

Exhibit 11

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

ROBERT V. STEINBUCH, . Case No. 07-50064 (MCR)
 .
Plaintiff, .
 . 100 S. Clinton Street
v. . Syracuse, NY 13261

JESSICA CUTLER, .
 .
Defendant. .
 . May 28, 2009
. 3:02 p.m.

TRANSCRIPT OF HEARING
BEFORE HONORABLE MARGARET CANGILOS-RUIZ
UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES:

For the Plaintiff: By: ROBERT V. STEINBUCH, Pro se

For the Defendant: Billips & Benjamin, LLP
By: MATTHEW C. BILLIPS, ESQ.
567 Ladonna Drive
Decatur, GA 30032

For Chapter 7 Trustee: Harris Beach, PLLC
By: LEE E. WOODARD, ESQ.
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Mediator:

Green Seifter Attorneys PLLC
By: MICHAEL J. BALANOFF, ESQ.
110 West Fayette Street
Syracuse, NY 13202

- - -

1 THE CLERK: All rise.

2 THE COURT: You may be seated.

3 THE CLERK: Today is Thursday, May 28th, 2009. It's
4 the three o'clock calendar and we're going to hear Steinbuch v.
5 Cutler, 07-50064. Two items on the calendar; the order
6 scheduling the status conference, and the motion to dismiss
7 adversary proceeding, motion for sanction and motion to compel.
8 Will the parties note their appearances?

9 MR. STEINBUCH: I'm Robert Steinbuch. I'm the
10 plaintiff pro se.

11 MR. BILLIPS: Matthew Billips for the defendant.

12 MR. WOODARD: Your Honor, I'm not a party to the
13 action, but I am a trustee in the case, so Lee Woodward,
14 trustee appearing.

15 THE COURT: You're welcome, Mr. Woodard.

16 MR. WOODARD: Thank you.

17 MR. BALANOFF: And Michael Balanoff. I'm a mediator
18 in the case.

19 THE COURT: Mr. Balanoff, if I could please ask you.
20 You were quite good in not notifying the Court of anything, and
21 I had made perfectly clear that I didn't want to hear a thing
22 about mediation because this Court is going to be the Article 1
23 Court that's going to deal with this matter until it's trial
24 ready. And so, let me just ask whether the matter is still in
25 mediation as far as you're concerned if you know, if you can

1 tell me that.

2 MR. BALANOFF: I have not discontinued the mediation,
3 and I think (indiscernible), mediation, but at this point
4 (indiscernible) --

5 THE COURT: And so, you do think that the August 1st
6 date -- if I made a mistake in giving too much time I
7 apologize, but you think the August 1st date should still be
8 held to?

9 MR. BALANOFF: I never -- Your Honor, I never assumed
10 that I had to wait till August 1st to make a decision, and this
11 should not continue to be mediated. Mediation would be
12 unsuccessful. At one point I had tried to set an earlier
13 deadline (indiscernible) events that had taken place to see
14 whether the parties (indiscernible).

15 THE COURT: Okay. Very good. Thank you. What has
16 prompted this Court to set this matter for a status conference
17 today and to require, despite requests that anything be done
18 telephonically, both parties here, is to address three letters,
19 initially, that came into the Court that frankly in my 30 years
20 of practice, and in my association with courts, I have never
21 seen with civil litigation this type of drivel coming in.

22 I am -- was referred with these letters because our
23 chief district court judge was not pleased with these letters
24 and said take care of them, and that's what we're doing today.
25 So, I'm going to start with the first letter that was directed

1 to our district court judge that complains that there has been
2 a violation of the professional code of responsibility and
3 that, therefore, there is a duty on a part of an attorney to
4 complain that a publicly filed on the CMECF docket that shows
5 certain information constitutes some inappropriate conduct by
6 the other party that they looked at exactly what that
7 information is. Mr. Steinbuch, do you want to address that?

8 MR. STEINBUCH: Yes. Would you like me to take the
9 podium?

10 THE COURT: We can hear you right where you are.

11 MR. STEINBUCH: Okay. Your Honor, I'm sorry that you
12 don't like the complaint. The fact is that New York State
13 Ethics Opinion makes it clear that you cannot use metadata to
14 determine authorship of documents as an attorney. If I can
15 just go back a moment historically, Your Honor may recall that
16 on a telephone conference when Mr. Carroll was my attorney, Mr.
17 Billips said something to the effect of me writing a document,
18 and Mr. Carroll quickly interceded and said that's not true,
19 and Mr. Billips said, oh, I didn't mean to suggest that. So,
20 we backed away from that.

