UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION

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| ARACELY ZAMORA-GARCIA, *et al*, | § | |
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| Plaintiffs, | § | |
| VS. | § | CIVIL NO. M-05-331 |
| | § | |
| MARC MOORE, *et al*, | § | |
| | § | |
| Defendants. | § | |

**ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT FAIRMONT'S MOTION FOR SUMMARY JUDGMENT AND GRANTING IN PART AND DENYING IN PART DEFENDANT STONINGTON'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

## I. Introduction

Now before the Court are the Motions for Summary Judgment filed by Defendant Fairmont f/k/a Ranger Insurance Company and Defendant Stonington f/k/a Nobel Insurance Company, respectively. (Docs. 153, 154).[1] The class-wide and individual claims relevant to these Motions concern alleged misconduct by "Bonding Defendants," including Fairmont and Stonington, in administering immigration surety bonds. (Doc. 114). Plaintiffs' surety bond claims commenced with the filing of Plaintiffs' First Amended Complaint in *Zamora-Garcia v. Trominski*, Southern District of Texas, McAllen Division, Cause No. M-02-144, the predecessor action to the instant suit. *Zamora-Garcia v. Trominski* (Doc. 2). In the amended complaint filed on May 7, 2002, Plaintiffs first named Aaron Federal Bonding Agency ("Aaron Bonding") as a defendant against whom they sought relief for the alleged mishandling of surety bonds. *Id.*[2] On

[1] Collectively, Fairmont and Stonington have been referred to throughout this litigation as "Insurer Defendants" or "Sureties." The Court will use the term "Sureties" herein.

[2] "Aaron Federal Bonding Agency" and "U.S. Immigration Bonds and Services" were assumed names for Don Vannerson. Vannerson died on March 1, 2004, after the predecessor action was

September 30, 2005, Plaintiffs filed their Third Amended Complaint in the predecessor action, in which they named Fairmont and Stonington (also referred to herein as "Sureties") as additional defendants. *Id.* (Doc. 150). Plaintiffs alleged that Aaron Bonding or its predecessor, U.S. Immigration Bonds and Services, had acted or was acting as an agent for Fairmont/Ranger and Stonington/Nobel in administering the surety bonds at issue; therefore, Plaintiffs sought to hold all three "Bonding Defendants" liable for their surety bond claims. *Id.* The Court severed Plaintiffs' Third Amended Complaint into the present cause. *Id*. (Doc. 151).

On October 27, 2006, Plaintiffs filed their Sixth Amended Complaint, the live complaint in this case. (Doc. 114). For purposes of clarification, the Court sets forth the following summary of the class-wide and individual claims that are pending and relevant to the Motions now before the Court.

**A. Class-Wide Claims**

In its Order Granting in Part and Denying in Part Plaintiffs' Motion for Class Certification, the Court certified two "Surety Bond Classes," *i.e.*, classes with claims against "Bonding Defendants," including Sureties. (Doc. 139). Plaintiff Irma Sandoval represents the "Indemnitor Notice Class," defined as follows:

> (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,[3] and
> (b) who have fully paid their up-front, non-reimbursable fees to the Bonding Defendant pursuant to the terms of the bonding contracts, and

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filed. *Zamora-Garcia v. Trominski* (Doc. 87). In their live complaint, Plaintiffs have named Michael W. Padilla as a defendant in his capacity as Independent Administrator of the Estate of Don Vannerson d/b/a Aaron Federal Bonding Agency. (Doc. 114).

[3] "Federal Defendants" are Marc Moore, District Director for Interior Enforcement, Department of Homeland Security; and Michael Chertoff, Secretary, Department of Homeland Security. (Docs. 114, 150). These defendants are sued in their official capacities. (Doc. 114).

> (c) where the Bonding Defendant's records indicate that on or after April 16, 1998, it received a "Notice to Obligor to Deliver Alien" indicating that the INS/DHS[4] had scheduled an appearance for deportation for the Bonded Immigrant, and where the Bonding Defendant did not provide notice of the requested appearance for deportation to either the Indemnitor or the Bonded Immigrant.

*Id.* Sandoval and the Indemnitor Notice Class (collectively, "Indemnitor Plaintiffs") assert a cause of action for breach of contract against Bonding Defendants. (Docs. 114, 139). More specifically, Indemnitor Plaintiffs claim that Bonding Defendants breached the "Terms and Conditions under Immigration Bond" agreement by failing to give notice to each Indemnitor Plaintiff and bonded immigrant upon receipt of a Form I-340, or "Notice to Obligor to Deliver Alien," requesting the immigrant's appearance before INS/DHS for deportation. *Id.* Indemnitor Plaintiffs seek damages equal to the value of all non-refundable, up-front fees paid to Bonding Defendants when entering into the surety bond contracts. *Id.*

Plaintiff Petra Carranza de Salinas represents the "Bonded Immigrant Class," defined as follows:

> (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 outstanding.

(Doc. 139). De Salinas and the Bonded Immigrant Class (collectively, "Bonded Immigrant Plaintiffs") assert a cause of action for "equitable relief preventing breach of contract" against Bonding Defendants. (Docs. 114, 139). Bonded Immigrant Plaintiffs seek an injunction requiring Bonding Defendants, directly or through their agents, to make good faith efforts to provide actual, timely, and reasonable notice to Bonded

[4] The Immigration and Naturalization Service ("INS") is the predecessor agency to the Department of Homeland Security ("DHS") in all respects relevant to the instant case.

