 15 history of lying to law enforcement to extort money from private persons?

16 **(ii) Carroll cannot show irreparable harm.**

17 Carroll’s argument that “irreparable harm” could result if an injunction does not  
 18 issue lacks any factual foundation. The first problem with her assertion is that, because the  
 19 United States is not a party and has not been given notice of this request, we do not even  
 20 know whether the government intends to return the property to Copperfield or resist a motion  
 21 for return of property when one is brought. Gaining such knowledge would be an appropriate  
 22 first step in determining whether any request for a preliminary injunction is even necessary.<sup>6</sup>

23 \_\_\_\_\_  
 24 <sup>5</sup> Plaintiff cites extensively to the *Exxon* case in her motion. But *Exxon* does not stand for the proposition that a  
 25 court may order the government to handle investigatory and seized materials in some particular way in  
 anticipation of a future *Touhy* request. *Exxon* merely stands for the proposition that whether or not an agency  
 must respond to a proper *Touhy* request depends on the federal rules of civil discovery. *Exxon*, 34 F.3d at 780.

26 <sup>6</sup> Counsel for Copperfield has today inquired of the government, seeking its position on this issue. See Calfo  
 Decl. ¶ 14, Ex. F.

1           Second, assuming the government is intending to return the property to Copperfield,  
2 Carroll asserts there is some danger that materials returned to Copperfield would be “secreted  
3 away” to his private island in the Bahamas. Plf.’s Mot. at 11. This is a serious charge, which  
4 Copperfield’s counsel is surprised is being asserted without any factual support whatsoever.  
5 Carroll has no evidence that Copperfield would take any steps to make it more difficult for  
6 Carroll to review evidence. Moreover, Copperfield has no reason to remove property to the  
7 Bahamas and, even if he did, whatever is brought there is just as easily returned so that  
8 Carroll may inspect and copy it in accordance with the civil discovery rules. Copperfield has  
9 no intention of “playing games” of the nature suggested by Carroll during discovery  
10 proceedings. Calfo Decl. ¶ 12. This kind of speculative injury cannot be the basis for a  
11 finding of irreparable harm. *See In re Excel Innovations, Inc.*, 502 F.3d 1086, 1098 (9th Cir.  
12 2007).

13           Third, Carroll claims there is some additional risk that evidence could be altered,  
14 damaged, or destroyed. Carroll has presented no reason to believe there is any greater risk  
15 that material could be inadvertently lost or destroyed while the government acts as Carroll’s  
16 private storage facility than if it is returned to its owner. Copperfield will gain access to this  
17 material through counsel, and counsel will discharge their obligation to preserve all evidence  
18 that comes into their or Copperfield’s possession. Calfo Decl. ¶ 12.

19           Fourth, *it is Copperfield* who will be prejudiced if the government is allowed to act  
20 as the distribution center for discovery of Copperfield’s (and others’) property. In the normal  
21 course of civil discovery, Copperfield would have control over his property, Carroll would  
22 make specific discovery requests, and Copperfield could review relevant material and make  
23 appropriate objections to the production of it as necessary. This is particularly important in  
24 this case, where the government seized voluminous materials during execution of its search  
25 warrants, including terabytes of computerized information.

26

1 Not only should Carroll not be allowed to skip over the process of formulating  
 2 discovery requests, but the government cannot possibly be the arbiter of which seized  
 3 materials are relevant and properly discoverable by Carroll in her civil case. A significant  
 4 portion of information seized by the government has no relationship to this lawsuit. The  
 5 government seized material protected by the attorney-client privilege and work product  
 6 doctrine, which it continues to maintain over Copperfield’s objection, much of it in electronic  
 7 format. *Id.* ¶ 13. Moreover, the material is being stored by the FBI, which does not offer  
 8 open access to Copperfield to the material. *Id.* Indeed, in order to review or copy such  
 9 material, the FBI requires adherence to strict rules that are burdensome, time-consuming, and  
 10 costly. *Id.* Rather than require the government to be the clearinghouse for Copperfield’s  
 11 property, the more appropriate procedure will be for the government to return such property  
 12 to Copperfield, and for Carroll to obtain relevant records through the civil discovery rules.<sup>7</sup>