21 He made the very same claim, however, in the
22 mediation, that I wrote the complaint in this case -- in this
23 bankruptcy case. So, I challenged him again at that point, and
24 he said repeatedly that he was basing this on metadata, a term
25 I was not particularly familiar with, frankly.

1 Thereafter, after the mediation session, we had
2 exchanged e-mails on various things, and I challenged him to
3 produce the evidence that there was metadata demonstrating that
4 I wrote the complaints in this case. He came back to me not
5 with any metadata regarding this case -- the bankruptcy case I
6 should say -- but regarding one of the underlying cases in the
7 District of Columbia and cited to the ECF filing report.

8 You are right that it clearly -- it's not that he
9 used some sort of computer software to dig into that metadata,
10 but New York City -- NYCLA Ethics Opinion 738 from just last
11 year says that you can't use metadata that's even clearly
12 showing. In that case it talks in part about -- what do you
13 call it --

14 THE COURT: Track changes that appear in an e-mail
15 when they're sent so that you can track who has been making
16 comments on a document, and therefore go underneath the
17 attorney/client privilege and issues of confidentiality.

18 MR. STEINBUCH: Exactly. And indeed the opinion
19 states -- Ethics Opinion 738 states, "If a lawyer sends
20 material clearly showing this tracking changes, the recipient
21 will have to determine whether the sender intended that," and
22 goes on to say, "And without such a prior understanding there
23 is a presumption that disclosure of metadata is inadvertent and
24 would be unethical to view."

25 THE COURT: Mr. Steinbuch, do you expect that there

1 should be a recall of a publicly filed document?

2

3 MR. STEINBUCH: No, no, no, no, no. I'm sorry, Your
4 Honor, if I'm not being clear. Let me go back to Ethics
5 Opinion 738. Ethics Opinion 738 says that, "It's improper to
6 both access" --

7 THE COURT: I can assume that I have read both 738
8 and 749, which I have.

9 MR. STEINBUCH: I'm sure. It says, "It's improper to
10 access metadata or to try to determine the authorship of
11 documents between an attorney and a client." That's the part
12 we're talking about here. It's that Mr. Billips has attempted
13 to use this data that you could see that was as 738 says,
14 clearly showing to determine the authorship of documents. That
15 violates the attorney/client privilege.

16 THE COURT: It says R. Steinbuch, and he pointed
17 that, "I have no idea how this shakes out in terms of the
18 substantive issues that are in this pending litigation." But,
19 what I am saying is that this is not akin, and you cite the New
20 York State Bar Association and the Committee on Professional
21 Ethics and those opinions for the formulation of these rules
22 when I was very involved with the New York State Bar
23 Association, went to each committee, and I was on a panel that
24 helped review them.

25 The clear, intent of these are not to infringe on the

1 confidentiality and the attorney/client relationship. It does
2 go to the type of e-mails that inadvertently have the track
3 changes or the bugs that can be put in track e-mails to see
4 what was sent to, who responded later, and glean information
5 that would be clearly violative of the attorney/client
6 privilege. We do not have this here.

7 This level of what has been filed in this court I
8 never want to see again. And I'm rejecting it out of hand. I
9 do not want you, and neither does the district court want to
10 hear any further letters of this type that purport to be
11 holding up and keeping us to a higher standard of practice. We
12 will monitor the rules and the code as the attorneys appear
13 before us, but I want to get back to the focus of this
14 litigation and move it through because I see this as this --
15 something that's dragging terribly this process which should
16 have been moved along in a much more civil fashion than that.
17 That's the first letter that went out.

18 Let me address the second letter. Letter 2 to
19 myself. The first paragraph -- and by the way, Mr. Steinbuch,
20 you say plaintiff pro se. I follow the district court and the
21 Judge Halloran who said that when a pro se party is a New York
22 attorney, they're going to be held to the level of what we
23 expect of New York attorneys. Now, I don't know whether you're
24 admitted to the bar in New York, are you, sir?