Immigrant Plaintiffs and to the indemnitors on their bonds of any and all demands for performance made on those bonds by Federal Defendants. *Id.* Bonded Immigrant Plaintiffs also seek corresponding declaratory relief. *Id.*

**B. Individual Claims against Bonding Defendants**

Plaintiff Juana Zamora and her daughter, Plaintiff Aracely Zamora-Garcia, assert individual claims for intentional infliction of emotional distress against individual Defendant Santiago Sol and Bonding Defendants. (Doc. 114). In doing so, Zamora and Zamora-Garcia seek to hold Bonding Defendants liable for the conduct of Sol, allegedly an agent for Aaron Bonding who attempted, by threats and harassment, to secure the removal of Zamora-Garcia. *Id.* Plaintiff Miguel Rubio also seeks to hold Bonding Defendants liable for false imprisonment, claiming that an unidentified agent of Aaron Bonding forcibly apprehended Rubio and surrendered him to INS/DHS without legal authority to do so, after which Rubio was forced to remain in detention for nearly five months. *Id.*

Finally, Plaintiff Alberta Rubio asserts two separate breach of contract causes of action against Bonding Defendants arising from her status as an indemnitor on the bond she secured on behalf of her son, Miguel Rubio. (Doc. 114). The Court declined to allow Ms. Rubio to represent the Indemnitor Notice Class; however, the Court's order did not dispose of Ms. Rubio's individual breach of contract claim against Bonding Defendants for failure to provide notice to her or to Miguel Rubio of any INS/DHS request for his appearance. (Docs. 114, 139). The Court also determined that Ms. Rubio was not a proper representative of the proposed "Indemnitor Collateral Class." (Doc. 139). Still, Ms. Rubio continues to have an individual claim against Bonding Defendants

for breach of contract arising out of these defendants' alleged failure, upon the cancellation of Miguel Rubio's bond, to return the collateral paid by Ms. Rubio on the bond. (Doc. 114). Ms. Rubio claims that this failure constitutes a material breach of the terms of the surety bond contracts and seeks damages equal to the value of all collateral deposited with Bonding Defendants, less any fees or expenses that may be validly charged against the collateral under the contracts' terms. *Id.*

## II. Summary Judgment Standard of Review

A district court will grant summary judgment when there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). A fact is material if it might affect the outcome of the lawsuit under the governing law, and a fact is genuinely in dispute only if a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A party moving for summary judgment has "the initial responsibility of informing the district court of the basis for its motion and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The burden then shifts to the non-movant to produce evidence or designate specific facts showing the existence of a genuine issue for trial. *Allen v. Rapides Parish Sch. Bd.*, 204 F.3d 619, 621 (5th Cir. 2000). At the summary judgment stage, the court "may not make credibility determinations or weigh the evidence" and must resolve doubts and reasonable inferences regarding the facts in favor of the non-moving party. *Reeves v. Sanderson Plumbing*

*Prods., Inc.*, 530 U.S. 133, 150 (2000); *Anderson*, 477 U.S. at 249; *Dean v. City of Shreveport*, 438 F.3d 448, 454 (5th Cir. 2006).

## III. Sureties' Motions for Summary Judgment

### A. Fairmont's Request for Summary Judgment on the Individual Claims of Plaintiffs Sandoval, de Salinas, Miguel Rubio, and Alberta Rubio and the Claims of the Indemnitor Notice Class and Bonded Immigrant Class

The Court first considers Defendant Fairmont's argument that it is entitled to summary judgment on the individual and class-wide claims against it for breach of contract, equitable relief preventing breach of contract, and false imprisonment on grounds of lack of standing. (Doc. 153). It is well-established that a plaintiff satisfies the standing requirement of Article III of the U.S. Constitution only where he presents a "case" or "controversy"—that is, he has suffered an "injury in fact" that is fairly traceable to the challenged action of the defendant and a likelihood exists that the injury can be redressed by a favorable decision. *Consol. Cos., Inc. v. Union Pac. R.R. Co.*, 499 F.3d 382, 385 (5th Cir. 2007); *Kitty Hawk Aircargo v. Chao*, 418 F.3d 453, 458 (5th Cir. 2005). If a plaintiff lacks Article III standing to sue, then a federal court lacks jurisdiction to hear the complaint. *Delta Commercial Fisheries Ass'n v. Gulf of Mex. Fishery Mgmt. Council*, 364 F.3d 269, 272 (5th Cir. 2004)(citing *Grant ex rel. Family Eldercare v. Gilbert*, 324 F.3d 383, 386 (5th Cir. 2003)).

Clearly, Plaintiffs' contract claims against Fairmont require proof of injury resulting from a breach of contract by this defendant. *See, e.g., McLaughlin, Inc. v. Northstar Drilling Tech., Inc.*, 138 S.W.3d 24, 27 (Tex.App.-San Antonio 2004, no pet.); *Prime Prods., Inc. v. S.S.I. Plastics, Inc.*, 97 S.W.3d 631, 636 (Tex.App.-Houston [1st Dist.] 2002, pet. denied); *Lewis v. Bank of Am. NA*, 343 F.3d 540, 544-45 (5th Cir. 2003).

