UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
McALLEN DIVISION

ARACELY ZAMORA-GARCIA, et al., Petitioners/Plaintiffs,	)	C.A. No. M-05-331
v.	)	
MARC MOORE, et al., Respondents/Defendants.	)	

PLAINTIFFS' OPPOSED MOTION FOR CLASS CERTIFICATION

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Aracely Zamora-Garcia, Juana Zamora, Manuel Sandoval-Herrera, Irma Sandoval Ibarra Valencia, Adriana Echavarria, Jorge Luis Echavarria, Petra Carranza de Salinas, Miguel Rubio-Flores, Alberta Rubio, Norma Pena De Herrera, Isidro Herrera, Maria Francisca Arce Cedeno, Luis Alvarado-Narvaez, and Juan Larin-Ulloa (collectively, "Plaintiffs"), in their own names, and as representatives for the putative class, seek certification of plaintiff classes pursuant to Rules 23(a), (b)(2) and (b)(3) of the Federal Rules of Civil Procedure ("FRCP"), as set forth herein.

INTRODUCTION

Plaintiffs seek to bring class claims against both the Bonding Defendants[1] and the Federal Defendants. Plaintiffs' class claims against the Bonding Defendants arise out their systematic breaches of their uniform bonding contracts (the "Bond Contracts"). Plaintiffs' class claims against the Federal Defendants based on their systematic compromise and denial of immigration rights and their failure to provide constitutionally required notice of calls on immigration bonds.

First, Plaintiffs' class claims against the Bonding Defendants stem from their failure to provide notice of appearances requested by the Immigration and Naturalization Service ("INS") (now known as the Department of Homeland Security ("DHS")). The Bonding Defendants entered into uniform Bond Contracts with thousands of persons (known herein as "Indemnitors") seeking to secure the release of aliens detained by the INS/DHS.[2] In the Bond Contracts, the Bonding Defendants contractually agreed to post surety bonds with the INS/DHS for the release of the third-

[1] The "Bonding Defendants" are Aaron Federal Bonding Company ("Aaron Bonding") and two insurance companies on whose behalf and in whose names Aaron Bonding operated – Fairmont Specialty Insurance Company (f/k/a Ranger Insurance Company) and Stonington Insurance Company (f/k/a Nobel Insurance Company) (collectively, the "Insurers"). Aaron Bonding was the business name for Don Vannerson, who is now deceased. Michael Padilla is the independent executor of the Vannerson Estate and manages Aaron Bonding. Mr. Padilla, the Vannerson Estate, and Aaron Bonding are all referred to collectively herein.

[2] *See* Sixth Amended Petition for Writ of Habeas Corpus and Class Action Complaint ("SAC") ¶¶ 2, 36, 37. On October 11, 2006, Plaintiffs filed their Unopposed Motion for Leave to File Plaintiffs' Sixth Amended Complaint [Dkt. 108]. The Sixth Amended Complaint is attached to that motion as an exhibit.

party beneficiaries of these contracts – "Bonded Immigrants."[3] The Bonding Defendants charged Indemnitors – financially unsophisticated persons of limited education and limited incomes – exorbitant up-front fees equal to 40%-50% of the total amount of the bond for their services.[4]

The Bond Contracts require the Bonding Defendants to provide notice to ***both*** Indemnitors and Bonded Immigrants of all appearances requested by the INS/DHS.[5] The INS/DHS only provides notice of scheduled appearances for interviews or for deportation to the Bonding Defendants. Consequently, the Bonding Defendants' failure to provide notice essentially results in no notice at all. Moreover, notice of these appearances is critical to the Bonded Immigrants and Indemnitors because a Bonded Immigrant's failure to appear may result in the INS/DHS' determination that a bond breach has occurred.[6] After a bond breach, Indemnitors are obligated to pay the Bonding Defendants for the bond's face amount, less deposited collateral, plus any expenses the Bonding Defendants incur in attempting to apprehend the Bonded Immigrant.[7] In addition, a breach may cause the Indemnitors' collateral to be forfeited and may impair the Bonded Immigrant's ability to remain in the United States.[8]

Unfortunately, although the Bond Contracts require the Bonding Defendants to provide notice, they made it their uniform practice *not to notify* either Indemnitors or Bonded Immigrants – at least until after this lawsuit was filed when they began to provide notice in certain instances after

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[3] *See* SAC ¶¶ 2, 36, 37.

[4] *See* SAC ¶¶ 2, 37; Cuayahuitl Dep. at 35-37 (Ex. CC1). To avoid unnecessary burden on the Court, Plaintiffs refer herein to exhibits previously submitted in support of their prior briefing on class certification, rather than re-submit these same exhibits here. *See* Dkt. 93 (Exhibits CC1-20) and Dkt. 99 (Exhibits CC21-27). New exhibits CC28-CC38A are submitted herewith. If, however, the Court desires fresh copies of the previously submitted exhibits, Plaintiffs will gladly provide them to the Court.

[5] *See* SAC ¶ 46.

[6] *See* SAC ¶¶ 5, 38, 41, 45, 50. A "breach of the bond" or "bond breach" by the INS/DHS should not be confused with the Bonding Defendants' breaches of contract. When an immigrant released from detention on bond breaches the terms of the bond (by failing to appear before the INS/DHS whenever requested), the INS/DHS will "breach the bond" – meaning that the immigrant released under the bond is again subject to detention and that the collateral posted for the release of the immigrant is forfeited to the INS/DHS. As discussed in detail herein, the Bonding Defendants breach the Bond Contracts (as opposed to the bond itself) by failing to provide the appropriate notice of INS/DHS-scheduled appearances.

[7] *See* SAC ¶¶ 3, 40, 45.

[8] *See* SAC ¶¶ 3, 39, 40, 45.

December 2005.[9] Plaintiffs seek to certify a class of Indemnitors (the "Indemnitor Notice Class") to recover the up-front fees that they paid for notice that was never provided. Because the record amply demonstrates that the Bonding Defendants uniformly breach their Bond Contracts, certification of this class under FRCP 23(b)(3) is appropriate.

Second, the Bond Contracts obligate the Bonding Defendants to return the Indemnitors' collateral upon cancellation of the bond.[10] However, the Bonding Defendants, as a matter of practice, do not return the Indemnitors' collateral absent a demand. This wrongful retention of the collateral also constitutes a breach of the Bond Contracts. Plaintiffs seek to certify a class of Indemnitors whose collateral has been wrongfully retained by the Bonding Defendants after cancellation of bond (the "Indemnitor Collateral Class"). The Bonding Defendants have uniformly breached the Bond Contracts by systematically retaining collateral absent demand. Thus, Plaintiffs are entitled to certification of the Indemnitor Collateral Class pursuant to FRCP 23(b)(3).

Third, Plaintiffs seek to bring class claims for injunctive and declaratory relief against the Bonding Defendants on behalf of Bonded Immigrants still released pursuant to a bond posted by the Bonding Defendants (the "Bonded Immigrant Class"). The Bonded Immigrants' ability to remain in the United States will be at risk if the Bonding Defendants continue their practice of refusing to provide notice of DHS/INS appearances. Because Bonded Immigrants – third-party beneficiaries of the bonding contracts – removed from the United States will have no adequate remedy at law to redress the contractual breach by the Bonding Defendants, class-wide equitable relief is appropriate, as is certification of this class pursuant to FRCP 23(b)(2).

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[9] *See* SAC ¶¶ 5, 46, 47, 50, 55; *see also infra* pp. 5-12.

[10] When the Bonded Immigrant has complied with all requirements of his/her release, including appearing at all required appearances, the government "cancels" the bond and absolves the Bonding Defendants of any further obligation under the bond.

Fourth, Plaintiffs seek to bring class claims against the Federal Defendants based on their failure to provide constitutionally required notice of DHS-requested appearances where an immigrant or someone acting on the immigrant's behalf (an "Obligor") posts the full amount of the immigrant's bond directly with the DHS (which bond is known as a "cash bond"). In cash bond cases, where a written appearance request is returned undelivered to the DHS, the DHS fails to make any additional effort to provide notice of the requested appearance to either the Obligor or the immigrant, even where the immigrant had previously appeared at all prior hearings in her removal proceedings and whenever else requested.[11] Instead, the DHS sits idly by and allows the bond to breach, the Obligor to forfeit the amounts posted, and the immigrant's rights to be compromised.[12] The DHS' policy in this regard is uniform, and certification of Plaintiffs' proposed cash bond classes pursuant to FRCP 23(b)(2) is justified.

Fifth, Plaintiffs seek to bring class claims against the Federal Defendants for their failure to issue Orders of Supervision for immigrants released on bond and who have been or will be under a final order of deportation, exclusion, or removal, which order was not executed during the three-month removal period following its issuance, notwithstanding that the immigrant did not obtain a judicial stay of deportation during that period, or otherwise impede removal. Plaintiffs seek an injunction requiring that, upon a request by a class member, the Federal Defendants place the class member under an Order of Supervision. This Court previously ordered that the Federal Defendants grant this relief to individual Plaintiffs Garrido, Lucio, Torres, and Rodriguez in the predecessor action.[13] The Federal Defendants have refused to provide such relief to other similarly situated

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[11] *See* SAC ¶ 43.
[12] *See id.*
[13] *See* Memorandum Opinion and Order, *Zamora-Garcia v. Ridge,* Civ. A. M-O2-144 (Jan. 4, 2005) (Ex. J) [Dkt. 60].

immigrants "unless instructed by Court order"[14] and Plaintiffs now seek this relief on behalf of other named Plaintiffs, and on behalf of the members of the Supervision Class.

Because each of Plaintiffs' proposed classes satisfies FRCP 23, Plaintiffs request that this Court certify each of Plaintiffs' proposed classes.

FACTS

Although Plaintiffs need not prove the merits at this stage, the discovery taken to date confirms Plaintiffs' key allegation that the Bonding Defendants systematically breached the Bond Contracts by: (i) failing to provide the contractually promised notice; and (ii) failing to return collateral deposited with the Bonding Defendants upon a cancellation of the bond.

