UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
McALLEN DIVISION

ARACELY ZAMORA-GARCIA, et al., in their own name and right, and on behalf of all others similarly situated, Petitioners/Plaintiffs,	)	
v.	)	C.A. No. M-05-331 JURY DEMAND
MARC MOORE, DISTRICT DIRECTOR FOR INTERIOR ENFORCEMENT, DEPARTMENT OF HOMELAND SECURITY, et al., Respondents/Defendants.	)	

PLAINTIFF IRMA SANDOVAL'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON HER CLAIMS AND THE INDEMNITOR NOTICE CLASS CLAIMS AGAINST STONINGTON AND FAIRMONT

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NOW COMES Plaintiff Irma Sandoval Ibarra Valencia, on her own behalf and on behalf of the Indemnitor Notice Class, to move this honorable Court, pursuant to Federal Rule of Civil Procedure 56(a), (c), and (d), for an order granting judgment on liability against Defendants Fairmont Specialty Insurance Company and Stonington Insurance Company, and for such other relief as this Court finds just and equitable.

INTRODUCTION

Aaron Federal Bonding Company ("Aaron Bonding"), on behalf of Ranger Insurance Company ("Ranger") and Nobel Insurance Company ("Nobel") (collectively, the "Sureties"),[1] contracted with individuals (known herein as "Indemnitors") for the posting of immigration surety bonds that secured the release from INS[2] detention of alleged illegal aliens. Plaintiff is one such Indemnitor, as are all members of the Indemnitor Notice Class.[3]

The bonding contracts Plaintiff and the Indemnitors entered contained the following provision (the "Notice Provision"):

> 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.[4]

Plaintiff and the Class members claim the Sureties breached this contract provision. Texas law establishes the following elements for breach of contract claims: (i) the

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[1] Ranger is now known as Fairmont Specialty Insurance Company ("Fairmont"). Nobel is now known as Stonington Insurance Company ("Stonington").

[2] The Immigration and Naturalization Service was formerly the government agency charged with detention and deportation of aliens. That responsibility is now handled by the Department of Homeland Security. Both organizations are referred to herein as the "INS."

[3] *See* Order Granting in Part and Denying in Part Plaintiffs' Motion to Certify Surety Bond Classes (Apr. 25, 2007) ("Surety Bond Class Order") at 28 (Dkt. # 139).

[4] *See, e.g.,* Sandoval Bond File at BF-0000238 (Ex. 1). Unless otherwise specified, all exhibits to this motion are attached to the February 27, 2008, Declaration of J. Benjamin King, submitted herewith.

plaintiff and defendant had a valid, enforceable contract; (ii) the plaintiff performed or tendered performance; (iii) the defendant breached the contract; and (iv) the defendant's breach caused the plaintiff's injuries.[5] Plaintiff will demonstrate herein that there is no disputed issue of material fact on any of these elements, and Plaintiff and the Class members are entitled to the entry of summary judgment on liability in their favor, leaving only the calculation of damages for trial.

First, the Notice Provision is a contractual term between the Sureties and the Indemnitors. Aaron Bonding was a "d/b/a" for Don Vannerson, and the Sureties gave Vannerson the authority to contract with the Indemnitors on their behalves.[6] Within the scope of that authority and on the Sureties' behalves, Vannerson agreed to the Notice Provision. When an agent acting within the scope of his authority makes a contract on behalf of a principal, the principal is a party to the contract. *See infra* Section II.B. Alternatively, the Sureties, with full awareness of the Notice Provision, willfully ratified the Notice Provision. *See infra* Section II.A. Either through ratification or agency principles, the Sureties are bound by the Notice Provision.

Second, Plaintiff and the Class members all materially performed their obligations under the bonding contracts. *See infra* Section III. ***Third,*** the Notice Provision required the Sureties to provide notice of appearance dates for deportation to both the Indemnitors and the aliens. *See infra* Section IV. ***Fourth,*** the Bonding Defendants admit that they did not provide notice of appearance dates for deportation to

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[5] *See, e.g., Kadhum v. Homecomings Fin. Network, Inc.*, -- S.W.3d --, 2006 WL 1125240, at *4 (Tex. App.—Houston [1st Dist.] Apr. 27, 2006).

[6] Aaron Bonding was briefly operated by Don Vannerson's son, Rodney Vannerson, after Don Vannerson' death. Michael Padilla is now the Independent Administrator of the Vannerson estate. The Sureties, Don Vannerson, Rodney Vannerson, and Mr. Padilla are collectively referred to herein as the "Bonding Defendants."

the aliens, and the Sureties thereby breached their contracts with the Indemnitors. *See infra* Section V. ***Fifth,*** Plaintiff and the Class members were all damaged. All Class members paid for the Bonding Defendants to fulfill the Notice Provision, but the Bonding Defendants failed to do so. Thus, no class member got what he or she paid for. While the parties may present evidence to the jury about the amount of damage, Plaintiff and each Class member suffered damage caused by the breach. *See infra* Section VI.