To recover against Fairmont for false imprisonment, Plaintiff Miguel Rubio must show that this defendant willfully detained him without his consent and without authority of law. *See, e.g., Wal-Mart Stores, Inc. v. Rodriguez*, 92 S.W.3d 502, 506 (Tex. 2002). Fairmont claims that Plaintiffs Sandoval, de Salinas, Miguel Rubio, and Alberta Rubio cannot demonstrate that they suffered, or will suffer, any injury traceable to Fairmont's conduct because the evidence shows that they did not contract with Fairmont or its predecessor-in-interest, Ranger. (Doc. 153). Therefore, Plaintiffs lack standing to assert their individual claims for breach of contract, equitable relief preventing breach of contract, and false imprisonment against Fairmont. *Id.* Fairmont also contends that it is entitled to summary judgment on the claims of the Indemnitor Notice Class and Bonded Immigrant Class because Sandoval and de Salinas lack standing to pursue, on their own behalf, the contract claims of the classes they represent. *Id.*

The undisputed summary judgment evidence shows that indemnitor Sandoval did not contract with Fairmont or its predecessor-in-interest, Ranger, for the posting of a surety bond to secure the release of bonded immigrant Manuel Sandoval from federal detention. (Doc. 153, Ex. 2 at BF-224, 232, 238, 241; Doc. 168). In addition, indemnitor Juan de la Rosa did not contract with Fairmont as part of his application to post a surety bond to obtain the release of bonded immigrant de Salinas. (Doc. 153, Ex. 5 at BF-315, 318, 320, 334, 342; Doc. 168). Finally, Fairmont was not the surety on the bond obtained by indemnitor Alberta Rubio to secure the release of her son, bonded immigrant Miguel Rubio. (Doc. 153, Ex. 6 at BF-269, 273-74, 287, 296; Doc. 168). To the extent that any of these Plaintiffs contracted with either of the Sureties, they contracted with Nobel, the predecessor-in-interest to Stonington. (Doc. 153, Exs. 2, 3, 5, 6).

Still, Plaintiffs have drawn the Court's attention to a "Portfolio Transfer Agreement" ("PTA" or "Agreement") that Plaintiffs say transfers any and all liability and responsibility Stonington may have had with respect to its "Immigration Bond Business" to Fairmont. (Doc. 168; Doc. 169, Ex. 1). As a general rule, a corporation that acquires the assets of another corporation does not also acquire the liabilities of the predecessor corporation. *E.g., Mozingo v. Correct Mfg. Corp.*, 752 F.2d 168, 174 (5th Cir. 1985). In Texas, an exception to this rule exists where the successor corporation expressly agrees to assume the liabilities of the predecessor. *Lockheed Martin Corp. v. Gordon*, 16 S.W.3d 127, 135, 139 (Tex.App.-Houston [1st Dist.] 2000, pet. denied); TEX. BUS. CORP. ACT Art. 5.10(B)(2)(purchase of all or substantially all of assets of selling corporation "does not make acquiring corporation…responsible or liable for any liability or obligation of the selling corporation that the acquiring corporation…did not expressly assume"). Although Fairmont does not dispute that this exception exists, it claims that it did not expressly agree to assume Stonington's liabilities. (Doc. 183). Fairmont instead claims that the PTA represents an agreement by Fairmont to indemnify Stonington, and therefore Stonington remains the proper defendant, if any, to Plaintiffs' claims. *Id.*; *see Kane v. Magna Mixer Co.*, 71 F.3d 555, 561 n.1 (6th Cir. 1995)("Where successor liability is imposed, the person harmed by the seller's pre-sale conduct may sue the purchaser directly," whereas "[a] claim of contractual indemnity…exists in favor of the agreed-upon indemnitee, not the…plaintiff.").

Upon review of the PTA, the Court finds that its language evinces both an express agreement by Fairmont to assume all of Stonington's liabilities related to its Immigration Bond Business and including the claims in the present litigation, as well as an agreement

to indemnify Stonington for its liabilities arising from this case. (Doc. 169, Ex. 1 at BF-3548; Art. I(A), (B), (D); Arts. IV, VI, XVI).[5] At the very least, the contract is ambiguous. Whereas "[t]he interpretation of an unambiguous contract is a matter of law," "the interpretation of an ambiguous contract through extrinsic evidence of the parties' intent is a matter of fact." *S. Natural Gas Co. v. Pursue Energy*, 781 F.2d 1079, 1081 (5th Cir. 1986); *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 229 (Tex. 2003). A court "may not grant summary judgment when a contract is ambiguous and the parties' intent presents a genuine issue of material fact." *Pursue Energy*, 781 F.3d at 1081. Here, Fairmont presents no evidence of the parties' intent. Plaintiffs, however, present the deposition testimony of Rex Ramos, Assistant Vice President of Stonington and its designated corporate representative, and Rick Klimaszewski, designated corporate representative of Fairmont. (Doc. 168; Doc. 170, Exs. 7, 8). Ramos, who helped negotiate the PTA, agreed that the PTA transferred to Fairmont all of Stonington's liabilities arising out of immigration bonds posted by Aaron Bonding. (Doc. 170, Ex. 7 at pp. 17, 165). He also testified that the PTA was intended to apply to the liabilities arising out of the "Zamora litigation." *Id.* at p. 169. Klimaszewski, who also provided some assistance in negotiating the PTA, testified that he "assumed" that the PTA transferred any liability Stonington might have under the notice provision of the contract on which Sandoval's and de Salinas's claims are based. (Doc. 170, Ex. 8 at pp. 176, 179-