25 MR. STEINBUCH: Yes.

1 THE COURT: Okay. Then I'm going to hold you with
2 your Columbia degree to a full knowledge of New York law, and
3 you are going to be held to the same standard that every other
4 attorney does even though you're pro se. You proceed in this
5 letter to say, and the first paragraph has a statement,
6 "Plaintiff consented to mediation and the defendant did not."
7 I can say for my own sitting here on the bench that this was a
8 consensual mediation. Mr. Ribarovski on behalf of Ms. Cutler
9 consented to mediation. So, I start by saying that from my own
10 knowledge the first part of your allegation is frivolous. It's
11 not true.

12 MR. STEINBUCH: Just a comment, Your Honor. I was on
13 the telephone as you know. I didn't hear Mr. Ribarovski, but
14 --

15 THE COURT: Well, then, you better be present for
16 every single hearing in this court from now on, Mr. Steinbuch.

17 MR. STEINBUCH: If I can just make a comment, Your
18 Honor?

19 THE COURT: You're not going to be on the telephone
20 anymore, just so you know.

21 MR. STEINBUCH: Okay. Mr. Billips said he needed to
22 check with his client before agreeing to the mediation. And
23 Your Honor said that notwithstanding, I'm going to order.
24 That's all that says --

25 THE COURT: Mr. Ribarovski at my instance consented

1 to the mediation. He was present in the courtroom and did so.

2 MR. STEINBUCH: I apologize.

3 THE COURT: You proceed to request that I put a stop
4 to defendant counsel's improper behavior. And let me tell you,
5 Mr. Steinbuch, that there is no one who will be more vigorous
6 in fighting discrimination and uphold the constitutional
7 protection of religious beliefs. At least I would hope to be
8 as vigorous as anyone.

9 What I wholly oppose, and I think it's a disgrace to
10 the Jewish people to have it referred to when you say it's the
11 Jewish holiday of Passover, and I know perfectly well when
12 Passover began this year. It was April the 8th through April
13 the 15th. And you would have this Court infer from the letter
14 you went on that there has been a belittlement of Jewish
15 people, and you've used other extraneous information that has
16 nothing to do with discovery, to then suggest that there has
17 been harassment and abuse of the rules.

18 May I respond by saying I think you are abusing the
19 process? I think you are invoking something that is totally
20 inappropriate when there are many reasons and times that it
21 should be. And you make little of it as a result because I am
22 perfectly aware of when Passover was this year.

23 MR. STEINBUCH: Your Honor, if I may comment. Mr.
24 Billips contacted me, said, we're going to have a deposition.
25 Notwithstanding that the mediator said let's hold off on

1 discovery.

2 THE COURT: Okay. Let's talk about that Columbia
3 J.D. and let's talk about the fact that you're a New York
4 attorney. Who is the one who is able to suspend discovery in
5 this case?

6 MR. STEINBUCH: Your Honor, my understanding is that
7 you empowered a mediator to control what was going on.

8 THE COURT: Well, your -- if you will go back to the
9 transcript of August the 21st when I talked about suspending
10 the scheduling order that talked about discovery proceeding,
11 that was the time that I suspended the May 8th, 2008 scheduling
12 order. And it was very clear on the record when I reviewed my
13 own comments that there was no doubt that discovery was
14 proceeding.

15 I looked at the further order that I entered when I
16 permitted Mr. Carroll to withdraw, and I permitted mediation to
17 proceed. And I said nothing about discovery. Now, you are a
18 very intelligent man, Mr. Steinbuch, I will give you that.
19 There is no basis to infer what you did. And if there was any
20 question you know where to go to get clarification.

21 MR. STEINBUCH: To Your Honor.

22 THE COURT: To the Court.

23 MR. STEINBUCH: Right. That's why I wrote the
24 letter.

25 THE COURT: No, I don't think so. This was a

1 scheduled deposition that was to take place. You wrote a
2 letter that was received by this Court April 27th. It's called
3 a protective order. You know how you have to move under the
4 federal rules of civil procedure. There was an outstanding
5 notice of deposition that was to take place in Georgia when you
6 were there.

7 MR. STEINBUCH: No, ma'am. No, ma'am.

8 THE COURT: Well, I would be very surprised. I
9 recognized your ability to redact private information from the
10 Court, but if you're going to represent to our chief judge of
11 the district court that you are going to be in Georgia until
12 May 15th at a certain address, then if there is a deposition
13 notice that is served for that period of time, I don't see any
14 basis unless you seek a protective order when you've been
15 properly served that you shouldn't have been there.