The Bonding Defendants' Uniform Contract Documents

When an Indemnitor enters into a Bond Contract to obtain a surety bond for a Bonded Immigrants' release, Aaron Bonding presents the Indemnitor with a pre-printed package of contract documents.[15] These pre-printed documents are uniform in every relevant respect from Indemnitor to Indemnitor.[16]

Among these pre-packaged documents is one entitled, "Terms and Conditions Under Immigration Bond."[17] These Terms and Conditions documents are uniform in all of the Bond Contracts.[18] The Bond Contracts executed in support of securing the release of Miguel Rubio, Manuel Sandoval, Petra Carranza de Salinas, and Aracely Zamora-Garcia are in the record.[19] Through discovery, Plaintiffs obtained copies of 63 random bond files from Aaron Bonding, 59 of

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[14] *See* Ex. L [Dkt. 64 at p.5].
[15] *See* Lopez Dep. at 51, 53, 61, 64-65, 67, 74 (Ex. CC2).
[16] *See* Lopez Dep. at 52, 53-54, 60, 62, 68; A. Gaeta Aff. ¶ 6 (Ex. CC3).
[17] *See* Lopez Dep. at 67; Cuayahuitl Dep. at 31-32 (Ex. CC1).
[18] *See* Lopez Dep. at 68; Cuayahuitl Dep. at 31-32; A. Gaeta Aff. ¶ 7.
[19] *See* Zamora-Garcia Bond File at BF-0000139 (Ex. CC4); Sandoval Bond File at BF-0000238 (Ex. CC5); Rubio Bond File at BF-0000274 (Ex. CC6); Salinas Bond File at BF-0000320 (Ex. CC7).

those files contained copies of the uniform Terms and Conditions document.[20] In no case was the Terms and Conditions document altered.[21]

Each of these Terms and Conditions documents obligated the Indemnitors to guarantee the appearance of the Bonded Immigrant whenever the INS/DHS requested:

> WHEREAS the undersigned [INDEMNITOR], whether one or more do now make application to AARON FEDERAL BONDING AGENCY of an Immigration Bond in the sum of $___ on behalf of [PRINCIPAL], in favor of the U.S. IMMIGRATION AND NATURALIZATION SERVICE, guaranteeing the faithful appearance of PRINCIPAL at any time, and from time to time, as the U.S. IMMIGRATION AND NATURALIZATION SERVICE may direct.[22]

In each of the Terms and Conditions documents, the Bonding Defendants agreed:

> PRINCIPAL and INDEMNITOR will be notified by AGENCY of all appearances requested by the U.S. IMMIGRATION AND NATURALIZATION SERVICE of which AGENCY receives notice.[23]

Within the context of the contract, this provision makes sense: if the Bonding Defendants do not provide notice of appearances requested by the INS/DHS, the Indemnitors cannot guarantee the appearance of the Bonded Immigrants. Each of the Indemnitors was required to pay an up-front, non-refundable fee of 40% to 50% of the total bond amount for the Bonding Defendants' services.[24]

The Bonding Defendants' Failure to Provide the Promised Notice

The INS/DHS does not contact Bonded Immigrants, their attorneys, or their Imdemnitors when it schedules an appearance for an interview or for deportation.[25] Instead, it sends a "Notice to

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[20] *See* T. Stone Aff. ¶ 3 (Ex. CC 8).
[21] *See id.*
[22] *See, e.g.,* Salinas Bond File at BF-0000320 (Ex. CC7).
[23] *See, e.g.,* Salinas Bond File at BF-0000320, ¶ 4.
[24] *See* Cuayahuitl Dep. at 35-37; Zamora-Garcia Bond File at BF-0000062; Sandoval Bond File at BF-0000250; Rubio Bond File at BF-0000303; Salinas Bond File at BF-0000343. *See also* SAC ¶¶ 2, 37, 46.
[25] *See* G. Stewart Dep. at 33-34, 36 (Ex. CC12).

Obligor to Deliver Alien" (Form I-340) ***only*** to the obligor on the bond, which, in the case of surety bonds, is the bond company.[26] If the Bonded Immigrant fails to appear before the INS/DHS as directed in the I-340, the INS/DHS may declare a breach of the immigrant's bond, which will likely lead to the Indemnitor's loss of collateral and the Bonded Immigrant's removal or deportation.[27]

Despite the obligation to provide notice of all appearances requested by the INS/DHS, the Bonding Defendants made it their uniform practice *not to provide notice*. There is not a scrap of documentary evidence in this case indicating that the Bonding Defendants fulfilled their obligations to provide notice under a single Bond Contract.

Log books: Eliud Salinas, Aaron Bonding's former manager, testified that, at least up until 2001, Aaron Bonding employees would record in log books whether the Bonded Immigrant and Indemnitor had been notified of the requested appearance.[28] Indeed, Salinas emphasized that Aaron Bonding employees performed this task regularly and faithfully.[29] Plaintiffs only recently obtained copies of Aaron Bonding's logbooks from 1999 to the present. ***The logbooks do not reflect a single instance in which Aaron Bonding provided notice to any Indemnitor or Bonded Immigrant.***[30]

Electronic bond files: The Bonding Defendants produced to Plaintiffs computer bond files, which contain additional information that is not in the hard-copy files. Although these electronic records contain dozens of columns recording a wealth of information about the

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[26] *See* SAC ¶ 42; Zamora-Garcia Bond File at BF-0000051 (including I-340 addressed only to surety); Sandoval Bond File at BF-0000217 (same); Rubio Bond File at BF-0000285 (same).

[27] *See* SAC ¶¶ 3, 39, 45, 47; G. Stewart Dep. at 40-41. Questioning by counsel for the Bonding Defendants indicates that they will rely on the existence of a 1-800 number immigrants can call to get updates on the status of their immigration cases. *See* Lopez Dep. at 129; Cuayahuitl Dep. at 69-70. This 1-800 number does not provide notice of appearance dates noticed in Notice to Obligor to Deliver Alien. Of the 63 bond files produced to plaintiffs in the predecessor action, 51 contained a Notice to Obligor to Deliver Alien. *See* T. Stone Aff. ¶ 7 (Ex. CC8). Calls to the 1-800 number demonstrated that the Immigration Court's automated system provided no information regarding appearances noticed in the Notices to Obligor to Deliver Alien. *See id.*

[28] *See* E. Salinas Dep. at 48-50 (Ex. CC29).

[29] *Id.*

[30] *See* T. Stone FRE 1006 Summary at ¶¶ 2-4 (Ex. CC28).

Indemnitors and the Bonded Immigrants, no column is dedicated to recording whether the Bonding Defendants provided notice of a DHS/INS appearance to anyone.[31] In fact, there are 10,345 bond contracts contained in the electronic files, but ***none*** of them reflect that Aaron Bonding provided notice to anyone on ***a single*** bond contract before December 21, 2005. There are, however, a few instances in which there was notice provided to either the Indemnitor or the Bonded Immigrant, but only after this lawsuit was filed.[32]

Hard copy bond files: Abby Lopez, the former record-keeper at Aaron Bonding, testified that if Aaron Bonding sent a letter to either the Bonded Immigrant or the Indemnitor, a copy of such a letter would be kept in the Bonded Immigrant's bond file.[33] None of the 63 random bond files produced in discovery contain any letter indicating that Aaron Bonding sent notice of receipt of a Notice to Obligor to Deliver Alien to a single Indemnitor or Bonded Immigrant.[34] None of the bond files indicate that any notice was sent by telephone, either.[35]

The deposition testimony also demonstrates that the Bonding Defendants implemented a practice of deliberately withholding notice to the Indemnitors and the Bonded Immigrants.

Laura Calderon Cuayahuitl worked at Aaron Bonding as a receptionist, bonding agent, in accounting, and in collections (where she was responsible for collecting fees or expenses from Indemnitors) from October 2001 until May 2005. She testified that if Aaron Bonding received a

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[31] *See* T. Stone FRE 1006 Summary ¶ 5.

[32] *See id.* The electronic records contain some vague notes regarding contacts with Indemnitors and Bonded Immigrants, and those notes may indicate that notice of appearances were provided to a handful of Indemnitors and Bonded Immigrants. However, none of these notes specifically indicate that notice was provided to ***both*** the Indemnitor and the Bonded Immigrant on a single contract (as is required by the bonding contracts), and ***all*** of these notes are dated on or after December 21, 2005.

That the Bonding Defendants may have begun to provide some of the notice required by the contracts in December 2005 likely reflects two facts. First, Ranger Insurance Company (now known as Fairmont Specialty Insurance Company) assumed responsibility for the day-to-day affairs of Aaron Bonding in 2005. *See* Lopez Dep. at 9, 105 (Ex. CC2). Second, Plaintiffs filed their Third Amended Complaint, specifically naming the Insurers as defendants, on September 30, 2005. The Insurers were both served shortly thereafter.

[33] *See* Lopez Dep. at 82.

[34] *See* T. Stone Aff. ¶ 4 (Ex. CC8).

[35] *See id.*

Notice to Obligor to Deliver Alien for deportation, no notice would be provided to the Bonded Immigrant, and, in fact, she was instructed to ***not*** provide such information to Bonded Immigrants who called in and asked for information regarding scheduled appearances:

> Q. And if the people called in and you – and the file or the computer indicated that there was a notice to deliver the alien into custody for deportation, would you provide that information to the person who called in?
>
> A. No.
>
> Q. Did indemnitors call in, as well as – I'm sorry. Did sureties call in as well as aliens?
>
> A. To check in, no. Sometimes they would call just to see if they were making – if the alien was making the payments or not. But most of the time it was just the alien calling in.
>
> Q. Did anyone instruct you not to provide information regarding a notice for deportation, such as Exhibit 21, to the aliens when they would call in?
>
> A. Yeah. I mean, it was -- our supervisor would just tell us, you know, [t]his is the way it works. And if they have a court, you can tell – you tell them, you know, so they can go. But if they have a deportation, you just get their information and pass it on to the pickup department.
>
> Q. So if someone called in and asked if they had any appearances scheduled and you saw that they had a notice to appear for a deportation, you would not provide them with that information?
>
> A. No.[36]

Abigail Lopez worked for Aaron Bonding from 1999 to September 2005.[37] For most of this time Lopez served as a secretary to Don Vannerson and Max Christensen.[38] Lopez was responsible for updating and maintaining the Bonded Immigrants' files, including updates regarding information found in the Notices to Obligor to Deliver Alien.[39] According to Eliud

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[36] Cuayahuitl Dep. at 68-69; *See also* Cuayahuitl Dep. at 66:6-13 (describing Aaron Bonding's contacts with Indemnitors and Immigrants after entering the bonding contracts, which does not include contacts with the Indemnitors to provide notice of surrender dates); 72:11-21 (describing Aaron Bonding's obligations under the contracts, which did not include providing notice of surrender dates); 73:15-18 (testifying that she failed to inform the Indemnitors that Aaron Bonding was not going to provide notice of surrender dates).

[37] *See* Lopez Dep. at 8-10.

[38] *Id.* at 10-12.

[39] *See id.* at 13-14, 76-77.

