

**IN THE CIRCUIT COURT OF ST. LOUIS COUNTY
STATE OF MISSOURI**

MARKEETA RIVERA, et al.,

Plaintiffs,

vs.

SIMPATICO, INC., et al.,

Defendants.

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Case No. 12SL-CC00339-01

Div. 13

DEFENDANTS' MOTION FOR SANCTIONS

COME NOW DEFENDANTS, Simpatico, Inc., and Stratus Franchising, LLC, and for their Motion for Sanctions as to Plaintiffs, state as follows:

1. This suit was initially filed on January 30, 2012, was removed to the United States District Court of Eastern Missouri, and was thereafter remanded back to this Court, on May 15, 2012.
2. On February 14, 2012, Matthew A. Jacober and the law firm of Lathrop and Gage, LLP entered their appearance on behalf of Defendants and have remained counsel of record throughout the lifetime of the suit.
3. Defendants became aware, on or about June 27, 2012, that Plaintiffs, through counsel, were serving subpoenas upon multiple nonparty individuals across the United States.
4. Defendants obtained this knowledge due to Plaintiffs' counsel's posting to a blog, with the web site address of <http://www.unhappyfranchisee.com/stratus-master-franchise-jumping-ship/>, containing the following statements:

Jonathan E. Fortman says:

June 8, 2012 at 11:31 am

Reasoned Source, what's the latest? We are preparing to send Notices of Deposition for Pete Frese and Dennis Jarrett. In addition, we are going to subpoena Farrell, Stapleton, Marissa Lather, and Marvin. We've waited through this week to monitor any further developments. The Unit Franchisees just can't wait any longer. I'll keep you posted.

Jonathan Fortman says:

June 15, 2012 at 7:34 pm

We served subpoenas on Bob Stapleton and Marissa Lather today. Within minutes of serving them, our investigator received a call from Pete Frese who said he'd be in the office Monday after 9. The investigator was told that Farrell and Garcia were not in the office. DJ was also absent. Guess he was home in Chicago. We'll see if Pete tries to duck service. We're beginning the process of getting subpoenas out to the Masters. Our focus for now will be the nature of the relationship between Stratus Franchising, LLC, and the master. We hope to have all of that done within 30 days. If anyone could give me your version of what happened in Las Vegas, New Jersey, LA, and Minneapolis I'd appreciate hearing it. Feel free to respond off list. Also, can you give me some background on the switch in KC, Omaha and phoenix that would be useful. The info out there is sketchy. Thanks.

Jonathan E. Fortman says:

June 21, 2012 at 5:48 am

Bob Stapleton and Marisa Lather were served with deposition subpoenas at their homes yesterday. We are now going forward with the out-of-state subpoenas which include Dennis Jarrett, Blair and Farrell. I still can't figure out their litigation strategy. The piecemeal approach only works in situations where there's no publicity.

I pretty much know through various sources what's happening. They have no intention of negotiating with the Unit Franchisees. It is apparent to me that there is no plan for Dennis and Pete to stay in for the long term. They are only trying to shut the masters up and delay as long as they can in order to stash money away. Missouri has a fraudulent transfers act which will subject any transfers to scrutiny if made after they are aware of potential claims. The speed at which all of this is happening will make it difficult to hide money. Our case is now in high gear. There's some good info from the California case and we have a lot of info from various sources that absolutely proves blatant fraud. They scheduled their lame motion to dismiss for hearing next Tuesday. However, I have appeared before the judge assigned to this case many times. She is not going to tolerate any tactics used for the sole purpose of delay. My worst case is that she orders me to add the masters as necessary parties. It just subjects Dennis and Pete to more scrutiny and will expose more fraud.

If they believed there was any chance to save this ship from going under, they would be coming to us to talk about resolution of the issues. The masters, including the guy out there in the mountains, should be smart enough to see that Jarrett and Frese are desperate and don't care about anyone else. They are selfish, greedy and they have been exposed for the con men they are. I don't see how any master franchisee who has been hurt by these guys can stay in the system.

I would again caution the masters to be careful about the manner in which they deal with the Unit Franchisees. Those are my clients and we are very uneasy about the lack of open communication caused by the confidentiality agreements. My clients signed franchise agreements in the Stratus system. However, they have suddenly been switched to another company. We are cautiously optimistic that it will improve their opportunities. Open communication is key. Many of them have been cheated out of money, lied to about accounts, and threatened. It is very important that they be given adequate assurance that positive changes are being made. We still have the nuclear option. It is not the path anyone wants to take. However, I cannot allow anyone to take money that should, by all rights, be returned to the Unit Franchisees hurt in this case.