16 MR. STEINBUCH: Your Honor, at the end of the letter
17 I said I wasn't familiar with the practice within a bankruptcy
18 court, but --

19 THE COURT: It's federal rules, Mr. Steinbuch. They
20 are federal. They are uniform. There are uniform rules of
21 procedure and discovery.

22 MR. STEINBUCH: I don't practice in bankruptcy court.
23 Mr. Carroll, when he handled this case, wrote letters before
24 filing any motion, and I tried to follow his form. In fact,
25 right after I mailed the letter I called the Court and spoke to

1 a clerk to say, you know, I'm not familiar if I should file a
2 motion. But, in any event, could I just speak to one more
3 issue, Your Honor, please?

4 I was not scheduled to be in Georgia at that time.
5 Indeed, on or about the date that Mr. Billips scheduled a
6 deposition, I had a meeting of a commission that I serve on in
7 Arkansas. Now, the date that Mr. Billips refers to and the
8 date on the letter refers to the fact that we don't know
9 exactly when the last day of classes are in the beginning or
10 the middle of a semester because we don't know when they're
11 weather days and we don't know if we have makeup days. So,
12 what we routinely do in Macadamia is we mark the semester from
13 the beginning of the semester where we know till on or about
14 the day of graduation.

15 THE COURT: Is there any question as to when you were
16 served with the notice of deposition?

17 MR. STEINBUCH: No.

18 THE COURT: And where were you served?

19 MR. STEINBUCH: In Georgia, yes.

20 THE COURT: Okay. So, you received the notice of the
21 deposition. You were served.

22 MR. STEINBUCH: Yes.

23 THE COURT: Mr. Steinbuch, I appreciate that you were
24 paid \$70,000 for teaching legal profession. I assume that
25 means that was one of the two courses that you were teaching in

1 Georgia?

2 MR. STEINBUCH: Yes. I don't know about the \$70,000,
3 but I was teaching two courses in Georgia, yes.

4 THE COURT: Okay. At the law school?

5 MR. STEINBUCH: Right.

6 THE COURT: So, I am going to not only hold you --
7 I'm going to hold you to your specialized knowledge of what it
8 means, whatever the legal profession -- what does the legal
9 profession course syllable include?

10 MR. STEINBUCH: The rules I was referring to, the
11 professional conduct rules.

12 THE COURT: I'm going to hold you to that legal
13 standard. You admit that you were served with the notice of
14 deposition?

15 MR. STEINBUCH: Yes.

16 THE COURT: There has been no stay of discovery.
17 There was no protective order. And I am not only going to
18 direct you to a cure for a deposition, but whatever additional
19 costs are incurred as a result of scheduling now that you were
20 not in Georgia and ignored it, are going to be born and paid by
21 you. So, I'm taxing costs. I'm going to ask Mr. Billips to
22 submit what the costs are. He had to file a motion today,
23 presumably because of the history of this case that has bogged
24 down, and he incurred -- he alleges \$1,000 for having to be
25 here. And that is part of the costs of what it costs because

1 you didn't show up at your deposition and if not, from what I
2 can see, cooperate with discovery going on here.

3 MR. STEINBUCH: Your Honor, if I may comment, and if
4 I may ask you to reconsider. Mr. Billips contacted me and said
5 I want to have a deposition. If you look at the e-mails I said
6 I don't think we have discovery right now.

7 THE COURT: I don't look at the e-mails because I had
8 told you, Mr. Steinbuch, and made it very clear, and you were
9 on the phone --

10 MR. STEINBUCH: Mm-mm.

11 THE COURT: -- that I didn't want anything pertaining
12 to mediation to, in fact, this Court. As soon as I saw things
13 about mediation, frankly I was not able to review them.

14 MR. STEINBUCH: Okay.

15 THE COURT: And that was inappropriate of you, in my
16 own opinion, to file them. To put before me matters that I
17 said I was not -- should not be a party or privy to as to
18 whatever was going on with respect to the mediation.

19 MR. STEINBUCH: Fair enough, Your Honor.

20 THE COURT: There are formal pleadings. There is a
21 way of protecting yourself against a notice that was served.
22 You did not follow the rules. And I hold you to that standard.
23 You should've known that if you are a party to a federal
24 proceeding and you are a law professor that you know that you
25 are supposed to come to the Court for protection from that if

1 there's any question.