Salinas, Aaron Bonding's former manager, Lopez was responsible for providing notice of appearances to the Bonded Immigrants and the Indemnitors:

> Q. And so at some point Abby Lopez took over the responsibility of providing notice of deportation dates to indemnitors and to aliens; is that right?
>
> A. Yes. Correct.
>
> Q. And if notice was provided to the indemnitors or the aliens, Ms. Lopez would be the one who would have done that. Is that right?
>
> [Objection.]
>
> A. Yes.[40]

However, Lopez made clear in her deposition that she did not provide notice to the Bonded Immigrant of the appearances requested in the Notices to Obligor to Deliver Alien, nor did anyone else at Aaron Bonding:

> Q. So your understanding was that INS would send copies of the notice to obligor to deliver alien directly to the alien, if they had the correct address for the alien?
>
> A. Yes.
>
> Q. And for that reason you did not provide notice to the alien?
>
> [Objection by counsel.]
>
> A. Right.
>
> Q. (By Mr. King) To your knowledge did anyone else at Aaron Bonding provide notice of receipt of a notice to obligor to deliver alien document to the alien?
>
> A. No.[41]
>
> Q. (By Mr. King) Turn the page to 285 [Bates No. BF-0000285 of Depo. Ex. 28]. This is the notice to obligor to deliver alien for Mr. Rubio Flores. Is that correct?
>
> A. Yes.
>
> Q. And this is the document – a copy of the document that we were discussing earlier that Aaron Bonding would not provide notice of to the alien, correct?
>
> A. Right.[42]

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[40] E. Salinas Dep. at 63:23-64:7.
[41] *Id.* at 79-80.

Eliud Salinas testified that after Aaron Bonding's front office received a Notice to Obligor to Deliver Alien, the alien's file was passed along to him, but he would not provide any notice himself (at least during the class period).[43] Instead, he would pass the file to a bounty hunter. The bounty hunters assigned to recover the Immigrants would not provide notice to the Immigrants. Instead, the bounty hunters simply tried to apprehend the aliens prior to their surrender date:

> Q. Okay. So when you received the notice to obligor to deliver alien for deportation, what further steps did you take to contact the aliens and/or the indemnitors?
>
> A. I passed it on [to] . . . A bounty hunter. Recovery.
>
> Q. So the recovery agent would attempt to go out and apprehend at some point the alien. Is that correct?
>
> A. Correct.
>
> Q. Okay. Would the bounty hunter give the alien a call to let them know about the deportation date?
>
> A. At this time?
>
> Q. Yes.
>
> A. It was – they tried to apprehend him. And they didn't, so they were still looking for him. . . .
>
> Q. Okay. Why would the—so the bounty hunter would at some point just go out to where they believed the alien was and try to get him? . .
>
> A. Correct.[44]

Named plaintiffs: The record in this case is consistent with the named plaintiffs' experience. Aaron Bonding failed to provide the named plaintiffs with any notice of appearances scheduled by the INS/DHS, of which Aaron Bonding received notice via Notices to Obligor to Deliver Alien.[45]

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[42] *Id.* at 98-99; *See also* Lopez Dep. at 62:16-63:5 (testifying with regard to Aaron Bonding's responsibility to provide notice of surrender dates, once the parties enter the bonding contracts, "everybody is on their own"), 134:3-21 (Aaron Bonding kept no records of affirmative attempts to contact the Immigrants and the Indemnitors because Aaron Bonding never made such attempts, other than to try to collect payments)

[43] *See id.*

[44] *See id.*

[45] *See* SAC ¶¶ 69, 74, 84; I. Sandoval Int. Resp. No. 8 (Ex. CC22); I. Sandoval Decl. (CC10); M. Sandoval Int. Resp. No. 9 (Ex. CC30); M. Sandoval Decl. (CC9); M. Rubio Int. Resp. No. 9 (Ex. CC31); Zamora-Garcia Int. Resp. No. 10 (Ex. CC39); A. Rubio Int. Resp. No. 9 (Ex. CC32).

The Bonding Defendants' failure to provide notice of INS/DHS-scheduled appearances is consistent with their stated understanding of their responsibilities under the Bond Contracts. Aaron Bonding admits that it believes the Bond Contracts do not require it to provide notice of a DHS call on an immigrant's bond to either the Bonded Immigrant or the Indemnitors.[46] Believing that they have no obligation to provide notice, it is no wonder that they do not do so.

The Indemnitors and the Bonded Immigrants are largely poor and financially unsophisticated.[47] Many cannot read or write English, as evidenced by the fact that most of the contract documents are produced to the Indemnitors in English and Spanish. These facts make the Bonding Defendants' treatment of the Bonded Immigrants and the Indemnitors that much more unconscionable.

The Bond Files

The hard copy bond files maintained by the Bonding Defendants provide a substantial amount of useful information that will simplify the management and administration of Plaintiffs' surety bond claims on a class-wide basis, including:

- Date of the bond contract. *See, e.g.,* Zamora-Garcia Bond File at BF-0000162.
- Amount of initial fee. *See* Lopez Dep. at 15; Zamora-Garcia Bond File at 0000062.
- Contact information for the Indemnitor and the Bonded Immigrant. *See* Lopez Dep. at 20-21, 27, 30; Zamora-Garcia Bond File at BF-0000127.
- Whether Aaron Bonding received a Notice to Obligor to Deliver Alien. *See* A. Lopez Dep. at 77-78.
- Whether the bond was breached, cancelled, or still outstanding. *See* Lopez Dep. at 15, 27; Zamora-Garcia Bond File at BF-0000045; Rubio Bond File at BF-0000289.
- Whether Aaron Bonding sent written notice of a DHS-requested appearance to the Bonded Immigrant or the Indemnitor. *See* Lopez Dep. at 82.

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[46] *See* Defendants' Responses to Plaintiffs' Second Set of Requests for Admission to Defendant Estate of Don Vannerson, As Sole Proprietor of Aaron Federal Bonding Agency (May 15, 2006) at Resps. 20-23 (Ex. CC13).

[47] *See* Lopez Dep. at 35-36. *See also* Receiver's Response to Ranger Insurance Company's Motion to Reconsider, or, in the Alternative, Motion for New Trial on Court's Order of April 27, 2005, *In re Don Vannerson,* No. 345,829 (Harris County Probate Court) (June 2, 2005) (arguing that "[m]any Indemnitors were financially unsophisticated") (CC14).

In addition, Aaron Bonding maintained much of this information, and more, in a searchable, sortable computer database.[48]

The Bonding Defendants' Failure to Return Collateral Upon Cancellation of the Bond

In addition to requiring notice of INS/DHS appearances, each Bond Contract contains a document entitled "Promissory Note" (or "Pagare" or "Nota de Pago" in Spanish), which obligates the Indemnitors to deposit collateral worth 50% to 60% of the total bond amount with the Bonding Defendants.[49] The "Promissory Note" document also requires the Bonding Defendants to return the collateral posted with the Bonding Defendants to the Indemnitors in the event the Federal Defendants cancel the bond:

> Monies will be deposited into a collateral fund to be returned upon the completion of Immigration Case No. ____ Defendant ____ and receipt of Immigration Bond Cancellation Form I-391.[50]

The Bond Contract contains no requirement that the Indemnitors contact the Bonding Defendants to seek a return of the collateral. Such a requirement would not make sense as the document that triggers the Bonding Defendant's obligation to refund the collateral – the I-391 sent by the Federal Defendants – is addressed to the Bonding Defendants, ***not*** to the Indemnitor or the Bonded Immigrant.[51] In many cases (as in the case of Alberta Rubio), the Indemnitor may never know that the immigration bond was cancelled and that the collateral is available for collection, absent notice. Unfortunately, the Bonding Defendants, as a matter of practice, never contact the Indemnitors to advise them that they are entitled to return of their collateral. Instead, the Bonding

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[48] *See* Lopez Dep. at 21, 24-27, 30-33; T. Stone FRE 1006 Summary ¶¶ 2, 5.

[49] *See* Cuayahuitl Dep. at 60-61 (Ex. CC1); Zamora-Garcia Bond File at BF-0000141 (Ex. CC4); Sandoval Bond File at BF-0000235-36 (Ex. CC5); Salinas Bond File at BF-0000322 (Ex. CC7). The Rubio Bond File does not contain a copy of the Promissory Note document, but former Aaron Bonding employees made clear that each Indemnitor (like Ms. Rubio) signed a unifrom Promissory Note. *See* Cuayahuitl Dep. at 34-36 (acknowledging that the Promissory Note document was used in every bond contract on which the deponent worked); Lopez Dep. at 71 ("Q: Did all the indemnitors sign promissory notes in connection with the surety agreements? A: Yes.").

[50] Salinas Bond File at BF-322.

[51] *See* Rubio Bond File at BF-0000289.

Defendants wrongfully retain the collateral, recognizing that the unsophisticated Indemnitors are unlikely to realize that they are entitled to its return.[52]

PROPOSED CLASSES[53]

This case presents an intertwined set of claims by seven classes of plaintiffs, broken down by the applicable defendants and distinctions in the relief each group is seeking. The first set of classes brings claims against the Bonding Defendants for their systematic breaches of contract. The second set of classes brings claims against the Federal Defendants for their systematic denial of immigration and constitutional rights.

Classes Bringing Claims Against the Bonding Defendants – the "Surety Bond Classes"

The Indemnitor Notice Class: Plaintiffs Irma Sandoval and Alberta Rubio seek to represent a class of the following Indemnitors in bringing claims for money damages against the Bonding Defendants:

> (a) those who served or are serving as Indemnitors on a surety bond posted by a Bonding Defendant to secure the release of a Bonded Immigrant detained by the Federal Defendants, and
>
> (b) who have fully paid their up-front, non-reimbursable fees to the Bonding Defendants pursuant to the terms of the bonding contracts, and
>
> (c) where the Bonding Defendant received notice that the DHS has scheduled an appearance for the Bonded Immigrant before it, on or after April 16, 1998, and where the Bonding Defendant failed to provide notification of the scheduled appearance to either the Indemnitor or the Bonded Immigrant.

The Indemnitor Collateral Class: Plaintiff Alberta Rubio seeks to represent a class of the following Indemnitors in bringing claims for money damages against the Bonding Defendants:

> (a) those who have served as Indemnitors on a surety bond posted by a Bonding Defendant to secure the release of a Bonded Immigrant detained by the Federal Defendants, and

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[52] *See* Cuayahuitl Dep. at 63:7-12 (CC1); Lopez Dep. at 118:19-119:8 (CC2).

[53] A table listing each of the classes, the causes of action pursued by each, and the relief sought by each is attached hereto as Exhibit CC34.

(b) where the Bonded Immigrant's bond has been cancelled by the Federal Defendants, and

(c) where the Bonding Defendants have failed to return any collateral, net of fees validly charged under the bonding contracts, deposited with the Bonding Defendants to either the Indemnitor or the Bonded Immigrant on the bonding contract.

The Bonded Immigrant Class: Plaintiff Petra Carranza de Salinas seeks to represent a class of the following Bonded Immigrants in bringing claims for injunctive and declaratory relief against the Bonding Defendants:

(a) those who have been released from custody of the Federal Defendants pursuant to surety bonds posted by the Bonding Defendants, and

(b) where the bond is still outstanding.