Finally, Plaintiff and all Class members may recover against Fairmont, even though their contracts may have been with Nobel/Stonington. As discussed at length in Plaintiffs' Opposition to Fairmont's Motion for Summary Judgment, Fairmont has taken on the liabilities of Stonington and is a proper defendant to the claims of Plaintiff and all Class members. *See infra* Section VII.

For these reasons and those set forth below, Plaintiff respectfully requests that this Court grant Plaintiff and the Indemnitor Notice Class partial summary judgment against the Sureties on liability. Should this Court determine that a grant of summary judgment is not appropriate, Plaintiff requests that this Court rule that there is no genuine issue of material fact on whatever elements of Plaintiff's and the Class's breach of contract claim as the Court finds established.

STATEMENT OF FACTS

The Relationship Between Don Vannerson and Nobel/Stonington

1. Pursuant to a contract between Carl W. Guillory and Nobel dated February 6, 1996, Carl Guillory was authorized as a general agent of Nobel to contract with sub-agents, who would sell Nobel immigration appearance bonds at the retail level.[7]

[7] *See* Nobel/Guillory General Agent Bail Agreement, with Addendum #1 (Nov. 24, 1997) at Addendum para. 7 (referring to Feb. 6, 1996, General Agent Bail Agreement with Carl Guillory) (PTF-GUILLORY 00010-19 at 18) (Ex. 2); Guillory/Vannerson Bail Bond Underwriting Agreement (June 14, 1996) at

2. Pursuant to a General Agent Bail Agreement dated November 24, 1997, between Nobel and Lyle S. Guillory (son of Carl Guillory) and United Surety Services, Inc. (and the Addendum to that agreement) (the "Nobel/Guillory Agreement"), Lyle Guillory was authorized as a general agent of Nobel.[8]

3. Carl W. Guillory, Lyle S. Guillory, and United Surety Services, Inc., are collectively referred to herein as "Guillory."

4. One of the subagents Guillory contracted with was Don Vannerson.[9] Vannerson and Guillory entered a Bail Bond Underwriting Agreement (June 14, 1996) and an Addendum to Existing Bail Bond Underwriting Agreement (Sept. 18, 1996) (collectively the "Guillory/Vannerson Agreement"). Pursuant to the Guillory/Vannerson Agreement, Vannerson had the authority to contract with persons for the posting of immigration bonds on which Nobel served as a surety.[10]

5. Pursuant to the Nobel/Guillory Agreement, Nobel provided Guillory with powers of attorney which allowed the sub-agents to post bonds with the INS on which Nobel served as surety. The sub-agents would solicit persons at the retail level to contract for the posting of a Nobel bond with the INS.[11]

6. The Nobel surety bonds posted by Guillory's sub-agents, including Vannerson, exposed Nobel to potential financial liability. Nobel could become liable to the federal government for the full amount of the bond in the event the government breached the bond. The government could breach the bond if Nobel or Aaron Bonding failed to surrender the alien on the bond as directed by the INS.[12]

7. Between October 1996 and June 1999, pursuant to his contract with Guillory and Guillory's contracts with Nobel, Vannerson posted with the INS 3,742 immigration

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Addendum to Existing Bail Bond Underwriting Agreement (Sept. 18, 1996) at para. 5 (referring to Carl Guillory's agreement with Nobel) (PTF-GUILLORY 00040-53, at 52) (Ex.3).

[8] Nobel/Guillory Agreement (Ex. 2); Plaintiff's Original Complaint and Application for Injunctive Relief, *Nobel Insurance Company v. Lyle Steven Guillory,* 3-00 CV 0141-H (N.D. Tex. Jan. 21, 2000), at ¶¶ 5-9 (PTF-GUILLORY 00001-4) (Ex. 4).

[9] *See* Ramos Dep. at 44:16-19 (Ex. 7 to the January 25, 2008 Declaration of Elisaveta Dolghih (Dkt. # 170, under seal)).

[10] *See* Guillory/Vannerson Agreement (Ex. 3); Motion for Leave to Intervene filed by Don Vannerson, *Nobel Insurance Co. v. Guillory,* Cause No. 3-00 CV 0141-H (N.D. Tex. Feb. 1, 2000), at ¶ 2 (PTF-GUILLORY 00020-24) (Ex. 5); Nobel/Vannerson Agreement Regarding Immigration Bonds (June 28, 2000) at BF-0000389 (WHEREAS, Vannerson has previously been a subagent of Lyle Steven Guillory of United Surety Services, Inc. (collectively, "Guillory") pursuant to which relationship, he produced a substantial number of immigration bonds which were issued by Nobel under Guillory's agreements with Nobel.") (Ex. 6).