[5] The PTA defines "Immigration Bond Business" as "collectively, *all bonds, policies, contracts, binders, certificates or agreements of immigration bond business written or issued by [Stonington] through Agent or Other Agents*, prior to the Effective Date of this Agreement." (Doc. 169, Ex. 1 at Art. I(D)). It further provides that "[Stonington] represents that its officers and directors in place on the Effective Date have no knowledge of any litigation, threatened litigation, or claims against [Stonington] *relating to the Immigration Bond Business other than bond breaches and the Zamora Litigation*." *Id.*

80). Both Ramos and Klimaszewski agreed that Stonington did not retain any liability arising out of its immigration bond business. (Doc. 170, Ex. 7 at p. 170; Ex. 8 at p. 181). Therefore, even if the PTA is ambiguous, the only evidence of intent indicates that the agreement represents an express assumption of Stonington's liabilities related to this case. Fairmont is not entitled to summary judgment on Plaintiffs' individual or class-wide claims on the grounds that Plaintiffs have no standing to sue.[6] [7]

**B. Stonington's Request for Summary Judgment on the Individual Claims of Plaintiffs Zamora and Zamora-Garcia and the Claims of Members of the Indemnitor Notice Class with Fairmont/Ranger Bonds**

In its Motion for Partial Summary Judgment, Stonington appeals to the argument advanced by Fairmont in support of its request for summary judgment on grounds of lack of standing—that is, that Plaintiffs whose claims are premised on surety bond contracts with one surety cannot assert these claims against the other. (Doc. 154). With respect to Stonington, this argument prevails. In fact, Plaintiffs do not dispute that Plaintiffs Zamora and Zamora-Garcia cannot recover against Stonington for intentional infliction of emotional distress because Stonington was not the surety on Zamora-Garcia's bond. (Doc. 171 at n.2). In addition, Plaintiffs agree that the members of the Indemnitor Notice Class who contracted with Fairmont/Ranger cannot recover on their breach of contract claims against Stonington. *Id.* Therefore, Stonington is entitled to summary judgment on these claims.

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[6] The Court has no need, therefore, to consider whether Sandoval and de Salinas may represent class members with claims against Fairmont even absent the existence of the PTA.

[7] Fairmont argues, apparently in the alternative, that "Plaintiffs, being mere incidental beneficiaries, may not bring suit under the PTA between Fairmont and Stonington." (Doc. 183). Plaintiffs correctly note that this argument is a "red herring," given that Plaintiffs are not suing under the PTA. (Doc. 190).

**C. Fairmont's Alternate Request for Summary Judgment on the Individual Claim of Plaintiff de Salinas and the Claims of the Bonded Immigrant Class**

In its reply brief, but not in its Motion for Summary Judgment, Fairmont makes the alternate argument that it is entitled to summary judgment on the claims of Plaintiff de Salinas and the Bonded Immigrant Class for "equitable relief preventing breach of contract" because this cause of action is "non-existent." (Doc. 183). Fairmont also argues that Bonded Immigrant Plaintiffs' request for declaratory relief is not ripe for review. *Id.* As Plaintiffs note, the Court considered these arguments and rejected them in its Order Granting in Part and Denying in Part Insurer Defendants' Motion to Dismiss. (Doc. 106 at pp. 19-21). Fairmont offers no new argument or evidence that would alter the Court's determination that Plaintiffs may seek injunctive and declaratory relief to enforce their alleged contractual rights under the surety bond contracts. *See id.* Fairmont also points to no evidence that would indicate that the alleged contractual breach that Plaintiffs seek to prevent—that is, Fairmont's failure to give adequate notice of INS/DHS requests for appearance—does not present a sufficiently "immediate" or "real" controversy between the parties. (Doc. 183); *see Venator Group Specialty, Inc. v. Matthew/Muniot Family, LLC*, 322 F.3d 835, 838 (5th Cir. 2003)("In the declaratory judgment context, whether a particular dispute is ripe for adjudication turns on whether a substantial controversy of sufficient immediacy and reality exists between parties having adverse legal interests."). Plaintiffs, on the other hand, cite to evidence that immigrants with outstanding bonds posted by Aaron Bonding and now administered by Fairmont rarely receive notice of INS/DHS requests for appearance from Fairmont or the federal government, leading to a high percentage of bonds breached and adverse legal consequences for the bonded immigrants. (Doc. 170, Ex. 8 at pp. 91, 194; Doc. 172, Ex.

17, Answers to Interrogatories Nos. 9, 10; Doc. 190, Ex. 30 at PTF-VAN 320-21; Ex. 31 at pp. 36-37; Ex. 32; Ex. 33, Answers to Interrogatories Nos. 9, 10). In short, genuine issues of material fact exist regarding the immediacy and reality of the claims of Plaintiff de Salinas and the Bonded Immigrant Class. Therefore, the Court must reject Fairmont's alternate request for summary judgment on these claims.