Classes Bringing Claims Against the Federal Defendants – the "Federal Classes"

The Supervision Class: Plaintiffs Zamora-Garcia, Manuel Sandoval, Salinas, Cedeno, Norma Pena de Herrera, Isidro Herrera, and Alvarado-Narvaez seek to represent the class of persons who are or will be under removal proceedings, who are not physically detained by the Federal Defendants, and who have been or will be under a final order of deportation, exclusion, or removal, which has not been or will not be executed for three months or more after its issuance, notwithstanding that there was no judicially ordered stay of deportation, exclusion or removal during that three month period, and to whom the Federal Respondents have not issued Orders of Supervision, or have subsequently revoked or refused to renew previously issued Orders of Supervision.

Obligor Cash Bond Class: Plaintiff Adriana Echavarria seeks to represent, as the Obligor Cash Bond Class

(a) all Obligors who posted an immigration Cash Bond,

(b) which bond was breached on or after July 28, 1998, following a demand made on the Obligor which was returned undelivered to the Federal Defendants, and

(c) where the Immigrant appeared at all hearings and other required appearances of which s/he received appropriate notice, and

(c) where the Federal Defendants did not make additional efforts to provide actual notice of the demand to the Obligors, as would be required by *Jones v. Flowers,* 126 S. Ct. 1708 (2006).

Plaintiff Adrianna Echavarris seeks injunctive and declaratory relief on behalf of herself and the Obligor Cash Bond Class, requiring the Federal Defendants to reinstate the breached bonds, (if proceedings are ongoing), or reinstate and cancel the breached bonds (if proceedings have been completed).

Immigrant Cash Bond Class A: Plaintiff Jorge Echavarria seeks to represent, as the Immigrant Cash Bond Class A,

(a) all Immigrants released on a Cash Bond,

(b) which bond was breached on or after July 28, 1998, following a demand made on the Obligor which was returned undelivered to the Federal Defendants, and

(c) where the Immigrant appeared at all hearings and other required appearances of which s/he received appropriate notice, and

(d) where the Federal Defendants did not make additional efforts to provide actual notice of the demand to the Obligors, as would be required by *Jones v. Flowers,* 126 S. Ct. 1708 (2006).

Plaintiff Jorge Echavarria seeks injunctive and declaratory relief on behalf of himself and the Immigrant Cash Bond Class A, requiring the Federal Defendants to reinstate the breached bonds, (if proceedings are ongoing), or reinstate and cancel the breached bonds (if proceedings have been completed).

Immigrant Cash Bond Class B: Plaintiff Juan Larin-Ulloa seeks to represent, as the Immigrant Cash Bond Class B, all Immigrants released on a Cash Bond that is still outstanding, and all Immigrants who will, in the future, be released on cash bonds. Plaintiff Juan Larin-Ulloa seeks injunctive and declaratory relief on behalf of himself and the Immigrant Cash Bond Class B, requiring the Federal Defendants to make efforts to provide notice of a demand on the bond consistent with *Jones v. Flowers,* 126 S. Ct. 1708 (2006).

ARGUMENT

I. PLAINTIFFS' PROPOSED SURETY BOND CLASSES SATISFY FRCP 23(a).

A district court has wide discretion in determining whether to certify a class, and if the district court considers the appropriate Rule 23 criteria in certifying a class, then it may only be reversed on appeal for an abuse of discretion.[54] Although this Court may go beyond the pleadings to determine whether a class may be certified,

> [t]he issue on a certification motion is not whether the plaintiffs will ultimately prevail on the merits of their claims, or the strengths and weaknesses of the evidence as to defenses. Rather, the court must examine the nature of the evidence that will be used to establish the claims and the defenses, to determine whether the evidence can be presented on a class-wide basis.[55]

As the Supreme Court has held, there is "nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action. Indeed, such a procedure contravenes the Rule."[56] Under FRCP 23, a case qualifies for class certification if a plaintiff demonstrates that the proposed class satisfies all of the requirements of Rule 23(a) – numerosity, commonality, typicality, and adequacy of representation – and at least one of the provisions of Rule 23(b). Here, Plaintiffs' proposed Surety Bond Classes all satisfy the Rule 23(a) requirements. The Indemnitor Notice Class and the Indemnitor Collateral Class satisfy the additional requirement of Rule 23(b)(3) – predominance and superiority. The Bonded Immigrant Class satisfies the Rule 23(b)(2) requirements for classes seeking injunctive and declaratory relief.

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[54] *See Jenkens v. Raymark Indus., Inc.*, 782 F.2d 468, 471-72 (5th Cir. 1986); *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 624 (5th Cir. 1999).
[55] *Colindres v. Quietflex Manu.*, 235 F.R.D. 347, 369 (S.D. Tex. 2006).
[56] *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1974).

A. The Members of the Surety Bond Classes Are Sufficiently Numerous.

Plaintiffs meet FRCP 23(a)'s numerosity requirement by demonstrating the "the class is so numerous that joinder of all members is impracticable." Any class consisting of more than forty members is presumptively sufficiently numerous.[57]

Here, joinder of all of the members of any of the proposed classes would be impracticable. The Bonding Defendants have admitted that there are nearly 8,000 bond files for surety bonds issued by Aaron Bonding for the Insurers after May 7, 1998.[58] The Bonding Defendants received Notices to Obligor to Deliver Alien in most cases. In the predecessor action, Aaron Bonding produced 63 random bond files to Plaintiffs. Of these 63 bond files, a Notice to Obligor to Deliver Alien appeared in 51 of them.[59] The files for named plaintiffs Manuel Sandoval, Zamora-Garcia, and Miguel Rubio all contained a Notice to Obligor to Deliver Alien in the bond files of Plaintiffs.[60] Because the Bonding Defendants never provided notice of DHS-requested appearances to either Indemnitors or the Bonded Immigrants prior to December 2005, there are thousands of putative class members in the Indemnitor Notice Class.

Moreover, the number of Plaintiffs in the Indemnitor Collateral Class will number in the hundreds (if not thousands), as well. According to the Bonding Defendants' computer bond files, since April 16, 1998, 3423 bonds were cancelled yet collateral appears to have been returned in only 324 cases.[61] The Indemnitors on bond contracts where collateral was not returned after a cancellation of the bond are too numerous to join.

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[57] *See Mullen,* 186 F.3d at 624.
[58] *See* R. Klimaszewski Aff. at 1 (Apr. 7, 2006) (CC16).
[59] *See* T. Stone Aff. at ¶ 6 (Ex. CC8).
[60] *See* Zamora-Garcia Bond File at BF-0000051 (Ex. CC4); Sandoval Bond File at BF-0000217 (Ex. CC5); Rubio Bond File at BF-0000285 (Ex. CC6).
[61] *See* T. Stone FRE 1006 Summary at ¶¶ 10, 11 (Ex. CC28).

The Bonded Immigrant Class comprises all of the Bonded Immigrants associated with outstanding surety bonds posted by the Bonding Defendants. According to the Bonding Defendants, the number of members of these classes is far too numerous to join.[62]

B. There Are Questions of Law or Fact Common to the Classes.

Plaintiffs meet the commonality requirement simply by demonstrating that "there are questions of law or fact common to the class."[63] "The test for commonality is not demanding and is met 'where there is at least one issue, the resolution of which will affect all or a significant number of the putative class members.'"[64] The absent class members' interests need not be identical to meet the commonality requirement.[65]

Numerous questions of law and fact common to the members of the Indemnitor Notice Class, the Indemnitor Collateral Class, and the Bonded Immigrant Class are present. At least two questions are common to all classes' claims against the Bonding Defendants:

1. Whether Texas law applies to Plaintiffs' breach of contract claim; and
2. Whether the Insurers can be required to answer for Aaron Bonding's conduct.

In addition to the two questions listed above, the following questions will be common to the Indemnitor Notice Class:

1. Whether the bonding contracts required the Bonding Defendants to provide notice of DHS-scheduled appearances directly to the Bonded Immigrants;
2. Whether the bonding contracts required the Bonding Defendants to provide notice of DHS-scheduled appearances directly to the Indemnitors;
3. Whether the Bonding Defendants failed to provide notice to the Bonded Immigrants;
4. Whether the Bonding Defendants failed to provide notice to the Indemnitors;

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[62] *See* Verification of Rick Klimaszewski, *In re Don Vannerson,* No. 345,829 (Harris County Probate Court) (July 27, 2004) at PTF-VAN 00563 (indicating that Aaron Bonding had 1,450 bonds outstanding in July 2004) (Ex. CC20).
[63] FRCP 23(a).
[64] *Mullen*, 186 F.3d at 625 (citing *Lightbourn v. County of El Paso,* 118 F.3d 421, 426 (5th Cir.1997)).
[65] *See Johnson v. Am. Credit Co. of Georgia,* 581 F.2d 526, 532 (5th Cir. 1978).

5. Whether the failure to provide notice to both the Bonded Immigrants and the Indemnitors constituted a breach of the bonding contracts;
6. Whether the failure to provide notice caused damage to the Indemnitors; and
7. Whether the breach entitles the Indemnitors to a return of all or a portion of the non-refundable fees paid for the bond.

The questions common to the Bonded Immigrant Class will include many of the same common questions listed above, plus the following

1. Whether the Bonded Immigrants are third party beneficiaries of the bonding contracts;
2. Whether, absent equitable relief, the Bonding Defendants will likely continue to fail to provide the contractually required notice; and
3. Whether the Court can order future injunctive relief for the Bonding Defendants' future anticipated breach of contract.

Finally, the following questions will be common to the claims of the members of the Indemnitor Collateral Class:

1. Whether the Bonding Defendants are required by the bonding contracts to return collateral to the Indemnitors in the event the bond was canceled;
2. Whether the failure to return collateral to the Indemnitors upon the cancellation of the bond constituted a breach of the bonding contracts; and
3. Whether the failure to return collateral damaged the Indemnitors.

The answer to these questions will not vary from class member to class member, given the uniform contracts, uniform conduct, and uniform governing standards. As in most class actions, the commonality requirement is met here.

C. The Claims of the Class Representatives Are Typical of the Class.

"Like commonality, the test for typicality is not demanding. It 'focuses on the similarity between the named plaintiff's legal and remedial theories and the theories of those whom they purport to represent.'"[66] Typicality requires only that "the class representative's claims have the

[66] *Mullen,* 186 F.3d at 625 (*citing Lighbourn,* 118 F.3d at 426).

same essential characteristics of those of the putative class. If the claims arise from a similar course of conduct and share the same legal theory, factual differences will not defeat typicality."[67]

The similarities between the named Plaintiffs' claims and the putative class of Surety Bond claimants are apparent. With respect to the Indemnitor classes, Irma Sandoval and Alberta Rubio are both Indemnitors who have contracted with the Bonding Defendants to secure the release from INS detention of a Bonded Immigrant (Manuel Sandoval and Miguel Rubio, respectively).[68] The Bonding Defendants received notices of appearance for both Manuel Sandoval and Miguel Rubio but failed to relate these notices to any of the Sandovals or the Rubios.[69]

With respect to the Bonded Immigrant Class, Plaintiff Salinas is currently released from DHS detention pursuant to a surety bond posted by the Bonding Defendants.[70] She currently faces the risk that the Bonding Defendants will not forward to her notice of a DHS-requested appearance.[71] Her claim for prospective relief is typical of other Bonded Immigrants released on surety bonds who face the risk that the Bonding Defendants will not forward notice of a DHS-requested appearance.