2 MR. STEINBUCH: And that's what I did with the
3 letter, Your Honor.

4 THE COURT: This is not a motion. This is not a
5 protective order. When was the deposition scheduled?

6 MR. STEINBUCH: I don't remember the day.

7 THE COURT: Mr. Billips?

8 MR. BILLIPS: Your Honor, my recollection is April
9 28th.

10 THE COURT: Well, an April 20 -- a letter that you
11 send by regular mail --

12 MR. STEINBUCH: No, I sent it priority or one of
13 these more rapid mails. Your Honor got it the next business
14 day.

15 THE COURT: It was received in the bankruptcy clerk's
16 office April the 27th.

17 MR. STEINBUCH: Okay.

18 THE COURT: They received something before we receive
19 it.

20 MR. STEINBUCH: And I called the clerk of the Court
21 the same day. Actually, I called the clerk when I sent it, and
22 then I called the clerk when it was received.

23 THE COURT: When were you noticed for the deposition?

24 MR. STEINBUCH: It's in the letter. It's the 6th or
25 so I think -- 6th or 8th.

1 THE COURT: Well --

2 MR. STEINBUCH: If I just may comment, Your Honor.
3 Mr. Billips asked me -- he said when you take a deposition? I
4 said I don't think we have discovery here, but let's talk about
5 taking reciprocal depositions because, 1) I do know that the
6 rules require a discussion about these things that a party --
7 if a party serves a deposition notice on another party and the
8 other party hasn't been conferred with, that is not in spirit
9 or, indeed, probably language of the rule. I said when can we
10 do reciprocal depositions. And also I said, Your Honor, to Mr.
11 Billips, if you think discovery's still going on, then I would
12 like to discuss the discovery that Mr. Carroll served on you.

13 THE COURT: Mr. Steinbuch, it's not typical that
14 these discussions aren't worked out.

15 MR. STEINBUCH: I know, but --

16 THE COURT: And if there was a notice of a
17 deposition, presumably, I'm going to hear from Mr. Billips.

18 MR. STEINBUCH: Mm-mm.

19 THE COURT: But, I find your attitude and your
20 approach and the way you're trying to pull down and bring the
21 Court into all of these little matters that should civilly be
22 worked out in litigation entirely inappropriate. This is not
23 the type of matter that the Court should be focused on. There
24 are -- I think it's abundantly clear the way the rules are
25 written that there should be open discovery, there should be a

1 free flow of information, and we had this discussion and I put
2 it all on the record about discovery when you had Mr. Carroll
3 present and when you were also present, at least
4 telephonically.

5 MR. STEINBUCH: Mm-mm.

6 THE COURT: The whole import of what I stated, I
7 find, has not been followed. There has not been appropriate
8 discovery here. It seems that the -- I will remain objective,
9 but I'm saying what I saw, it looks particularly that someone
10 is just trying to derail the process of having this proceed.

11 MR. STEINBUCH: I apologize, Your Honor. I sincerely
12 do. My understanding was that there was no discovery.

13 THE COURT: I don't know how as a lawyer you would
14 arrive on that and be satisfied and not seek some
15 clarification, but that's what you have said, so I accept that
16 that's the case. You are wrong, and as a result there are
17 going to be costs taxed. I'm going to have Mr. Billips file
18 and direct him to file whatever costs are related to the
19 failure to appear for that deposition, and that includes the
20 rescheduling and where it's going to have to be and where
21 it's -- and what costs are going to be involved to take the
22 deposition now that you are somewhere else. And he's going to
23 have to travel there, presumably, unless there's some
24 consensual agreement that there's a cheaper way to do it that
25 you both agree to which I doubt there's going to be agreement

1 here.

2 MR. STEINBUCH: Can I ask Your Honor, the point that
3 I was bringing out was, I had asked to do reciprocal
4 depositions, and at that point Mr. Billips stopped the
5 conversation.

6 THE COURT: Listen --

7 MR. STEINBUCH: I'm sorry, Your Honor. Just, the
8 point is, going forward --

9 THE COURT: There's discovery. I'm not going to
10 direct discovery. You know, you're big boys. You're going to
11 follow the rules. You're going to notice depositions if that's
12 the case, interrogatories, and you're going to work it out.
13 And that's the way I expect it to be done. I don't expect the
14 Court to be dragged in to trying to resolve this type of he
15 said/she said and then get the types of pleadings and drivel
16 that I've been getting here. This is not a pleading there, a
17 letter. But, let me address the third letter.