**D. Sureties' Requests for Summary Judgment on Plaintiff Alberta Rubio's Individual Claim for Breach of Contract to Recover Collateral**

In the alternative to its request for summary judgment on grounds of lack of standing, Fairmont contends that the Court should grant summary judgment on Plaintiff Alberta Rubio's individual claim that Fairmont breached its contract with her by failing to return collateral because no evidence exists that Ms. Rubio paid any collateral that needs to be returned. (Doc. 153). Stonington moves for summary judgment on Ms. Rubio's "collateral" claim against it on the same grounds. (Doc. 154). Sureties correctly point out that at the time the Court issued its Order denying Plaintiffs' request to certify the "Indemnitor Collateral Class," the evidence presented to the Court did not indicate that Ms. Rubio could properly represent the interests of the class. (Doc. 139 at pp. 28-34). The Court discussed this evidence at length in its Order and incorporates that discussion herein. *Id.* In finding Ms. Rubio to be an improper class representative, the Court noted that

> [t]he primary difficulty with Plaintiffs' evidence is that it is derived from documents other than the Promissory Note that Plaintiffs claim is contained in each bond file, and which allegedly obligates Bonding Defendants to return collateral posted by the indemnitor upon the cancellation of the immigrant's bond. In other words, if the Promissory Note is the document from which Plaintiffs hope to identify each class member and his or her damages, and upon which the breach of contract claim of the Indemnitor Collateral Class is based, that Ms. Rubio's payment of collateral and entitlement to its return cannot be established by reference to this document makes her an improper class representative.

(Doc. 139 at p. 31)(internal citation omitted).

The Court went on to find that "Plaintiffs have failed to establish that Ms. Rubio ever made a collateral deposit," basing this finding primarily on the lack of evidence that Bonding Defendants had identified any payment by Ms. Rubio as "collateral." *Id.* at pp. 31-33. However, the evidence submitted then, and now at the summary judgment stage, at least raises genuine issues of material fact regarding whether Ms. Rubio paid $2,500 that Bonding Defendants *treated* as collateral and were required to return upon the cancellation of Miguel Rubio's bond. *See id.*; (Doc. 153, Ex. 6 at BF-268, 279, 289, 303-04; Doc. 170, Ex. 7 at pp. 110-11; Ex. 8 at pp. 82-83; Doc. 172, Ex. 27; Ex. 28 at pp. 46, 49-50; Ex. 29 at PTF-VAN 166-67). Although this factual scenario did not demonstrate the "commonality," "typicality," or "adequacy" necessary to allow Ms. Rubio to represent the Indemnitor Collateral Class, it is sufficient to defeat summary judgment on Ms. Rubio's individual breach of contract claim against Fairmont and Stonington.

**E. Fairmont's Request for Summary Judgment on the Individual Claims of Plaintiffs Zamora and Zamora-Garcia and Stonington's Request for Partial Summary Judgment on the Claims of the Indemnitor Notice Class**

Finally, both Fairmont and Stonington move for summary judgment on certain of Plaintiffs' claims against them on the grounds that these claims are barred by the applicable limitations periods. (Docs. 153, 154). More specifically, Fairmont contends that Texas's statute of limitations for personal injury actions bars the individual claims of Plaintiffs Zamora and Zamora-Garcia for intentional infliction of emotional distress. (Doc. 153).[8] Stonington requests partial summary judgment on the claims of members of

[8] As explained *supra*, Stonington is entitled to summary judgment on these claims on other grounds.

the Indemnitor Notice Class that accrued before September 30, 2001, and thus outside the statute of limitations for breach of contract actions in Texas. (Doc. 154).

In Texas, a suit for intentional infliction of emotional distress must be brought "not later than two years after the day the cause of action accrues." TEX. CIV. PRAC. & REM. CODE ANN. § 16.003(a)(Vernon 2007). The conduct giving rise to the claims of Zamora and Zamora-Garcia for intentional infliction of emotional distress allegedly occurred in or around April 2002, and thus accrued at this time. (Doc. 114); *see S.V. v. R.V.*, 933 S.W.2d 1, 4 (Tex. 1996)("As a rule, we have held that a cause of action accrues when a wrongful act causes some injury, even if the fact of injury is not discovered until later, and even if all resulting damages have not yet occurred."). A plaintiff must bring suit for breach of contract in Texas "not later than four years after the day the cause of action accrues." TEX. CIV. PRAC. & REM. CODE § 16.004(a)(Vernon 2007). Plaintiffs do not dispute that each Indemnitor Plaintiff's contract claim against Stonington accrued when the alleged breach occurred—that is, when Stonington failed to give notice to the Indemnitor Plaintiff or bonded immigrant of a requested appearance for deportation. *Stine v. Stewart*, 80 S.W.3d 586, 592 (Tex. 2002)("It is well-settled law that a breach of contract claim accrues when the contract is breached."); *see also S.V.*, 933 S.W.2d at 4. Plaintiffs first named Fairmont and Stonington in their Third Amended Complaint filed on September 30, 2005, and thus outside the statute of limitations applicable to Zamora and Zamora-Garcia's claims for intentional infliction of emotional distress. *Zamora-Garcia v. Trominski* (Doc. 150). On that date, any claim by an Indemnitor Plaintiff that had accrued before September 30, 2001 was also barred by the applicable statute of limitations. Plaintiffs contend, however, that the claims against Sureties in the Third

Amended Complaint "relate back" to the filing of Plaintiffs' First Amended Complaint on May 7, 2002 or, at the very least, to the filing of the Second Amended Complaint on July 31, 2003. (Doc. 171); *Zamora-Garcia v. Trominski* (Docs. 2, 36).