Alberta Rubio's claim is typical of the members of the Indemnitor Collateral Class. Even though the Federal Defendants cancelled Miguel Rubio's bond, releasing the Bonding Defendants of any obligation to pay on the bond, Aaron Bonding and Ranger (the surety on Mr. Rubio's bond) have failed to return Alberta Rubio's collateral.[72] Moreover, the Bonding Defendants' records regarding Mr. Rubio's bond specifically acknowledge that Alberta Rubio is owed a return of a

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[67] *James v. City of Dallas,* 254 F.3d 551, 571 (5th Cir. 2001) (citation and internal quotation marks omitted).
[68] *See* Sandoval Bond File at BF-0000238; Rubio Bond File at BF-0000274.
[69] *See* Sandoval Bond File at BF-0000217; Rubio Bond File at BF-0000285; SAC ¶¶ 69,74.
[70] *See* Salinas Bond File at BF-0000334-338.
[71] *See* SAC ¶ 81.
[72] *See* SAC ¶ 78; Rubio Bond File at BF-289.

portion of the collateral she posted.[73] Like the other Indemnitor Collateral Class members, Ms. Rubio suffered harm from the Bonding Defendants' policy of retaining collateral.

D. The Named Plaintiffs and Class Counsel Will Adequately Represent the Interests of the Surety Bond Classes.

Rule 23 also imposes the requirement that the class representative "fairly and adequately protect the interest of the class."[74] The court must consider both the adequacy of class counsel and the adequacy of the named class representatives.[75]

1. Class Counsel Is Adequate.

Rule 23(g), adopted in 2003, preserves the long-standing requirement that class counsel "must fairly and adequately represent the interests of the class."[76] Rule 23(g) sets forth specific factors this Court must consider in determining whether to appoint an attorney or attorneys to serve as class counsel:

- the work counsel has done in identifying or investigating potential claims in the action,
- counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action,
- counsel's knowledge of the applicable law, and
- the resources counsel will commit to representing the class.[77]

Here, Plaintiffs propose that William T. Reid, IV, and J. Benjamin King of Diamond McCarthy, LLP –with the support of other Diamond McCarthy attorneys and staff – serve as class counsel for the Surety Bond Classes. The attorneys from Diamond McCarthy routinely handle complex civil litigation matters – including matters involving claims of fraud, negligent misrepresentation, breach of contract, and unjust enrichment. Diamond McCarthy has the

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[73] *See* Rubio Bond File at BF-0000279 ("Need to Refund. To: Alberta Rubio, $2500").
[74] FRCP 23(a).
[75] *See, e.g., Recinos-Recinos v. Express Forestry, Inc.*, 233 F.R.D. 472, 480 (E.D. La. 2006). *See also* FRCP 23(g) (setting forth specific requirements and considerations for the appointment of class counsel).
[76] *Id. See also In re Universal Access, Inc., Secs. Litig.*, 209 F.R.D. 379, 386 (E.D. Tex. 2002) (class counsel must be "qualified, experienced and able to vigorously conduct the proposed litigation").
[77] FRCP 23(g)(1)(C)(i).

resources to diligently prosecute the class' claims, and they will use whatever resources are necessary to do so.[78]

Plaintiffs also propose that Tucker Ronzetti of the Kozyak Tropin & Throckmorton ("KTT") law firm in Coral Cables, FL, represent the Surety Bond Classes as co-counsel. Tucker Ronzetti specializes in class action litigation. An adjunct professor of the University of Miami School of Law teaching a seminar on class action litigation, Mr. Ronzetti, with other members of KTT, has served as class counsel in *In re Managed Care Litigation*, MDL No. 1334 (S.D. Fla.), *Lipuma v. American Express Co.*, no. 04-20314-CIV-Altonaga (S.D. Fla.), *Smith v. First Union National Bank*, no. 00-4485-CIV-Marra (S.D. Fla.), *Borcea v. Carnival Corp.*, no. 05-22968-CIV-Cooke (S.D. Fla.), and *Hollinger v. Keybank National Ass'n*, no. 03-08-4925 (Ohio Ct. Cmn. Pleas), among other cases.[79]

In addition, Plaintiffs propose that Elisabeth S. Brodyaga represent the Surety Bond Classes. Ms. Brodyaga has successfully prosecuted two class actions in the Southern District of Texas, one before this Court.[80] Ms. Brodyaga has over twenty-five years of experience in immigration law, which is closely intertwined with the claims of the Surety Bond Classes.[81] In addition, Ms. Brodyaga has received national recognition for her work on behalf of immigrants, receiving awards from the American Immigration Lawyers Association and the National Lawyers Guild, as well as the Lexis-Nexis Daniel Levy Memorial Award.[82] Her commitment to the rights of immigrants is unquestionable, as is her resolve to fairly and adequately advance the rights of the proposed class members.

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[78] *See* King Decl. ¶ 7 (Ex. CC18).
[79] *See* Ronzetti Decl. at ¶¶ 4-5 (Ex. CC33).
[80] *See* Brodyaga Decl. (Ex. CC19).
[81] *See id.*
[82] *ee id.*

2. The Class Representatives Are Adequate.

As a general rule, "class representatives are not required to have a complete knowledge of the case."[83] They do not need to be "legal scholars" and are "entitled to rely on counsel."[84] The only requirement imposed on class representatives is that they must "possess a sufficient level of knowledge and understanding to be capable of 'controlling' or 'prosecuting' the litigation."[85] The *Berger* adequacy standard must be applied in light of the facts of each case and in light of the characteristics of a particular body of class members.[86]

Irma Sandoval and Alberta Rubio seek to represent the Indemnitor Notice Class, and they have demonstrated that they meet the adequacy standard.[87] Ms. Sandoval demonstrated in her deposition and her affidavit that she understands the "action's factual underpinnings."[88] Her knowledge amounts to more than just the knowledge that she was "involved in a bad business deal."[89] Ms. Sandoval's deposition and declaration show that she:

- Knew that Aaron Bonding had been the bond company for her father. *See* I. Sandoval Dep. at 13-14 (Ex. CC21); I. Sandoval Decl. at ¶ 2 (Ex. CC10).
- Believed Aaron Bonding would provide her father with notice of court dates by mail. *See* I. Sandoval Dep. at 20, 23; I. Sandoval Decl. at ¶ 4.

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[83] *See Lehocky v. Tidel Techs.*, 220 F.R.D. 491, 503 (S.D. Tex. 2004) *citing Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52, 62 (2d Cir. 2000); *In re Firstplus Fin. Group, Inc. Sec. Litig.*, No. 3:98-CV-2551-M, 2002 WL 31415951, at *2-3 (N.D. Tex. Oct. 23, 2002) (Lynn, J.)).

[84] *Berger v. Compaq Comp. Corp.*, 257 F.3d 475, 483 (5th Cir. 2001), *clarified on rehg. en banc*, 279 F.3d 313 (5th Cir. 2002).

[85] *Id.* at 482-83.

[86] *See* 7 WRIGHT AND MILLER § 1765 ("what constitutes adequate representation is a question of fact that depends on the circumstances of each case"); *Apanewicz v. Gen. Motors Corp.*, 80 F.R.D. 672 (E.D. Pa. 1978) (same). *See, e.g., Morris v. Transouth Fin. Corp.*, 175 F.R.D. 694, 698 (M.D. Ala. 1997) (ruling that "unsophisticated consumers" who sued a finance company and who did not necessarily understand the "intricacies of finance" or have intimate understanding of their claims could serve as class representatives); *Heastie v. Community Bank of Greater Peoria*, 125 F.R.D. 669, 677 (N.D. Ill. 1989) (refusing to require proposed class plaintiffs to demonstrate sophistication where defendant "targeted these consumers partly *because* they were unsophisticated"); *Recinos-Recinos*, 233 F.R.D. at 480.

[87] *See* SAC at ¶ 21.

[88] *Ogden v. AmeriCredit Corp.*, 225 F.R.D. 529, 533 (N.D. Tex. 2005) (considering the awareness of facts giving rise to the lawsuit as one of the factors in the adequacy analysis).

[89] *Id.* at 534.

- Remembered Aaron Bonding representative telling her that she would receive half of her fee back if her father showed up for his appointments. *See* I. Sandoval Dep. at 35-36; I. Sandoval Decl. at ¶ 2.
- Knew that she was responsible to making sure her father appeared for his appointments. *See* I. Sandoval Dep. at 19.

Additionally, in her interrogatory responses Ms. Sandoval stated that she believed Aaron Bonding would fulfill all of its promises in the contract and that Aaron Bonding would let her know of every appearance requested so that she could make sure that her father appeared.[90] She also demonstrated knowledge of the basis for her legal claims by stating that she wants to recover the money she paid to post the bond because Aaron Bonding did not notify her or her father of his appointment with INS.[91]

Ms. Sandoval has also demonstrated that she is an active participant in this litigation. She has participated in the preparation of interrogatory responses and a declaration in the support of her claims. She timely appeared at the deposition noticed in this case,[92] and looks forward to testifying before the court at an evidentiary hearing, as necessary. During the deposition, Ms. Sandoval even testified that she would be willing to travel to Houston to pursue her claims, if necessary.[93] Ms. Sandoval has also attended at least one hearing in this case, and testified that she regularly kept in contact with class counsel, Lisa Brodyaga, about this litigation.[94]

Alberta Rubio exemplifies the proposed class members' vulnerability. She paid Aaron Bonding $4,000 on a $3,000 bond to secure the release of her son, Plaintiff Miguel Rubio.[95] Although Ms. Rubio is an unsophisticated plaintiff, she appeared promptly for her deposition, and

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[90] *See* I. Sandoval Interrog. Resp. No. 6 (Ex. CC22).
[91] *See* I. Sandoval Dep. at 36 (CC21).
[92] In fact, Ms. Sandoval and her father, Manuel Sandoval traveled to the deposition cite in McAllen, which is an hour and a half away from their current residence, and spent almost 10 hours at the offices where the depositions were being taken. Ms. Sandoval's actions show dedication to the pursuit of this class action.
[93] *See* I. Sandoval Dep. at p. 44.
[94] *Id.* at 45.
[95] *See* Rubio Bond File at BF268, 304 (Ex. CC6).

she knows she is attempting to recover her money from the bond company.[96] Moreover, she understands that she is attempting to represent the interests of people like her and that she has a responsibility to protect their interests, and she has had frequent meetings with counsel regarding her case.[97]

Ms. Salinas seeks to represent the Bonded Immigrant Class – those immigrants currently released from detention on a bond issued by Aaron Bonding. *See* SAC ¶ 23. She has demonstrated personal knowledge of the facts that give rise to her claim:

- Aaron Bonding is a defendant in this lawsuit. *See* P. Salinas Dep. at 49 (Ex. CC26).
- Aaron Bonding posted the bond for her. *See* P. Salinas Dep. at 15; Salinas Decl. at ¶ 3 (Ex. CC27).
- She knows that Juan De La Rosa contracted with Aaron Bonding to post a $3,000 bond on her behalf. *See* P. Salinas Dep. at 18-19; Salinas Decl. at ¶ 3.
- She gave an address to Aaron Bonding when she was released on bond. *See* P. Salinas Dep. at 16.