18 The third letter then proceeds back again to the
19 district court chief judge, but now there's been some improper
20 request that it be withdrawn and pushing the issue once again.
21 I've already ruled as to what my impression is on the first
22 charge. The third is bothering the Court.

23 MR. STEINBUCH: I didn't -- Your Honor, I didn't have
24 the Court's order before I sent the third letter. And so, I
25 sent the third letter without -- I would've directed the third

1 letter if at all to -- I probably would've just waited for this
2 hearing, but I didn't have the Court's order.

3 THE COURT: Well, I suggest that you don't proceed in
4 this fashion again until it goes to trial, if it does, before
5 the district court. Everything should be directed to this
6 Court, not to the district court.

7 MR. STEINBUCH: Your Honor, the reason I sent that to
8 the district court, if I just may put it on the record, rules
9 say that you must inform the district court chief judge, and so
10 that's --

11 THE COURT: We're not tattletaling about violations
12 of ethical rules in this court. We are trying to go to trial
13 if need be, and if possible, resolve it.

14 MR. STEINBUCH: Agreed.

15 THE COURT: And resolve it only on a way that is
16 ethical so that there should not be a -- and this was mentioned
17 at a hearing before this even went into mediation about trying
18 to obtain some type of testimony so that you would be
19 successful in another lawsuit as a release to dismiss a
20 lawsuit. And if you ask me if we want to get -- review the
21 ethical rules, that could be entirely sanctionable.

22 So, Mr. Steinbuch, take warning. I am only right now
23 addressing the fact that you didn't show up for your deposition
24 as a party. You were required to. There didn't need to be a
25 subpoena. You're right about the law that all you have to do

1 is give a notice to a party. You never appeared, and you're
2 going to pay the costs as a result.

3 If, and I'm forewarning you, if there is any further
4 breach and there -- what I sense is you're trying to for your
5 own, you know, using this to -- using this proceeding and this
6 Court to try to extract some benefit in another piece of
7 litigation, there could be sanctions and other consequences.
8 And I warn you as a professor of law and as a practicing
9 attorney who has -- doesn't have complaints, that I have done
10 it in the past and I am not reluctant to refer conduct that I
11 see to be appropriate reviewing body.

12 MR. STEINBUCH: I fully understand that I and
13 appreciate that, Your Honor. Your Honor, the thing about the
14 statement wasn't even my idea. This was when Mr. Carroll was
15 representing me.

16 THE COURT: Well, that concludes the status
17 conference. I want to hear from Mr. Billips if I can because
18 now we have a motion before us, and I have a couple of
19 statements about that. But, this equally strikes me as
20 something that is kitchen sink and everything is thrown into
21 it. It starts out by saying it's a motion. I've never seen a
22 motion in federal court that isn't numbered with paragraphs.

23 It doesn't at one -- any point in that motion
24 reference the 12 -- reference the federal -- civil rule of
25 civil procedure, and then it proceeds right on the second page,

1 you talk about a memorandum and goes into being a memo and
2 throws lots of things in there in terms of alternative relief
3 being sought. So, it may have been utter frustration, and I
4 would understand it if that's what it was, but let me hear you
5 articulate if you can what it is that you want from the Court
6 today.

7 MR. BILLIPS: Your Honor, may it please the Court.
8 The motion for judgment on the pleadings ask that the
9 complaint -- the adversary proceeding be dismissed because it
10 fails to allege a central element of non-dischargeability as if
11 there is a wilful and malicious injury meaning that there was
12 an intent to injure.

13 The complaint alleges that there was wilful and
14 malicious conduct causing injury, and the supreme court has
15 made it very clear that those are different. The Court as well
16 in two decisions that post-date the district court's decision
17 in the D.C. case, the supreme court has heightened the pleading
18 rule requiring much more in the way of specificity, factual
19 specificity to show intent.

20 In the Iqbal case just in the last few weeks the
21 Court held that it is not simply enough to generally allege
22 that there is the intent using the language of the cause of
23 action. That there has to be some underlying factual basis
24 alleged in the complaint for showing the requisite intent, and
25 this complaint doesn't have it. That, in a nutshell, is the

1 motion for judgment on the pleading.

