STATE OF VERMONT
WASHINGTON COUNTY

Small Claims Court
Docket No. 43-1-05 Wnsc

GREEN MOUNTAIN BUREAU, LLC,
Plaintiff,

v.

JONATHAN LARKIN,
Defendant.

NOTICE OF CONDUCT and ORDER TO SHOW CAUSE

The matter presently before the court in this small claims case is a post-judgment motion for a financial disclosure hearing. On February 23, 2005, the court entered judgment in Plaintiff's favor based on the parties' agreement. Plaintiff has been represented by Attorney Alan Bjerke and Defendant has been unrepresented throughout this litigation.

As set forth below, Attorney Bjerke's conduct related to the filing of two motions for financial disclosure hearings, one currently pending, appears to violate Rule 11(b) of the Civil Rules.[1] This notice describes the conduct that appears to be in violation in accordance with V.R.C.P. 11(c)(1)(B), applicable by analogy through V.R.S.C.P. 13. The court will schedule a hearing for Attorney Bjerke to show cause why it does not. Defendant Jonathan Larkin is welcome to attend, but is not required to attend.

On July 11, 2005, Attorney Bjerke filed the first motion for a financial disclosure hearing. Such a motion is required to be filed on a form supplied by the court clerk. V.R.S.C.P. 7(a). The form actually filed by Attorney Bjerke has the appearance of the official court form in all respects except that it includes additional language. The additional language appears in bold at the bottom of the form. It is in the same typeface and size as the official form text and plainly is designed to appear to be an original part of the official court form. The added language reads, "In addition, the Judgment Creditor may request that the Court issue an Order permitting them to obtain information from one or more Credit Reporting Agencies concerning the Judgment Debtor pursuant to 9 V.S.A. §2480e(a)(1)."

The alteration to the official court form appears to be calculated to deceive the unrepresented defendant into believing that: 1) notice regarding a request pursuant to 9 V.S.A. §2480e(a)(1) is part of the official court form and, hence, is an official part of the financial disclosure process; 2) such a request is permissible in small claims court; 3) the small claims court has jurisdiction to grant the requested relief; and 4) 9 V.S.A. § 2480e(a)(1) authorizes the

[1] Rule 11 of the Rules of Civil Procedure is not in the Rules of Small Claims Procedure. In accordance with V.R.S.C.P. 13, the court concludes that Rule 11 should be applied as it is consistent with the Small Claims Rules: the obligations it requires from attorneys are just as important to fairness in small claims cases as in other civil cases.

small claims court to issue such an order.

Generally, motion practice in small claims court is severely limited by V.R.S.C.P. 4. All motions in small claims court must be in writing, *id.*, and nothing in the small claims rules permits any type of "request" for access to a judgment debtor's credit report at a financial disclosure hearing. Moreover, the small claims court's jurisdiction is limited to claims for money damages not exceeding $3,500.00. V.R.S.C.P. 2(a).[2] Attorney Bjerke should be well aware that the relief he suggests he may request is not even within the subject matter jurisdiction of the small claims court to order.

The deceptive language added to the court form also patently misrepresents 9 V.S.A. § 2480e(a)(1). Section 2480e is a part of the Consumer Fraud Act, 9 V.S.A. § 2451–2480n, plainly intended to protect the confidentiality of a consumer's credit report, not to make a consumer's credit report available to judgment creditors at financial disclosure hearings. Accordingly, section 2480e bars anyone from obtaining a credit report except with the consumer's consent, 9 V.S.A. § 2480e(a)(2), or "in response to the order of a court having jurisdiction to issue such an order," 9 V.S.A. § 2480e(a)(1). That is, while section 2480e(a)(1) permits a person to acquire a credit report on the authority of an appropriate court order, it does not specifically authorize any particular court to issue such an order, and certainly does not imply that the small claims court has jurisdiction to issue such an order.

The language added to the court form appears to have the improper purpose of frightening an unrepresented defendant into believing that the collections attorney has available a statutory tool to invade Defendant's financial privacy in furtherance of the collections process in small claims court, and with the imprimatur and advance approval of the small claims court. In fact, the threatened request for relief is outside the small claim's court's subject matter jurisdiction, is not permissible in the small claims rules, and is not supported by the statute cited.

Attorney Bjerke filed a second (and currently pending) motion for a financial disclosure hearing on November 14, 2006. The second motion consists of a filled-out court form without the deceptive alteration that appeared on the first form. Filed with the form is a paper bearing a full caption and entitled, "NOTICE TO DEFENDANT IN CONNECTION WITH FINANCIAL DISCLOSURE HEARING." The text of the "notice" reads:

> Please take notice that in the event you do not appear at the Financial Disclosure hearing described in the enclosed Notice of Hearing, the Plaintiff in your case may, in addition to other requests, ask that the Court order that the Plaintiff may have access to your credit bureau reporting information pursuant to 9 V.S.A. §2480e(a)(1).
>
> You may also contact Plaintiff's attorney directly in advance of the hearing date and make your financial disclosure by telephone. If you do so to the satisfaction of the Plaintiff's attorney, they may cancel the hearing and you would not be required to attend. The telephone number to reach the Plaintiff's attorney is: . . . . You should plan to contact the Plaintiff's attorney well in advance of the hearing.