In her deposition testimony, Ms. Salinas demonstrated that she understands the claims, the relief she is seeking, and the significance of acting as a class representative:

- She would be entitled to a return of her deposit with Aaron Bonding should her immigration case conclude without her ever having missed an appearance. *See* P. Salinas Dep. at 78-79.
- She knew that she would forfeit the entire amount of the bond if she did not make all of her appearances required under the contract. *See* Salinas Decl. at ¶ 3.
- Aaron Bonding has a responsibility to provide her with notice of deportation dates. *See* P. Salinas Dep. at 62-63; 80.
- She understands that she is a representative of a class of people who are in her same situation and that she has a responsibility to represent their interests. *See* P. Salinas Dep. at 81; Salinas Decl. (10/23/06) (CC36 & CC36A).
- She has kept in contact with her attorneys throughout this case and intends to continue to do so. *See* P. Salinas Dep. at 81; Salinas Decl. (10/23/06).

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[96] *See* A. Rubio Dep. at 33 (CC23).
[97] *See* A. Rubio Decl. (Ex. CC35 & CC35A).

Ms. Salinas also demonstrated herself to be an active participant in this litigation. She, too, participated in the preparation of a declaration and interrogatory responses and timely attended her deposition.

For these reasons, and those set forth in Plaintiffs' Motion for Class Certification, under any reasonable interpretation of the *Berger* standard, Irma Sandoval, Alberta Rubio, and Petra Carranza de Salinas are adequate representatives of the classes described above.

II. PLAINTIFFS' PROPOSED INDEMNITOR NOTICE CLASS AND INDEMNITOR COLLATERAL CLASS SATISFY FRCP 23(b)(3).

A. Common Issues Predominate Over Individual Issues With Respect to the Indemnitor Notice Class and Indemnitor Collateral Class.

The Indemnitor Notice Class and Indemnitor Collateral Class seek to bring class claims for breach of contract against the Bonding Defendants pursuant to Rule 23(b)(3). To qualify for class treatment under Rule 23(b)(3), "questions of law or fact common to the members of the class [must] predominate over any question affecting only individual members."[98] "The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation."[99]

"In order to 'predominate' common issues must constitute a significant part of the individual cases."[100] However, "[p]redominance does not require all questions of law or fact to be common, but only that common questions predominate over individual questions."[101] "The existence of individual questions concerning class members does not necessarily defeat the

[98] FRCP 23(b)(3).
[99] *Bywaters v. United States,* 196 F.R.D. 458, 468 (E.D. Tex. 2000).
[100] *Jenkens,* 782 F.2d at 472.
[101] *Recinos-Recinos,* 233 F.R.D. at 481; *In re Elec. Data Sys. Corp. Sec. Litig.,* 226 F.R.D. 559, 570 (E.D. Tex. 2005).

commonality requirement; the Rule requires only that common issues predominate, not that they be unanimous."[102]

Plaintiffs' claims allege uniform breaches of the Bond Contracts. These form documents define the parties' contractual rights. Because evidence of a breach of a form contract can be presented on a class-wide basis, it is a well-recognized tenet of federal procedural law that "claims arising from interpretations of a form contract appear to present the classic case for treatment as a class action, and breach of contract cases are routinely certified as such."[103]

Texas law[104] establishes the following elements for breach of contract claims: (i) the plaintiff and defendant had a valid, enforceable contract; (ii) the plaintiff performed or tendered

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[102] *Kleiner v. First Nat'l Bank of Atlanta,* 97 F.R.D. 683, 692 (N.D. Ga. 1983) (citations omitted). *See also Smilow v. Southwestern Bell Mobile Sys., Inc.,* 323 F.3d 32, 39 (1st Cir. 2003) ("Rule 23(b)(3) requires merely that common issues predominate, not that all issues be common to the class.")

[103] *Kleiner,* 97 F.R.D. at 692 (citing multiple cases). *See also Steinberg v. Nationwide Mut. Ins. Co.,* 224 F.R.D. 67, 74 (E.D.N.Y. 2004) (citing quoted language from *Kleiner*); *Klay v. Humana, Inc.,* No. 02-16333, 2004 WL 1938845, at *17 (11th Cir. Sept. 1, 2004) (same); *Egge v. Healthspan Servs. Co.,* 208 F.R.D. 265, 269 (D. Minn. 2002) (same); *Ballard v. Equifax Check Servs., Inc.,* 186 F.R.D. 589, 595 (E.D. Cal. 1999) (same); *Harco, Inc. v. Am. Nat'l Bank & Trust Co.,* 121 F.R.D. 664, 669 (N.D. Ill. 1988) (same); *Arenson v. Whitehall Convalescent & Nursing Home, Inc.,* 164 F.R.D. 659, 664 (N.D. Ill. 1996) (same); *Robin Drug Co. v. Pharacare Mgmt. Servs., Inc.,* No. Civ. 033397 (PAM/RLE), 2004 WL 1088330, at 5* (D. Minn. May 13, 2004) (citing *Kleiner* for similar proposition); *Gibb v. Delta Drilling Co.,* 104 F.R.D. 59, 73 (**N.D. Tex. 1984**) (same); *Meyer v. CUNA Mutual Group,* No. Civ. A. 03-602, 2006 WL 197122, at *4 (W.D. Pa. Jan. 25, 2006) (finding that common issue of contract interpretation predominated over any individual issues); *In re Universal Serv. Fund Tele. Billing Practices Litig.,* 219 F.R.D. 661, 679 (D. Kan. 2004) (allegations of breach of certain provisions of standard form contracts satisfied predominance requirement); *Heartland Comms., Inc. v. Sprint Corp.,* 161 F.R.D. 111, 117-18 (D. Kan. 1995) (same); *In re Tri-State Crematory Litig.,* 215 F.R.D. 660, 693 (N.D. Ga. 2003) ("Breach of contract claims are certifiable as appropriate for class action."); *In re Commonpoint Mort. Co.,* 283 B.R. 469, 478 (Bankr. W.D. Mich. 2002) ("Common questions of law and Fact are particularly likely to predominate in cases which derive from form documents and standardized procedures."); *Winkler v. DTE, Inc.,* 205 F.R.D. 235, 243 (D. Ariz. 2001); *Mayo v. Sears, Roebuck & Co.,* 148 F.R.D. 576, 583 (S.D. Ohio 1993); *Durrett v. John Deere Co.,* 150 F.R.D. 555, 558 (**N.D. Tex. 1993**) ("common questions of law and fact abound" in class claims arising out of "virtually" uniform contracts; granting certification under Rule 23(b)(3)).

[104] Each of the uniform bonding contracts contains a choice of law provision specifying that Texas law shall govern the contract. *See, e.g.,* Sandoval Bond File at BF-238 (Ex. CC5). Texas routinely enforces contractual choice of law provisions and has adopted the approach articulated in RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 187 (1988) to determine the enforceability of a contractual choice of law provision. *See DeSantis v. Wackenhut Corp.,* 793 S.W.2d 670, 677 (Tex. 1990). Section 187(1) provides that "[t]he law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(1) (1988). Here, Plaintiffs' breach of contract claims center around the Bonding Defendants' failure to provide notice of all DHS-scheduled appearances and failure to return collateral upon cancellation of the bond. Both of these issues not only "could have resolved by an explicit provision in their agreement," but were in fact subject to explicit provisions of the agreement. Therefore, the law of the state chosen by the parties—in this case, Texas—should be applied on a class-wide basis to determine Plaintiffs' breach of contract claims.

performance; (iii) the defendant breached the contract; and (iv) the defendant's breach caused the plaintiff's injuries.[105]

1. Valid and Enforceable Contract

The hard-copy and electronic bond files establish the existence of valid and enforceable contracts.

2. Plaintiff's Substantial Performance

Receipts and other documents in the bond files will demonstrate which class members made the payments required under the contracts.

3. Defendants' Breach

Indemnitor Notice Class: The central question regarding the Indemnitor Notice Class is whether the Bonding Defendants are obligated to provide notice of surrender and interview dates set forth in the Notice to Obligor to Deliver Alien. This question requires a legal answer to a question that is uniform to the class. Moreover, the bond files demonstrate whether the Bonding Defendants received a Notice to Obligor to Deliver Alien.[106] Because the class is limited to people whom the Bonding Defendants did not notify, the answer to that legal question will establish the breach or the absence of a breach class-wide. Thus, the Indemnitor Notice Class falls squarely within Rule 23(b)(3).

Indemnitor Collateral Class: Similarly, the central question regarding the Indemnitor Collateral Class is whether the Bonding Defendants were obligated to return collateral to the Indemnitors. The answer to that question will not vary among class members because the Bonding Defendants' contractual obligations are uniform across the class. Because the class is limited to

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[105] *See Kadhum v. Homecomings Fin. Network, Inc.*, -- S.W.3d --, 2006 WL 1125240, at *4 (Tex. App.—Houston [1st Dist.] Apr. 27, 2006, no pet. hist.). The Bonding Defendants' uniform contracts contain a Texas choice-of-law provision. *See, e.g.,* Salinas Bond File at BF-0000320 (Ex. CC7).

[106] *See* A. Lopez Dep. at 77-78 (Ex. CC2); T. Stone Aff. ¶ 6 (Ex. CC8); T. Stone FRE 1006 Summary ¶ 7 (Ex. CC28).

those individuals that did not receive a return of their collateral from the Bonding Defendants, the Indemnitor Collateral Class falls squarely within Rule 23(b)(3).

4. Damages Caused by Breach

Under Texas law, plaintiffs may seek reliance damages for breach of contract claims. Where a party makes a substantial investment in performing their obligations under an agreement and the agreement is breached, the party is entitled to a return of their investment as reliance damages.[107] Alternatively, a court may award a plaintiff the benefit the plaintiff's performance conferred on the defendant in a restitution award.[108] In either event, a uniform damage model could be constructed using the Defendants' bond files, which reflect amounts paid by the Indemnitors.[109] Similarly, individual damage calculations emanating from the Bonding Defendants' retention of collateral could be easily calculated by reference to the bond files, which reflect the collateral accounts.