2 Frankly, I have never seen anything in this case,
3 either in the pleadings or in a discovery response, that would
4 indicate that Ms. Cutler in any way intended to harm Mr.
5 Steinbuch. Let me also say in fairness, Your Honor, the --
6 because of some difficulty that I had with the ECF system and
7 getting this thing filed, there was a -- some of the exhibits
8 that were initially going to be attached were too long and
9 couldn't be filed. They were supposed to be filed on the 8th.
10 They did not end up getting filed until the 11th. It was
11 mailed to Mr. Steinbuch on the 8th because I thought it had
12 been filed.

13 So, using the 11th, if the 11th is the service date,
14 or for purposes of his response, I believe his response would
15 be due today. So, he was served a copy that was slightly
16 different because of changes to incorporation of exhibits. He
17 was served that on the 8th. But -- which would make his
18 response due prior to today, but based on the filing date his
19 response would be due today. Otherwise, I would contend it's
20 unopposed because no response had been submitted.

21 As to the motion to compel and motion for sanctions
22 for failure to provide discovery, Your Honor's addressed a
23 large part of that, and frankly Mr. Carroll and I, I thought
24 were working toward a process to try to resolve the -- where we
25 are and why we're at loggerheads in exchanging discovery.

1 When Mr. Carroll was -- when he withdrew from the
2 case, at that point the Court had sent it to mediation and, you
3 know, hope springing eternal, I was -- decided that I would
4 wait before doing anything in terms of dealing with Mr.
5 Steinbuch on discovery issues until after that happened and see
6 if the process was at all successful.

7 Without going into what I've heard there, having
8 concluded that that process was not going to be successful, and
9 also in frustration at the inability to get written discovery
10 responses, that's when we got the -- my decision tactically
11 that, just go ahead and take his deposition, demonstrate the
12 absence of merit in the case, and move on without doing the
13 whole suspenders and belt thing with requiring written
14 responses and production of all -- whatever documents he has.
15 Then when the -- he refused to come to the deposition either, I
16 felt that I didn't have any choice but to present the matter to
17 the Court partly in response to the allegations that he was
18 making in these letters so that Your Honor would know where --
19 how we got to the point we are -- where we are today.

20 THE COURT: One of your complaints is that you are
21 not getting served with copies of notices that are being
22 generated for discovery. Is that one of your complaints?

23 MR. BILLIPS: Your Honor, that had been an issue with
24 respect to subpoenas that were served on the United States
25 senate. And that is an issue that came up, and I've checked

1 with Mr. Ribarovski again today as he had gone back and checked
2 his file and we were never served with those subpoenas when
3 they were served on the senate.

4 THE COURT: And these were served by whom?

5 MR. BILLIPS: Mr. Carroll said in the hearing that he
6 is the one who issued the subpoena, and he had a process server
7 serve them. The senate objected. To my knowledge nothing was
8 ever produced by the senate to Mr. Carroll. He represented
9 that it was simply an oversight, and I accept that
10 representation.

11 THE COURT: In looking at the complaint I agree with
12 the Geiger analysis that in terms of what has to be proved for
13 523(a)(6) that it's the intent to cause the injury. What I do
14 see kind of bare bones hanging in here is Paragraph 25 of the
15 complaint. "Cutler wilfully and maliciously transformed her
16 blog into a book for her own profit at the intentional expense
17 of plaintiff."

18 It's very broad, but it seems to intend to hurt him.
19 I don't know whether that's a fair reading or not. But, rather
20 than dismiss the complaint I would think alternatively we would
21 let a one-time amendment to permit the proper pleading of the
22 cause of action. And I will say that this is not the typical
23 way that we see a 523(a)(6) complaint.

24 I'm not going to spell it out, but there's a
25 reference to other actions and then the summary conclusions and

1 I think you really need to tie it in to properly alleging
2 elements of a non-dischargeable debt for wilful and malicious
3 injury under 523(a)(6). I don't know if that's going to hold
4 things up or not, but rather than dismiss I will give you a
5 one-time chance to re-plead your complaint which means there'll
6 be an answer.

7 MR. BILLIPS: Yes, Your Honor.

8 THE COURT: What else can I address today? What else
9 did you mention here? I need to have, Mr. Billips, an
10 affidavit of your costs.

11 MR. BILLIPS: Yes, Your Honor. Your Honor, I
12 apologize. Is -- for purposes of this proceeding does costs
13 include fees?