Stratus has about a month to figure something out. Once I take Pete Frese' depo, the window of opportunity will close. Will he testify or will he plead the fifth? I'm not sure. All I know is that I have so much information now, that I can be ready to present our case to the court for determination by the end of August.

@Reasoned Source, thank you for your continuing contributions to this post. It is important that accurate information get out in the open. You have the same mindset that I do. The only way to go after guys like this are to bash them in the face. Waiting for the FTC or a state's attorney general to do anything is a mistake. This is a complicated scheme. They have to start from scratch. I've worked my ass off and by the time the feds would catch up, the case will be over.

See, <http://www.unhappyfranchisee.com/stratus-master-franchise-jumping-ship/>.

5. Although Plaintiffs' counsel makes reference to six different subpoenas being served (Counsel represents subpoenas were served on Dennis Jarrett, Bob Stapleton, Marisa Lather, Farrell and Blair), Plaintiff's counsel did not serve a single notice, either formal or informal, of those subpoenas.¹

6. Missouri Rule of Civil Procedure 57.09(c) specifically directs notice to be given to all parties' of record: "[t]he party serving a subpoena on a non-party *shall provide a copy of the subpoena to every party as if it were a pleading.*" Mo. R. Civ. Pro. 57.09(c).

7. Missouri Rule of Civil Procedure 43.01 requires service of pleadings be made in the following manner:

(1) Upon the attorney:

(A) By delivering a copy to the attorney;

¹ The Blog further indicates that Plaintiffs intend to serve subpoenas on the masters and specifically references serving subpoenas in 13 states for 17 people. Plaintiffs' counsel has failed to provide any document regarding these subpoenas.

- (B) By leaving a copy at the attorney's office with a clerk, receptionist, or secretary or with an attorney employed by or associated with the attorney to be served;
- (C) By facsimile transmission;
- (D) By electronic mail; or
- (E) By mailing a copy to the attorney at the attorney's last known address;

(2) Upon a party:

- (A) By delivering or mailing a copy to the party;
- (B) By facsimile transmission;
- (C) By electronic mail; or
- (D) By serving a copy in the manner provided for service of summons in Rule 54.13.

8. Plaintiffs purposely failed to comply with the requirements of Rules 57.09. In fact, Mr. Fortman states in his blog, "My information is that once they are served, Stratus must be put on notice to give them an opportunity to object. It'll be interesting to see what response we get."

9. Upon becoming aware of the blog and the subpoenas mentioned therein, on June 28, 2012, Defendants, through counsel, sent correspondence to Plaintiffs' counsel, demanding notice of all issued subpoenas, per Mo. R. Civ. Pro. 57.09(c). *See, Exhibit 1*, attached hereto. Unfortunately, Plaintiff's counsel ignored this communication, forcing Defendants to involve the Court in this discovery dispute and file the instant Motion.²

²Interestingly, Plaintiff forwarded copies of its Motion for Leave to File Amended Petition, Notice of Hearing and Amended Petition via facsimile at 3:08 pm on Friday, June 29, 2012. Clearly, someone at Plaintiffs' counsel's office counsel was in the office on June 29, 2012, but simply chose to ignore Defendants' request that Plaintiff conform its conduct to the relevant Rules of Civil Procedure, and continues to ignore such request.

10. Plaintiffs deliberately ignored Defendants' efforts to bring the legal proceedings into compliance with the Missouri Rules of Civil procedure, mocking Defendants' counsel, — fellow members of the Missouri bar—and the Rules, in the process.

Jonathan E. Fortman says:

May 26, 2012 at 10:47 am

Reasoned Source: Thanks for the update. I take being referred to as a "junkyard dog" as a compliment. Once again, the Stratus attorneys are giving false information to you...

July 2, 2012 at 1:49 am

I received a nice letter from the "poodles" that was reminding me of my ethical duties. They stated that they saw on my blog that I was going to subpoena all of the masters and that under the Missouri rules I was required to provide copies to them. I used to get pissed off at these types of letters. After all, the "poodles" have the audacity to call my ethics into question when they represent con men who have no ethics or morals... Normally, I would have shot off a letter telling them to go f#\$@ themselves. However, these days I just let it go. Instead of a letter, I gave them the amended petition.

11. Plaintiffs failure to conform to the rules even after notice is nothing less than an effort to circumvent the rules and prejudice Defendants by depriving them of the knowledge of the subpoenas. Mr. Fortman has acted intentionally and with conscious disregard to the rules to deprive Defendants of their rights and has done so even after being confronted by Defendants' Counsel in the correspondence of June 28, 2012. By refusing Defendants or their counsel the opportunity to have knowledge of and prepare for the depositions, Plaintiff is attempting to obtain a strategic and tactical advantage and deny Defendants their rights.