Plaintiffs' contract claims present overriding common questions and any individual issues will not predominate and can easily be managed through the bond files. Accordingly, Plaintiffs request that this Court certify the Indemnitor Notice Class and the Indemnitor Collateral Class as described above.

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[107] *See Tae Mun Chung v. Jeong Ran Lee,* – S.W.3d –, 2006 WL 1391249, at *4 (Tex. App. May 23, 2006). *See also Texas Nom Ltd. P'ships v. Akuna Matata Invs., Ltd.,* No. 04-04-00447-CV, 2005 WL 159459, at *5 (Tex. App. Jan. 26, 2005) ("[R]eliance damages seek to restore the status quo at the time before the contract.").

[108] *See Hector Martinez & Co. v. S. Pac. Transp. Co.,* 606 F.2d 106, 108 n.3 (5th Cir. 1979); *IT Corp. v. Motco Site Trust Fund,* 903 F. Supp. 1106, 1132 (S.D. Tex. 1994) ("[I]t is undisputed that restitution is one appropriate damage measure for a breach of contract claim.").

[109] Differences in damages as to individual class members will not preclude class certification, especially where reasonable means for assessing damages on an individual basis exist. *See State of Ala. v. Blue Bird Body Co., Inc.,* 573 F.2d 309, 326 (5th Cir. 1978); *Transamerican Refining Corp. v. Dravo Corp.*, 130 F.R.D. 70, 76 (S.D.Tex. 1990); 7B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE § 1781 (2d ed. 1986) ("[I]t uniformly has been held that differences among the members [of a class] as to the amount of damages incurred does not mean that a class action would be inappropriate.") (collecting cases).

B. Class-wide Adjudication of the Claims of the Indemnitor Notice Class and Indemnitor Collateral Class Is Superior to Other Available Methods of Adjudication.

Rule 23(b)(3) sets forth four factors federal courts are to consider in determining whether proceeding by class litigation is superior to other methods. ***First,*** the absent class members have no interest in proceeding individually. The claims of the class members are insufficient to justify the expense of litigation against the Bonding Defendants. The facts of this case present the exact situation – relatively small amounts of damage suffered because of uniform conduct against a large number of similarly situated persons – for which class-action treatment was designed:

> The core purpose of Rule 23(b)(3) is to vindicate the claims of consumers and other groups of people whose individual claims would be too small to warrant litigation. *See [Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 617 (1997)] ("While the text of Rule 23(b)(3) does not exclude from certification cases in which individual damages run high, the Advisory Committee had dominantly in mind vindication of the rights of groups of people who individually would be without effective strength to bring their opponents into court at all." (internal quotation marks omitted); *Mace [v. Van Ru Credit Corp.,* 109 F.3d 338, 344 (7th Cir. 1997)] ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.").[110]

Classes "that are made up of consumers are especially likely to satisfy the predominance requirement."[111]

Second, Plaintiffs are unaware of any litigation concerning the controversy already commenced by members of the class. Thus, certifying the proposed classes will not interfere with any ongoing litigation.

Third, it is desirable to concentrate the litigation of these claims in this Court. This Court has extensive experience with this case and the claims raised herein.

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[110] *Smilow v. Southwestern Bell Mobile Sys.,* 323 F.3d 32, 41-42 (1st Cir. 2003).
[111] *Id.* at 42 n.19 (citing *AmChem Prods. Inc.,* 521 U.S. at 625).

Fourth, as discussed above, litigation of this class is manageable. Liability to the Indemnitor Notice Class and Indemnitor Collateral Class may be determined on a class-wide basis. Individual class member damages may be determined by reference to the bond files and Aaron Bonding's computer records. This case is indeed less complex than other certified classes.[112] Once the common questions are resolved, the remainder of the case may be disposed of through a relatively quick claims process.[113] Thus, while every class action case involves some complexity, class treatment here remains a superior method of resolving all of the claims the Defendants' wrongdoing presents.

Moreover, the members of the proposed Indemnitor Notice Class can be easily identified from Aaron Bonding's records. As Plaintiffs have alleged and as the evidence gathered thus far confirms, the Bonding Defendants uniformly fail to provide the contractually required notice. Thus, virtually all Indemnitors (within the class period) fall within the Indemnitor Notice Class.

Likewise, the members of the proposed Indemnitor Collateral Class can also be easily identified from Aaron Bonding's records. The Plaintiffs have alleged, and the evidence confirms, that the Bonding Defendants have made it their uniform practice to not return the posted collateral to the Indemnitors absent a request by the Indemnitors to do so. Whether the bond was canceled and whether the collateral has been returned can be easily determined from the bond files.[114]

III. PLAINTIFFS' PROPOSED BONDED IMMIGRANT CLASS SATISFIES THE REQUIREMENTS OF FRCP 23(b)(2).

In addition to certification of classes seeking money damages pursuant to Rule 23(b)(3), Plaintiffs seek certification of the Bonded Immigrant Class under Rule 23(b)(2) for the purposes of

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[112] *See, e.g., Klay v. Humana, Inc.*, 382 F.3d 1241 (11th Cir. 2004) (approving certification a class of essentially all the doctors in the country); *Allapattah Servs. v. Exxon Corp.*, 333 F.3d 1248 (11th Cir. 2003) (approving certification of hundreds of gasoline dealers across the country).

[113] *See, e.g., Allapattah Servs., Inc. v. Exxon*, 157 F. Supp. 2d 1291, 1324 (S.D. Fla. 2001) (describing a claims process adopted to resolve post trial issues in a breach of contract class case).

[114] *See* T. Stone FRE 1006 Summary at ¶ 11 (Ex. CC28).

obtaining injunctive and declaratory relief. Certification under Rule 23(b)(2) is appropriate where the defendant "had acted in a consistent manner toward members of the class so that his actions may be viewed as part of a pattern of activity." 7B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE § 1775 (2d ed. 1986). The conduct of the Bonding Defendants in routinely failing to provide notice of DHS-requested appearances to both the Indemnitors and the Bonded Immigrants plainly satisfies this requirement. Plaintiffs seek certification of the proposed classes for the purposes of seeking an injunction requiring the Bonding Defendants to provide reasonable notice of all DHS-requested appearances they receive to both the Bonded Immigrants and the Indemnitors, and corresponding declaratory relief.[115]

IV. PLAINTIFFS' PROPOSED SUPERVISON CLASS SATISFIES RULES 23(a) AND (b)(2) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

Zamora-Garcia, Manuel Sandoval, Salinas, Cedeno, Norma Pena de Herrera, Isidro Herrera, and Alvarado-Narvaez seek habeas corpus relief for themselves, and declaratory and injunctive relief on behalf of the class they seek to represent. For many of the same reasons as discussed above, Plaintiffs' proposed supervision class satisfies Rules 23(a) and (b)(2) of the Federal Rules of Civil Procedure.

A. The Members of the Supervision Class Are Sufficiently Numerous.

In general, there are three classes of aliens under final orders of removal who, in the past, have received Orders of Supervision. The first class consists of nationals of countries, such as Cuba, who refuse to accept them as deportees. That group is not represented and is not involved herein. The second group, represented herein by Plaintiffs Zamora-Garcia, Manuel Sandoval, Salinas, and Alvarado-Narvaez, consists of immigrants who are or will be under final orders of

[115] *See, e.g., Irwin v. Mascott,* 112 F. Supp. 2d 937, 964-65 (N.D.Cal. 2000) (granting injunction against defendants and ordering them to cease collection of debts in a consumer class-action asserting a violation of the Fair Debt Collection Practices Act.); *In re Great Southern Life Insurance Co Sales Practices Litig.*, 192 F.R.D. 212, 221-22 (N.D. Tex. 2000) (certifying class seeking injunctive relief to prevent insurance fraud).

removal and who challenged or will challenge their removal orders in federal court, and whom the Federal Defendants did not or will not remove during the ninety-day removal period, notwithstanding that the immigrants did not obtain a judicial stay of removal during that period, or otherwise obstruct removal. Previously, such immigrants were routinely placed under Orders of Supervision. Even after this policy was changed, in 2002, aliens to whom Orders of Supervision had previously been issued were allowed to remain at liberty, and to obtain and renew employment authorization documents, so long as they substantially complied with the conditions of the Orders of Supervision. The third group, represented herein by Plaintiffs Cedeno, Norma Pena de Herrera, and Isidro Herrera, consists of immigrants who are or will be under final orders of removal, and whom, for humanitarian reasons, the Federal Defendants did not or will not remove during the ninety-day removal period, notwithstanding that the immigrants did not obtain a judicial stay of removal during that period, or otherwise obstruct removal. Such immigrants were previously also routinely placed under Orders of Supervision.

The policy of the Federal Defendants with respect to both the second and third groups changed on or about February 27, 2006, with the Interoffice memorandum issued by Michael Watkins, Assistant Field Office Director for the Harlingen Office of ICE.[116] Said Memorandum advised "All Staff" that, except for those aliens who were under Orders of Supervision because their home countries would not accept them as deportees, (the first group, not involved herein), they were to cancel or revoke the Orders of Supervision and employment authorization documents of all aliens who were under such Orders, and to instruct such persons to file applications for administrative stays of removal with the Federal Defendants.[117]

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[116] [Dkt. 55, pp.3-4].
[117] *Id.*

By letter dated April 21, 2006,[118] counsel requested that aliens who had been allowed to remain in the United States for more than the 90-day removal period, and who ***thereafter*** obtained stays of removal, be issued Orders of Supervision, or, if they already had such Orders, be allowed to keep them.

Mr. Watkins responded by letter dated April 24, 2006, denying counsel's request.[119] He further informed counsel that he would allow only those aliens named in this Court's prior order,[120] to remain under Orders of Supervision, and that he would no longer abide by the informal agreement allowing people to remain who had federal challenges pending. This uniform treatment by the Federal Defendants satisfies Rule 23(b)(2). As a result, counsel started the process of obtaining judicial stays of removal for her clients who had previously been subject to the informal agreement, and advised Mr. Watkins of the existence of such stays as they were granted.[121]

As prior counsel for the Federal Defendants, Lisa Putnam, admitted in open court, there were in 2002-2003 approximately 2,000 immigrants in this district who had been allowed to remain at liberty while they challenged removal orders in federal court. Although some (if not most) have doubtless been removed, the fact that a substantial number remain is shown by the fact that counsel has obtained stays of removal from the Fifth Circuit for at least 26 such individuals.[122] Three others have cases pending at the Supreme Court.[123] Counsel also represents several such clients who were

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[118] [Dkt. 59 at pp.7-8].