[11] Nobel/Guillory Agreement at ¶¶ 2, 4 (Ex. 2); Plaintiff's Original Complaint and Application for Injunctive Relief, *Nobel Insurance Company v. Lyle Steven Guillory,* 3-00 CV 0141-H (N.D. Tex. Jan. 21, 2000), at ¶¶ 5-9 (Ex. 4).

[12] *See, e.g.,* Sandoval Bond File at BF 0000206, 215 (invoice from government to Nobel for breach of Manual Sandoval's bond; notice of immigration bond breach) (Ex. 1).

bonds on which Nobel was the surety.[13] In doing so, Vannerson exposed Nobel to approximately $15,000,000 in liability.[14]

8. Nobel ceased writing immigration bonds on June 30, 1999,[15] at which time Vannerson ceased writing Nobel immigration bonds.[16]

9. After Vannerson and Guillory terminated their relationship, Nobel and Vannerson entered a direct contractual relationship in a June 28, 2000 Agreement Regarding Immigration Bonds (the "Nobel/Vannerson Agreement").[17] This Agreement acknowledged that Vannerson had written Nobel bonds as a subagent of Guillory and that Vannerson would not write any new Nobel immigration bonds.[18]

The Relationship Between
Don Vannerson and Ranger/Fairmont

10. On June 29, 1999, Vannerson and Ranger entered an Agent Underwriting Agreement ("Ranger/Vannerson Agreement").[19]

11. Pursuant to this Agreement, Vannerson contracted with indemnitors for the posting of immigration bonds and posted with the INS immigration bonds on which Ranger served as surety.[20]

12. After Vannerson's death on March 1, 2004, Aaron Bonding continued to be run by his son, Rodney Vannerson, until July 2004.[21] Aaron Bonding posted a total of 6,574 Ranger bonds for a total penal amount of about $35.9 million.[22] During the period

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[13] *See* February 26, 2008, Declaration of Jodie Mow at ¶ 3.a (Ex. 7).

[14] *See id.* at ¶ 3.b.

[15] Original Complaint in Intervention and Application for Injunctive Relief, *Nobel Ins. Co. v. Guillory,* (N.D. Tex. Feb. 2, 2000) at ¶ 8 (PTF-GUILLORY 00076-87) (Ex. 8); Ramos Dep. at 52:18-21(Ex. 7 to the January 25, 2008 Declaration of Elisaveta Dolghih (Dkt. # 170, under seal)).

[16] Intervenor's Response to Defendant's Counterclaim, *Nobel Ins. Co. v. Guillory* (N.D. Tex. Mar. 10, 2000) at ¶ 5 (PTF-GUILLORY 00228-233) (Ex. 9).

[17] Nobel/Vannerson Agreement (BF-0000389-394) (Ex. 6).

[18] *Id.* at BF-0000389.

[19] *See* Ranger/Vannerson Agreement (BF-0000381-387) (Ex. 10).

[20] *See* Ranger/Vannerson Agreement at ¶ 4 (BF-0000381); Zamora-Garcia Bond File at BF-0000056-58 (Ranger bond posted by Vannerson) (Ex. 11).

[21] *See* Supplemental Aff. of Rick Klimaszewski, *In the Estate of Don Vannerson*, Cause No. 345,829-401 (Harris County Probate Court, July 5, 2005) at PTF-VAN 00322 ("After Don Vannerson's death, I met with Rodney Vannerson about continuation of Aaron's business.") (Ex. 12); Motion to Delegate Managerial Duties to Ranger Ins. Co., *In the Estate of Don Vannerson,* Cause No. 345,829-402 (Harris County Probate Court, Aug. 23, 2004) at PTF-VAN 00580 (noting that Aaron Bonding ceased doing business in July 2004) (Ex. 13).

[22] *See id.* at ¶ 3.c, d.

March-July 2004 after Vannerson's death, Aaron Bonding posted 313 Ranger bonds.[23]

The Vannerson Probate Proceedings

13. Don Vannerson died on March 1, 2004.[24] His will was submitted to probate in Harris County, Texas, Probate Court.[25]

14. Ranger and Nobel each filed claims for millions of dollars in the Vannerson Probate Proceedings.[26]

15. Ranger and Nobel settled with the heirs of the Vannerson Estate. Ranger/Fairmont assumed responsibility for administering any outstanding Nobel or Ranger bonds.[27] All of Aaron Bonding's files are now in the possession of Ranger/Fairmont.[28]

16. As part of the settlement, Ranger/Fairmont's employee, Michael Padilla, was appointed Independent Administrator of the Estate of Don Vannerson.[29]

Nobel/Stonington and Ranger/Fairmont
Enter the Portfolio Transfer Agreement

17. On December 1, 2005, Nobel/Stonington and Ranger/Fairmont entered into a Portfolio Transfer Agreement.[30] This Agreement, produced under seal in this case, is discussed at length in prior briefing in this matter.[31]

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[23] *See id.* at ¶ 3.e.