Rule 15(c) of the Federal Rules of Civil Procedure provides that an amendment changing the party against whom a claim is asserted relates back to the date of the original pleading if:

> (a) the amendment asserts a claim that arose from the same conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading; and
>
> (b) the party to be brought in by amendment, within the time period prescribed by Federal Rule of Civil Procedure 4(m),
>
> (i) received notice of the claim such that it will not be prejudiced in defending on the merits; and
>
> (ii) knew or should have known that, except for a mistake concerning the identity of the proper party, it would have originally been named as a defendant.

*See* FED. R. CIV. P. 15(c).

The Court finds, and in fact Sureties do not dispute, that Plaintiffs' claims against them in the Third Amended Complaint arose out of the conduct, transaction, or occurrence alleged in Plaintiffs' prior two pleadings. In the First Amended Complaint, Plaintiffs first named Aaron Bonding as a defendant to their allegations of misconduct regarding the administration of surety bonds. *Zamora-Garcia v. Trominski* (Doc. 2). In that pleading, Plaintiffs detailed the conduct of Santiago Sol that would form the basis of the intentional infliction of emotional distress claims asserted against Aaron Bonding in

Plaintiffs' Second Amended Complaint. *Id.* at Docs. 2, 36.[9] In addition, Plaintiffs complained of the kind of lack of notice that served as the basis for the claims of Sandoval and the proposed Indemnitor Notice Class in the Second Amended Complaint. *Id.* The record also makes clear that Plaintiffs served Aaron Bonding on June 5, 2002, within 120 days of the filing of the First Amended Complaint and therefore within the time period required by Rule 4(m). *See* FED. R. CIV. P. 4(m); *Zamora-Garcia v. Trominski* (Docs. 2, 9). The real dispute between the parties thus concerns whether Plaintiffs' naming of Aaron Bonding as a defendant put Sureties on notice of the claims at issue and, if so, whether Sureties knew or should have known that but for Plaintiffs' mistake, they would have been named as defendants to these claims in either Plaintiffs' First or Second Amended Complaints.

Plaintiffs do not attempt to argue that Sureties received actual notice of the claims at issue upon the filing of either the First or Second Amended Complaints. However, as the parties recognize, actual notice is not required. *E.g.*, *Jacobsen v. Osborne*, 133 F.3d 315, 320 (5th Cir. 1998); *Kirk v. Cronvich*, 629 F.2d 404, 407 (5th Cir. 1980). As set forth most clearly in *Kirk*, notice can be imputed to a "new" defendant through service of the original complaint upon its agent, shared counsel between the original defendant and the defendant brought in by amendment, or "identity of interest" between these defendants. *Kirk*, 629 F.2d at 407-08.[10] More specifically, the Fifth Circuit in *Kirk* explained that

[9] Although Plaintiffs added Juana Zamora as a party in the Second Amended Complaint, Plaintiffs' prior pleading referenced Ms. Zamora and described Defendant Sol's alleged harassment of her in April 2002. *Zamora-Garcia v. Trominski* (Docs. 2, 36).

[10] In decisions subsequent to *Kirk*, the Fifth Circuit has indicated that courts may consider shared counsel as a factor in determining whether the requisite "identity of interest" exists. *E.g.*, *Jacobsen*, 133 F.3d at 320 (sufficient identity of interest established through shared counsel); *Moore v. Long*, 924 F.2d 586, 587 (5th Cir. 1991)(recognizing application of identity of interest theory where original defendant and defendant sought to be added share counsel); *Honeycutt v.*

"where service of the original complaint is perfected upon an agent of a party sought to be brought in by amendment, there is adequate notice of the action to that party" under Rule 15(c). *Id.* at 407. The court then noted that the Fifth Circuit and other courts had also held that "the requisite notice of an action can be imputed to a new defendant through his attorney who also represented the party or parties originally sued." *Id.* at 408 (citing numerous cases). In a footnote, the Fifth Circuit further explained that a new defendant can also receive the requisite notice by virtue of the "identity of interest" between himself and the original defendant. *Id.* at 408 n.4. The court directed that "[i]dentity of interest generally means that the parties are so closely related in their business operations or other activities that the institution of an action against one serves to provide notice of the litigation to the other." *Id.* (internal quotations omitted).

Here, Plaintiffs perfected service of the First Amended Complaint on Aaron Bonding by personally serving its owner, Don Vannerson. *Zamora-Garcia v. Trominski* (Doc. 9). Although the attorneys for Sureties did not represent Aaron Bonding at the time Plaintiffs filed the First or Second Amended Complaints,[11] Plaintiffs point to evidence sufficient to raise genuine fact issues regarding whether Don Vannerson d/b/a Aaron Bonding was an agent for Sureties in administering surety bonds, and whether

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*Long*, 861 F.2d 1346, 1351 (5th Cir. 1988)(notice could not be imputed to subdivision of Department of Defense that did not share geographical location or counsel with department); *Hendrix v. Galveston County*, 776 F.2d 1255, 1257-58 (5th Cir. 1985)(sufficient notice where original defendant and new defendant "used the same mailing address, the same counsel, and are located within the same business complex"). However, no decision indicates that shared counsel is *required* to find constructive notice under Rule 15(c). Rather, a finding of constructive notice can be premised upon any one of the three alternate bases for imputing notice set forth in *Kirk*.