12. What makes Mr. Fortman's conduct even more abhorring is his willingness to post his actions on his self serving blog while simultaneously depriving Defendants of their rights. Surely, the law cannot be that Defendants have the burden to check Mr. Fortman's blog to confirm he has complied with the Missouri Rules of Civil Procedure.

13. Defendants move this Court to impose sanctions upon Plaintiffs for the brazen and purposeful attempt at deceit pursuant to Mo. R. Civ. Pro. 61.01. *See also, Karolat v.*

Karolat, 151 S.W.3d 852, 857 (Mo. App. W.D. 2004) (stating, Rule 61.01 "expressly permit a trial court to strike pleadings and enter judgment by default as permissible sanctions").

14. Further support of Defendants Motion for sanctions is found in the Missouri Rules of Professional Conduct which govern a lawyer's responsibilities in discovery and to opposing counsel. These rules include, but are not limited to the following:

Rule 4-8.4 which provides that it is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct . . . ;

...

(c) engage in conduct involving dishonesty . . . , deceit, or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice

15. Plaintiffs' counsel violated the Rules of Professional Conduct as well as the Missouri Rules of Civil Procedure by failing to provide copies of the pleadings pursuant to Mo. R. Civ. Pro. 57.09(c). More importantly, Plaintiffs' Counsel has refused to take remedial action following the June 28, 2012 correspondence.

16. Only a "reasonable" notice period is required for a hearing on a party's Motion for Sanctions. "All provisions of [61.01] condition sanctions "upon motion and reasonable notice to the other parties.' Reasonable notice must provide 'an [o]ppportunity for a litigant to present his views as to the matters instantly before the court which may affect his rights.'" *Ballesteros v. Johnson*, 812 S.W.2d 217, 224 (Mo. Ct. App. 1991). Rule 61.01 also allows for attorneys' fees to the moving party. *See*, Mo. R. Civ. Pro. 61.01 *et seq.*

WHEREFORE, Defendants Simpatico, Inc., and Stratus Franchising, LLC move this Court for sanctions against Plaintiffs as provided by Missouri Rule of Civil Procedure 61.01, et seq., attorneys' fees incurred herein, for this Court's Order barring any discovery from

proceeding forward until such time as the Plaintiff has filed a Petition that can survive legal challenge, and for such other and further relief as the Court deems just and appropriate.

Respectfully submitted,

LATHROP & GAGE LLP



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing was served, by First Class United States Mail, Postage Prepaid, on the following counsel of record this 3rd day of July, 2012:

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Attorneys for Plaintiffs

A handwritten signature in black ink, appearing to read 'J.E. Fortman', is written over a horizontal line.

LATHROP & GAGE_{LLP}

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June 28, 2012

VIA FACSIMILE

Jonathan Edward Fortman
Law Office of Jonathan E. Fortman, LLC
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RE: Rivera, et al. v. Simpatico, et al.

Dear Mr. Fortman:

Based on a review of your blog postings, it appears that you have served a number of subpoenas to third-party witnesses in this matter. Despite our being entered as attorneys of record in this matter, we have to date not received any of those subpoenas. While we would assume that you understand your responsibilities under the Missouri Rules of Civil Procedure, we would take this opportunity to remind you that pursuant to Rule 57.09(c) is required that "the party serving the subpoena on a non-party shall provide a copy of the subpoena to every party as if it were a pleading." To refresh your understanding of the rules, Rule 43.01(c) provides that service of pleadings shall be made to all attorneys entered in a case by either delivery, leaving a copy at our office, by facsimile transmission, by electronic mail (assuming consent has been given), or by mailing a copy to the attorney at the attorney's last known address. Your failure to comply with these rules has prejudiced our client's abilities under Rules 57.09(c) and 56.01(c) to object to the scheduled depositions.

In addition to the subpoena and again based on the postings on your blog, it would appear that many of these subpoenas have been served outside the State of Missouri. Please provide to us the Miscellaneous Matters you have filed in each jurisdiction to allow issuance of subpoenas in foreign jurisdictions for this matter. Given your failure to comply with the relevant Rules, we demand that the documents be provided to our office by **noon on Friday, June 29, 2012.**



June 28, 2012
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Should you have any questions, please do not hesitate to contact me.

Very truly yours,

LATHROP & GAGE LLP

By:



Matthew A. Jacobson

MAJ/lms