14 THE COURT: I'm sorry?

15 MR. BILLIPS: For purposes of this proceeding to this
16 affidavit would costs include fees spent for traveling --

17 THE COURT: I think attorneys fees are part of it
18 also.

19 MR. BILLIPS: Thank you, Your Honor.

20 THE COURT: Is there any question about that?

21 MR. STEINBUCH: I think there is, but I'd have to
22 research it, Your Honor. I'm not sure that when costs are
23 imposed it includes fees, but I couldn't say for sure.

24 THE COURT: Well, to the extent it allows it I'm
25 going to permit it. And so --

1 MR. BILLIPS: Clearly, they're permitted under Rule
2 37. I just wasn't clear as to what Your Honor intended.

3 THE COURT: These are reasonable expenses including
4 attorneys fees incurred in making -- I'm going to permit them.
5 Now, if you want to object to the quantity of it you can. I
6 will allow you within ten days to do so, but I suggest instead
7 that the focus be on seeing where this is going because this
8 seems to be an enormous involvement of judicial time, and
9 certainly of the caliber of the people that are sitting in
10 front of me. There are very important things to be done.

11 I'm not belittling the fact that you have a right to
12 be in federal court, but I think the focus should be, if you
13 are truly bringing an action to prosecute here, that you either
14 proceed promptly and efficiently and get to the issues or
15 consider whether or not there is still room for settlement.
16 Until I hear from Mr. Balanoff as to whether or not there is a
17 mediation, successfully included or not, I'm reluctant to enter
18 a scheduling order. But, in the interim we're going to have an
19 amended complaint filed within 20 days of today's date and the
20 answer within 20 days after that.

21 Is there anything else that either party wants to
22 bring to the Court's attention that -- and somehow while I have
23 you both in the same room, facilitate something that's going to
24 be helpful or moving this beyond where it's been? Mr.
25 Steinbuch?

1 MR. STEINBUCH: Just a minor thing. The brief which
2 I think we've resolved, so it's not a time issue, but the brief
3 that I received, it was the May 11th brief not the May 8th
4 brief, but I never received any --

5 THE COURT: What brief are we referring to?

6 MR. STEINBUCH: Oh, I'm sorry. The motion --
7 defendant's motion. And I don't have any -- but I never
8 received any exhibits. So, I was wondering if I could just get
9 those exhibits.

10 MR. BILLIPS: Your Honor, we'll send out an entire
11 new set.

12 THE COURT: Okay. So, you can study them and see
13 what the -- I mean, I'm not -- I wondered why there was no
14 answer. I think I have my response today as to why you didn't
15 respond. I understand. But, I think that it is something
16 that's going to cause the Court to permit you to file an
17 amended complaint and -- is there anything else?

18 MR. STEINBUCH: No, not for me.

19 THE COURT: Well, I trust that this is going to
20 proceed in an efficient, civil way, and that you are going to
21 proceed through this process without being bogged down on
22 discovery disputes. And if it is that the evidence is going to
23 come before the Court in terms of trying personal injury
24 action, then so be it. But, there is no reason to have a
25 debtor wait as long as this case has been pending to have this

1 kind of a case come to trial and resolution. So, I would hope
2 that it proceeds.

3 MR. STEINBUCH: Could I ask the Court a question? If
4 the case proceeds is it -- has the Court decided if it's its
5 intention to send the case to the district court?

6 THE COURT: Well, you've also made some statements
7 about that, and let me make that clear, that this case will
8 stay with the Court until it's trial-ready.

9 MR. STEINBUCH: I'm sorry?

10 THE COURT: Until it is trial-ready.

11 MR. STEINBUCH: Okay.

12 THE COURT: And at the point it's trial-ready it goes
13 upstairs, there's a decision, and it comes back to this Court
14 for then the ultimate determination of dischargeability because
15 that's where this jurisdiction lies. So, unless I hear
16 something otherwise from the district court that's how it's
17 going to proceed. That's -- they're very busy upstairs and we
18 try to assist the Court as much as we can given our limited
19 Article 1 powers, but -- so, with those words of caution I just
20 trust that this will proceed on track. Thank you.

21 MR. BILLIPS: Thank you, Your Honor.

22 MR. STEINBUCH: Thank you, Your Honor.

23 THE CLERK: All rise.

24 * * * * *

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C E R T I F I C A T I O N

I, KATHLEEN BETZ, court approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter, and to the best of my ability.

/s/ Kathleen Betz _____

DATE: June 2, 2009

KATHLEEN BETZ

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