13 **B. CARROLL’S REQUEST FOR AUTHORITY TO ISSUE SUBPOENAS**  
 14 **SHOULD BE DENIED AND THE REQUIREMENTS OF RULE 26(f)**  
 15 **SHOULD BE OBSERVED.**

16 Carroll asserts that she intends to issue subpoenas as soon as the stay is lifted. Plf.’s  
 17 Mot. at 6. The Court should deny this request and allow the parties to confer regarding  
 18 discovery as required by Federal Rule of Civil Procedure 26, which provides that “[a] party  
 19 may not seek discovery from any source before the parties have conferred as required by Rule  
 20 26(f)” unless authorized elsewhere in the “rules, by stipulation, or by court order.” Fed. R.  
 21 Civ. P. 26(d). Carroll shows no reason why the issues raised in her motion cannot be  
 22 addressed through the normal course of discovery proceedings. In fact, Rule 26 specifically  
 23 contemplates that the parties will meet and confer regarding a number of subjects that Carroll  
 24 has prematurely raised on her motion to lift the stay. For example, at the Rule 26(f)

25 <sup>7</sup> In addition to failing to show that she is likely to succeed on the merits or that irreparable harm will ensue if  
 26 no injunction is entered, Carroll cannot show that the equities tip in her favor or that the public interest would be  
 served by disclosure. Carroll’s request is not made with the public interest in mind: she seeks easy access to  
 materials to use in pursuit of a false rape claim against a celebrity for money damages.

1 conference, the parties are required to discuss the nature and basis of their claims and  
2 defenses and the possibility of prompt settlement; initial disclosures; *any issues about*  
3 *preserving discoverable information*; and develop a proposed discovery plan. Fed. R. Civ.  
4 Proc. 26(f)(2). The discovery plan must state the parties' views on any changes in the initial  
5 disclosure schedule; subjects on which discovery may be needed and whether discovery  
6 should be conducted in phases; *any issues about electronically stored information*; *any issues*  
7 *about privilege or work product*; any necessary changes or limitations on discovery; and any  
8 other orders (like protective orders) that the court should enter. Fed. R. Civ. P. 26(f)(3).

9           Moreover, at the conference, Copperfield will raise several discovery issues with  
10 Carroll prior to briefing them. For example, Copperfield will request that Carroll and her  
11 lawyers preserve all evidence of communications between them relating to Carroll's false  
12 rape claim. These would include attorney notes, memoranda, e-mail and the like.

13 Copperfield submits that these materials are subject to potential discovery under the crime-  
14 fraud exception to the attorney-client privilege. Copperfield will show that Carroll's claim  
15 against Copperfield is itself a crime – a scheme to defraud Copperfield of money by filing a  
16 malicious and false criminal complaint against him as well as a malicious civil suit. Under  
17 well-established law, a showing by Copperfield of such criminal activity will allow him to  
18 request that the Court conduct an *in camera* review of communications between Carroll and  
19 her lawyers to see if her retention of counsel was a part of a scheme by Carroll to commit a  
20 crime and, if it was, to order production of such communications to Copperfield. *See In re*  
21 *Grand Jury Proceedings*, 87 F.3d 377, 379 (9th Cir. 1996) (holding that otherwise privileged  
22 communications can be “in furtherance of” criminal activity, and therefore within the crime-  
23 fraud exception, even if attorney is unaware of and takes no affirmative steps to further  
24 crime). Copperfield will raise many other issues of this kind with Carroll at the discovery  
25 conference. Rather than burdening the Court by requesting a ruling on these issues – and  
26

1 those raised in Carroll’s motion to lift stay – now, Copperfield’s counsel will first raise them  
2 in a Rule 26(f) conference.

3 **IV. CONCLUSION**

4 For the foregoing reasons, Carroll’s motion to lift the stay should be granted, but her  
5 remaining requests should be denied.

6 DATED this 25th day of January, 2010.

7 YARMUTH WILSDON CALFO, PLLC

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19 *Attorneys for Defendant David Copperfield*

CERTIFICATE OF SERVICE

I hereby certify that on this date, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to:

Kathryn Goater [goater@sgb-law.com](mailto:goater@sgb-law.com)

Rebecca Jane Roe [roe@sgb-law.com](mailto:roe@sgb-law.com)

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 25th day of January, 2010 at Seattle, Washington.

/s/ Sonja Rasmussen  
Sonja Rasmussen  
Legal Assistant

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