[11] Plaintiffs attempt to argue that Sureties received constructive notice of the prior pleadings through former counsel for Aaron Bonding, who represented Sureties in other proceedings related to bond forfeitures. (Doc. 171). However, Fifth Circuit precedent indicates that notice can be imputed to a new party through the original party's attorney where that attorney represents both parties in the *same* proceeding. *Jacobsen*, 133 F.3d at 320; *Moore*, 924 F.2d at 588; *Honeycutt*, 861 F.2d at 1351; *Kirk*, 629 F.2d at 407-08.

Bonding Defendants shared an identity of interest sufficient to impute notice to Sureties of the claims in both pleadings. (Doc. 153, Ex. 2 at BF-224-25; Ex. 4 at ¶ 10; Ex. 5 at BF-334; Doc. 170, Ex. 7 at pp. 55, 131-33; Ex. 8 at pp. 39-40, 95-97; Ex. 19 at pp. 29, 44, 47; Doc. 172, Ex. 2 at BF-56; Ex. 9 at ¶ 7; Doc. 190, Ex. 34).

Sureties also cannot establish that they would be prejudiced in defending against the claims at issue. The evidence cited above is sufficient to raise genuine fact issues regarding whether Aaron Bonding had the same interest as Sureties in investigating and defending against the claims of misconduct by Defendant Sol and of failure to give notice of appearances for deportation. In other words, the record contains some evidence that Aaron Bonding's presence in the case protected Sureties' interests in developing a defense. *See Kirk*, 629 F.2d at 408 (new defendant's agent and his attorneys should have taken steps to investigate claim against original defendant, thus precluding new defendant from claiming prejudice through loss of evidence or by undue surprise). In addition, the Court notes that regardless of the outcome of Stonington's request for partial summary judgment on limitations grounds, Stonington must still defend against the claims of members of the Indemnitor Notice Class that accrued after September 30, 2001. It has not identified any prejudice unique to the claims that accrued prior to that date.

The Court therefore turns to whether Sureties knew or should have known that, except for a mistake concerning identity, they would have been sued within the limitations period. The Fifth Circuit has made clear that failure to properly name an intended defendant constitutes a "mistake" for purposes of Rule 15(c), whereas lack of knowledge concerning the identity of the defendant does not. *Jacobsen*, 133 F.3d at 320-21 (relying on *Barrow v. Wethersfield Police Dep't.*, 66 F.3d 466, 470 (2d Cir. 1995),

*modified on other grounds by* 74 F.3d 1366 (2d Cir. 1996)(no relation back where plaintiff's amended complaint identifying "John Doe" defendants by name "did not correct a mistake in the original complaint, but instead supplied information [the plaintiff] lacked at the outset," *i.e.*, amendments were made "not to correct a mistake but to correct a lack of knowledge"); *Worthington v. Wilson*, 8 F.3d 1253, 1257 (7th Cir. 1993)(substitution of named defendants for "unknown police officers" "was due to lack of knowledge as to their identity, and not a mistake in their names," and thus amended complaint did not relate back); *Wilson v. United States Gov't*, 23 F.3d 559, 562-63 (1st Cir. 1994)(no mistake but rather lack of knowledge where plaintiff "fully intended to sue [employer], he did so, and [employer] turned out to be the wrong party" because it did not own vessel on which plaintiff was injured)). The Fifth Circuit explained that Rule 15(c) "'is meant to allow an amendment changing the name of a party to relate back to the original complaint only if the change is a result of an error, such as a misnomer or misidentification.'" *Id.* at 320 (quoting *Barrow*, 66 F.3d at 469).

As the parties recognize, other jurisdictions have held that a mistake for purposes of Rule 15(c) can be grounded in "'law as well as fact.'" *Soto v. Brooklyn Corr. Facility*, 80 F.3d 34, 36 (2d Cir. 1996)(quoting *Woods v. Indiana Univ.-Purdue Univ.*, 996 F.2d 880, 887 (7th Cir. 1993)). Citing to a prior decision, *Cornwell v. Robinson*, 23 F.3d 694 (2d Cir. 1994), the Second Circuit in *Soto* characterized a "legal mistake" as a plaintiff's misunderstanding of the legal requirements of a cause of action and a "factual mistake" as a misapprehension of the identity of the party a plaintiff wishes to sue. *Id.* In *Cornwell*, the plaintiff had supported her allegations of gender and race discrimination by detailing numerous incidents of harassment and identifying the perpetrators in her

original complaint. *Cornwell*, 23 F.3d at 700, 705. After the applicable limitations period had run, she amended her complaint to add as defendants the individuals identified in the original pleading. *Id.* at 701, 704-05. Based on these facts, the court found no mistake of law or fact, reasoning that the plaintiff was not required to sue the individual defendants of which she had knowledge, and thus "her failure to do so in the original complaint…must be considered a matter of choice, not mistake." *Id.* at 705.