[2] "**Jurisdiction.** . . .Claims for relief other than money damages may not be brought under these rules."

In bold letters, the notice states "Court's Copy" at the bottom. This paper includes neither Attorney Bjerke's signature nor mailing address. A second copy of the notice also was filed; it is identical to that described but states that it is "Defendant's Copy" at the bottom.

The cover letter accompanying the motion includes, as the second paragraph, "In addition, I have enclosed two copies of a notice to the Defendant concerning access to credit bureau reporting information. Kindly forward the copy marked "Defendant's copy" to the Defendant along with the Notice of Hearing. I have also enclosed an additional copy for the Court's file."[3]

Like the altered court form, these notices deceptively appear to have the imprimatur of the court because they imply that access to Defendant's credit report is part of the official court process at a financial disclosure hearing. The small claims rules do not permit the filing of these "notices" or any such request at a financial disclosure hearing. Furthermore, these "notices" bear no signature or address in violation of Rule 11(a). The lack of a signature does not appear to be inadvertent as no signature block appears on either paper. An undiscerning defendant could easily interpret the Notice as a document issued directly from the court.

By presenting these papers to the court, at risk of sanction under Rule 11, Attorney Bjerke is deemed to have certified that they were not presented for an improper purpose and that the legal contentions contained in them were warranted. V.R.C.P. 11(b)(1), (2). Contrary to the requirements of Rule 11(b), Attorney Bjerke appears to have designed these papers specifically for the improper purposes of misrepresenting the role of the court in the financial disclosure process and of taking unconscionable advantage of an unrepresented defendant, all based on legal contentions not supported by current law or any nonfrivolous argument for the extension of current law, and directly in violation of small claims procedural rules.

The court will not "permit unfair imposition or unconscionable advantage to be taken of one who acts as his own attorney." *Ferris-Prabhu v. Dave & Son, Inc.*, 142 Vt. 479, 481 (1983) (quoting *Vahlteich v. Knott*, 139 Vt. 588, 590 (1981)). "This should be especially true in small claims actions where self-representation is encouraged." *Ferris-Prabhu*, 142 Vt. at 481.

Most defendants in small claims cases do not have attorneys, and would not have the knowledge or ability to address the legal issues presented by this situation on their own behalf. It would be helpful to the court to have attorney input from the perspective of defendants in small claims cases who would be in the same position as the defendant in this case. There are a large number of such defendants, and their experience in small claims court affects their perception of the fairness of the judicial process and their confidence in the impartiality of the courts.

Wright and Miller, in discussing appropriate circumstances for the filing of briefs by amicus curiae, note the following excerpt from a chambers opinion of Chief Judge Richard Posner:

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[3] The letter is signed by Jean Couillard. There is no indication of Jean Couillard's role, although she states that Attorney Bjerke is the attorney responsible for the case.

> An amicus brief should normally be allowed when a party is not represented competently or is not represented at all, when the amicus has an interest in some other case that may be affected by the decision in the present case (though not enough affected to entitle the amicus to intervene and become a party in the present case), or when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide. . . .

16A Wright and Miller, Federal Practice and Procedure § 3975 at 542 (quoting Ryan v. Commodity Futures Trading Commn., 125 F.3d 1062, 1063 (7th Cir. 1997) (opinion of Posner, C.J., in chambers)).

For the foregoing reasons, the court invites an attorney from Vermont Legal Aid, Inc., a law firm familiar with the legal interests of defendants in debt collection actions, to file an amicus brief on the issues identified above prior to the show cause hearing to be scheduled. The court is not appointing Vermont Legal Aid, Inc., or any individual attorney, as attorney to represent the interests of the Defendant in this case. Furthermore, no compensation will be available for services performed. Legal Aid is not required to accept the invitation to file an amicus brief. In the event that Legal Aid wishes to do so, the opportunity is provided.

ORDER

For the foregoing reasons,

1. Attorney Bjerke and the law firm of Bauer, Gravel, Farnham, Nuovo, Parker & Lang, with which Attorney Bjerke is associated, are hereby ordered to show cause why the conduct described above does not violate Rule 11(b) and warrant sanctions as a result.

2. A show cause hearing will be scheduled. Jonathan Larkin is not required to attend.

3. Legal Aid will be given notice of the hearing, and is invited to file an amicus brief and attend the hearing.

Dated at Montpelier, Vermont this 4th day of January 2007.

Mary Miles Teachout

Mary Miles Teachout
Superior Court Judge