[119] [Dkt. 64, pp.3-5]. This policy applies regardless of whether the stay of removal is issued judicially, or administratively. For example, putative class member Alfonso Acosta-Grimaldo, A90 453 081, was ordered removed on December 15, 2005. His timely petition for review to the Fifth Circuit was dismissed on March 16, 2006. A timely petition for certiorari to the Supreme Court, No. 05-1276, is being held in abeyance, apparently until the Court resolves the underlying issue in *Lopez v. Gonzales,* No. 05-547 and *Toledo-Flores v. United States,* No. 05-7496. An administrative stay of deportation was granted June 19, 2006. *See* Plaintiffs' Exh. "S" [Doc. 111]. However, Mr. Acosta has not been placed under an Order of Supervision.

[120] [Dkt. 60].

[121] [Dkt. 61,64,90].

[122] [Dkt. 90].

[123] Laura Salazar, Nohemi Rangel, and Alfonso Acosta, Nos. 05-830 and 05-1276, respectively. Applications for stays of removal were filed for all three. Those of Ms. Salazar and Ms. Rangel have never been adjudicated. Mr. Acosta was

under Orders of Supervision for humanitarian reasons, including Plaintiffs Cedeno, Herrera, and Pena de Herrera. In their cases as well, applications for administrative stays of removal have been filed, but not adjudicated.[124] None has been ordered to report for removal, and none currently has an Order of Supervision.

B. There Are Questions of Law or Fact Common to the Supervision Class.

By definition, there are questions of law common to the class. The primary legal issue presented by this class is whether an alien under a final order of deportation, exclusion, or removal, in whose case there was no judicial stay of removal in effect during the 90-day "removal period" specified by 8 U.S.C. § 1231(a), and who did not fail or refuse to request any necessary travel documents, or otherwise "conspire[] or act[] to prevent ... removal" during that period, is entitled to an Order of Supervision, regardless of whether said alien subsequently obtained a judicial or administrative stay of removal. Most if not all class members also have a common fact pattern, to wit, in most if not all cases, these are individuals in whose cases the Federal Defendants voluntarily abstained from executing an administratively final order of removal, either because of an informal agreement between the federal defendants and counsel for the aliens, or for humanitarian reasons.

C. The Claims of the Supervision Class Representatives Are Typical of the Members of the Class.

The claims of the class representatives are typical of the class. In each case, the class representative was under an administratively final order of removal for more than ninety days, and was not removed during that period, even though s/he did nothing during the removal period to prevent the Federal Defendants from executing that order.

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twice denied a stay, but ICE reversed itself, following intervention by the Office of the Solicitor General, and granted a stay *sua sponte*. [Dkt. 91,111].

[124] *See, e.g.,* [Dkt. 55, at pp.10-26].

D. The Named Plaintiffs and Class Counsel Will Adequately Represent the Interests of the Supervision Class.

1. Class Counsel Is Adequate.

For the reasons discussed above, it is submitted that class counsel is adequate.[125]

2. The Class Representatives Are Adequate.

The named plaintiff's interests are not antagonistic to the interests' of absent class members.[126] "Differences between named plaintiffs and class members render the named plaintiffs inadequate representative only if those differences create conflicts between the named plaintiffs' interests and the class members' interests."[127] Here, the interests of the Order of Supervision Plaintiffs reflect the interests of the absent class members, and rise and fall along with the interests of the absent class members. They also "possess a sufficient level of knowledge and understanding to be capable of 'controlling' or 'prosecuting' the litigation."[128] They have worked with Ms. Brodyaga for years in litigating their claims against the Federal Defendants. Moreover, named Plaintiffs Petra Carranza de Salinas, Isidro Herrera-Moreno, and Norma Pena de Herrera have submitted sworn declarations demonstrating that they understand their responsibilities as class representatives and that they have remained in regular contact with their attorneys regarding this case.[129]

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[125] In the Order of Supervision and cash bond causes of action, Plaintiffs are represented solely by Ms. Brodyaga.
[126] *Stirman*, 280 F.3d at 563; *Munoz*, 200 F.3d at 306; *Jenkens*, 782 F.2d at 472.
[127] *Mullen*, 186 F. 3d at 626; *Jenkens*, 782 at 472.
[128] *Berger*, 257 F.3d at 482-83.
[129] *See* P. Salinas Decl. (10/23/06) (Ex. CC36 & CC36A); I. Herrera-Moreno Decl. (Ex. CC37 & CC37A); N. Herrera Decl. (Ex. CC38 & CC38A).

E. The Federal Defendants Have Acted or Have Refused to Act on Grounds Generally Applicable to the Supervision Class.

As described above, the Federal Defendants' failure to grant the Orders of Supervision is done in a manner generally applicable to the members of the Supervision Class. Thus, equitable relief pursuant to FRCP 23(b)(2) is appropriate.

V. PLAINTIFFS' PROPOSED CASH BOND CLASSES SATISFY RULES 23(a) AND (b)(2) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

Plaintiff Adriana Echavarria seeks certification of the Obligor Cash Bond Class on behalf of the proposed class of all Obligors who posted or will post an immigration Cash Bond to secure the release of a person during deportation, exclusion or removal proceedings, which bond is either still outstanding, or was breached on or after July 28, 1998, following a demand made on the Obligor which was returned undelivered to Federal Defendants, and where the Federal Defendants did not make further efforts to provide actual notice of the demand to the Obligors, and where the Bonded Immigrant appeared at all hearings and other required appearances of which s/he received appropriate notice.[130] Jorge Echavarria seeks to represent, as Immigrant Cash Bond Class A, all Bonded Immigrants in whose behalf such Cash Bonds have been issued.[131] Juan Larin-Ulloa seeks to represent, as the Immigrant Cash Bond Class B, all Immigrants released on such cash bonds.[132]

A. The Members of the Cash Bond Classes Are Sufficiently Numerous.

As shown above, Plaintiffs are not required to show actual numbers of class members. Here, numerosity can be discerned from the discovery conducted in *Zamora I*. Plaintiffs' Exhibit CC therein, [Dkt. 66], consists of excerpts from the bond logs of the San Antonio office of the federal defendants, between January 1, 2003 and June 30, 2003. These logs reveal that about equal

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[130] *See* SAC ¶ 25.
[131] *See* SAC ¶ 26.
[132] *See* SAC ¶ 27.

numbers of cash and surety bonds were posted during that period, in the neighborhood of thirty per month of each type. They also show that Mexicans were more likely to post cash than surety bonds, and that the bond amounts for Mexicans tended to be significantly lower than those for other nationalities. Further, they show that as many, if not more, bonds were breached as were posted, indicating that a very high number of cash bonds were breached during that period.

Further, the deposition of Glen Stewart reveals that if an I-340 sent to a cash obligor is returned by the Postal Service as undeliverable, no further efforts are made to contact the obligor, and the bond is breached.[133] This not only satisfies the requirements of Rule 23(b)(3), but it also makes highly likely that there is a significant percentage of breaches of cash bonds, regardless of the good faith or intent of the obligor and bonded immigrant. Unless and until the class is certified, and class counsel appointed, more detailed discovery cannot be conducted, and reasonable estimates cannot be provided.

B. There Are Questions of Law or Fact Common to the Cash Bond Classes.

Here too, the class is essentially defined by its common characteristics. The Obligor Cash Bond Class and the Immigrant Cash Bond Class A seek similar relief: injunctive and declaratory relief requiring the Federal Defendants to reinstate the breached bonds (if proceedings are ongoing), or to reinstate and cancel the breached bonds (if proceedings have been completed). The Immigrant Cash Bond Class B seeks declaratory and injunctive relief requiring the Federal Defendants to provide the constitutionally required notice. The notice required under *Jones v. Flowers* and the U.S. Constitution is a question common to each of these classes.

[133] *See* Stewart Dep. at 43-46 (Ex. CC12).

C. The Claims of the Representatives of the Cash Bond Classes Are Typical of the Members of the Classes.

Again, the claims of the class representatives are typical of the class. Mr. Echavarria is a Mexican national, which is typical of immigrants for whom cash bonds are posted. As a lawful permanent resident, with a potential defense against deportation, his bond was in the low range, ($1,500), typical of bonded immigrants whom the federal Defendants consider likely to appear for their hearings. The Echavarrias also moved during the deportation proceedings, and assumed that notice of Mr. Echavarria's change of address was sufficient to ensure that they would be notified of any demands on the bond. Mr. Echavarria also appeared at all appearances of which he had notice, and eventually won his case. This would also be typical of cases where cash bonds were breached, even though the bonded immigrant appeared at all settings of which he had notice. Mr. Echavarria's A-file reveals that the I-130 sent to his wife was returned undelivered by the Postal Service, that no further efforts were made to contact her, that the bond was breached on the date he was to have been presented, and the notice of the bond breach sent only to the same address, which the federal Defendants already knew to be invalid. These are typical facts.

Mr. Larin-Ulloa is currently released on a cash bond. He faces the prospect that the Federal Defendants will fail to provide the constitutionally required notice of a demand on his bond.

D. The Named Plaintiffs and Class Counsel Will Adequately Represent the Interests of the Cash Bond Classes.

Again, for the reasons previously discussed, both the Echavarrias, Mr. Larin-Ulloa, and class counsel, will adequately represent the interests of the class. The Echavarrias have both a long history with class counsel and a stake in the outcome of the case. And class counsel has the experience and resources necessary to prosecute the instant action.

E. The Federal Defendants Have Acted of Refused to Act on Grounds Generally Applicable to the Class.

According to the testimony of the Federal Defendants' FRCP 30(b)(6) witness, the Federal Defendants routinely fail to attempt to provide additional notice of a call on a bond after the notice is returned to them undelivered, even where the released immigrant has appeared at all hearings and other appearances of which he has received notice. *See* Stewart Dep. at 43-46 (Ex. CC12). Thus, the requirement of FRCP 23(b)(2) is met here – the Federal Defendants have acted or have refused to act on grounds generally applicable to the class, thereby making appropriate final equitable relief.

CONCLUSION

For all the reasons stated above, Plaintiffs request that this Court certify the classes described above and appoint Lisa Brodyaga, Diamond McCarthy, LLP (through J. Benjamin King and William T. Reid, IV), and Kozyak Tropin & Throckmorton, PA (through Tucker Ronzetti) as class counsel.

Respectfully submitted,

/s/ J. Benjamin King
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CERTIFICATE OF CONFERENCE

I hereby certify that, on October 24, 2006, counsel for Plaintiffs emailed all opposing counsel, asking whether they were opposed to this motion. Counsel for the Bonding Defendants and Federal Defendants indicated that they were opposed to the motion.

/s/ J. Benjamin King
J. Benjamin King

CERTIFICATE OF SERVICE

I certify that, on October 24, 2006, a true, correct, and complete copy of the foregoing document, with exhibits, was sent via email to Brad Irelan at irelan@irelanhargis.com and to Rene Benavides at rene.benavides@usdoj.gov.

/s/ J. Benjamin King
J. Benjamin King