In contrast, the plaintiff in *Soto* was legally required under § 1983 to sue the defendants he had failed to name within the applicable limitations period. *Soto*, 80 F.3d at 37. In that case, the district court had dismissed the *pro se* plaintiff's § 1983 suit against a corrections facility for failure to allege that the conduct of which he complained was part of that defendant's official policy or custom. *Id.* at 34-35. In the absence of any institutional custom or policy, the plaintiff's only recourse under § 1983 was to sue the individual corrections officers involved. *Id.* Finding that "but for his mistake as to the technicalities of constitutional tort law," the plaintiff would have named the proper parties, the court determined that the plaintiff's mistake fell within the contours of Rule 15(c). *Id.* at 37.

The Fifth Circuit has not expressly recognized the distinction between "legal" and "factual" mistakes. However, the plaintiff's error in *Kirk*, *supra*, could be characterized as legal in nature, in that he first brought suit against an institutional entity not capable of being sued. *Kirk*, 629 F.2d at 405. More specifically, the plaintiff asserted claims against the Jefferson Parish Sheriff's Office under § 1983. *Id.* Upon dismissal of the complaint as to that defendant, the plaintiff amended her complaint to substitute the sheriff, individually and in his official capacity, in lieu of the sheriff's office. *Id.* The court

found that the plaintiff's substitution of the sheriff satisfied the mistake requirement of Rule 15(c), given that the sheriff had the requisite notice of the action against the sheriff's office and thus knew or should have known that he was the party who should have been sued. *Id.*

Here, Plaintiffs do not argue that they made a mistake in naming Aaron Bonding as a defendant, and they continue to pursue the claims at issue against this defendant. In other words, this is not a case of factual "misnomer" or "misidentification" of the intended defendant(s). In addition, counsel for Plaintiffs attests in an affidavit submitted to the Court that "[a]t the time I filed the First and Second Amended Complaints, I understood that Aaron Bonding was the agent for one or more sureties, *whom I now know to be [Nobel] and [Ranger]*, for the posting of immigration bonds," and that "the relief plaintiffs sought in the First and Second Amended Complaints would have a direct impact on the sureties." (Doc 172, Ex. 26)(emphasis added). Standing alone, these statements would appear to place the case squarely within *Jacobsen*, as Plaintiffs' lack of knowledge concerning the identities of Fairmont or Stonington does not constitute a mistake under Rule 15(c). Plaintiffs attempt, however, to frame their mistake as a legal one. Counsel's affidavit also attests that the failure to name the "sureties" as additional defendants within the limitations period stemmed from her belief that "by bringing claims against the sureties' agent, Aaron Bonding, Plaintiffs had in effect brought claims against the sureties themselves." *Id.* Counsel further explains:

> My practice is exclusively an immigration/human rights law practice. In my practice, I frequently bring claims against a government organization (such as the DHS) by bringing a claim against an agent for the organization (such as Marc Moore or Alberto Gonzales). Similarly, I believed that by suing a private organization's agent (Aaron Bonding), plaintiffs in the predecessor action had in effect brought claims against the private organizations (Nobel and Ranger).

*Id.*

These allegations do not present the kind of factual scenario that supported a finding of legal mistake in the decisions cited above—that is, Plaintiffs' mistake does not consist of counsel's failure to properly name the only known defendant(s) against whom Plaintiffs could assert their chosen causes of action. Limiting the scope of legal mistake in this way corresponds with Rule 15(c)'s additional requirement that the defendant "knew or should have known" that but for the mistake, it would have been sued. In other words, a potential defendant to a plaintiff's claims is less likely to meet this requirement than one who is the clear legal substitute for the defendant originally named. Again, Plaintiffs continue to assert claims against Aaron Bonding, also a proper defendant to Plaintiffs' claims. Although the Court at this time makes no explicit finding concerning the nature of the relationship between Aaron Bonding and Sureties, it cannot ignore that no party has produced evidence or argument that Plaintiffs were legally *required* to sue Sureties to recover on the claims at issue. The record does not support a finding that Fairmont and Stonington knew or should have known that, but for counsel's mistake in assuming that Plaintiffs' claims against Aaron Bonding constituted claims against unidentified "sureties," Fairmont and Stonington would have been named earlier as defendants to Plaintiffs' chosen causes of action. For these reasons, the claims of Plaintiffs Zamora and Zamora-Garcia against Fairmont for intentional infliction of emotional distress are barred by the applicable statute of limitations. For the same reasons, Indemnitor Plaintiffs' claims against Stonington that accrued before September 30, 2001 are barred by the applicable limitations period.

## IV. Conclusion

For the foregoing reasons, it is hereby **ORDERED** that Sureties' Motions for Summary Judgment are both hereby **GRANTED IN PART AND DENIED IN PART**. (Docs. 153, 154). To the extent that Sureties request summary judgment on the individual claims of Plaintiffs Zamora and Zamora-Garcia for intentional infliction of emotional distress, their Motions are hereby **GRANTED**. *Id.* To the extent that Stonington requests summary judgment on the claims of members of the Indemnitor Notice Class with Fairmont/Ranger bonds and/or with claims that accrued before September 30, 2001, its Motion is hereby **GRANTED**. (Doc. 154). All other relief requested by Sureties' Motions is hereby **DENIED**. (Docs. 153, 154).

SO ORDERED this 30th day of September, 2008, at McAllen, Texas.

Randy Crane
United States District Judge