[24] *See* Suggestion of Death (Ex. 22 to the January 25, 2008 Declaration of Elisaveta Dolghih (Dkt. # 172)).

[25] *See* Application for Probate of Will and for Letters Testamentary, *Estate of Don Vannerson* (Harris County Probate Court) (PTF-VAN 00072-76) (Ex. 14).

[26] Claim of Ranger Ins. Co., *In the Estate of Don Vannerson* (Harris County Probate Court, Feb. 24, 2005) (without attachments) (PTF-VAN 00094-96) (Ex. 15); Claim of Stonington Ins. Co., *In the Estate of Don Vannerson* (Harris County Probate Court, Oct. 31, 2005) (without attachments) (PTF-VAN 000209-11) (Ex. 16).

[27] *See* Padilla Dep. at 44:15-45:3; 47:3-10 (Ex. 17).

[28] *See id.* at 53:1-4.

[29] *See id.* at 29:17-23; Agreed Order Approving Resignation of Dependent Co-Executors and Order Appointing Independent Administrator with Will Annexed, *In the Estate of Don Vannerson* (Harris County Probate Court, April 7, 2006) (PTF-VAN 00005-9) (Ex. 18); Settlement Agreement and Mutual Release, *In the Estate of Don Vannerson* (Harris County Probate Court, signed March 30-April 7, 2006) at ¶ 5.2 (PTF-VAN 4349) (Ex. 19).

[30] *See* Ex. 1 to the to the January 25, 2008 Declaration of Elisaveta Dolghih (Dkt. # 169), filed under seal.

[31] Plaintiffs' Opposition to Fairmont's Motion for Summary Judgment (Jan. 24, 2008) at 5-15 (Dkt. # 168, under seal).

Nobel's and Ranger's Immigration Bond Rate Filings

18. On April 24, 1998, Nobel filed a rate of 20% of the penal amount of the immigration bond with the Texas Department of Insurance ("Texas DOI"). When filing this rate, Nobel informed the Texas DOI that "[i]t is the judgment of our management that the proposed rates are adequate, non-excessive, not unfairly discriminatory and comply with the laws of the State of Texas."[32] Nobel's proposed 20% rate was approved by the Texas DOI.[33]

19. In its rate filing, Nobel sought to have approved the same 20% rate that the Texas DOI had already approved for Ranger's immigration bonds.[34] Ranger had previously sought approval of a 20% rate on its immigration bonds.[35] Ranger believed 20% was an adequate rate to charge for its product.[36]

20. Aaron Bonding charged Ms. Sandoval a rate of 60% for the Nobel immigration bond she purchased.[37] Aaron Bonding routinely charged the indemnitors rates of 40% or more.[38]

The Documents the Bonding Defendants Used in Contracting With Ms. Sandoval and the Indemnitors

21. The Bonding Defendants provided copies of the following documents to the Indemnitors in contracting with them:

- A Nobel/Ranger Receipt for Collateral Deposited. The Nobel and Ranger versions of the Receipt are identical in every meaningful respect.[39] A copy of the Nobel Receipt is in the Sandoval bond file.

- A Nobel/Ranger Application for U.S. Immigration Bond. The Nobel and Ranger versions of the Receipt are identical in every meaningful respect.[40] A

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[32] April 24, 1998 Letter from Nobel to Texas DOI (PTF-VAN 4566) (Ex. 20); June 16, 1998 Letter from Nobel to Texas DOI (PTF-VAN 4552-53) (Ex. 21).

[33] Sept. 3, 1998 Letter from Texas DOI to Nobel (PTF-VAN 4548) (Ex. 22). *See also* Ramos Dep. at 150:7-9.

[34] *See* April 24, 1998 Letter from Nobel to Texas DOI (PTF-VAN 4566) (Ex. 20).

[35] *See* Ranger Insurance Co., Exception Page (BF 0003565) (Ex. 23); Klimaszewski Dep. at 167:22-168:4 (Ex. 8 to the to the January 25, 2008 Declaration of Elisaveta Dolghih (Dkt. # 170), filed under seal).

[36] *See* Klimaszewski Dep. at 173:19-174:8.

[37] *See* Sandoval Bond File at BF-0000244 (Ex. 1).

[38] *See* Klimaszewski Dep. at 93:3-7; Ranger Insurance Co.'s First Amended Petition, *In the Estate of Don Vannerson* (Cause No. 345,829-401) (Aug. 20, 2004) at PTF-VAN00591, 592 (admitting Vannerson charged "40% or more of the penal liability of the bond") (Ex. 24).

[39] Sandoval Bond File at BF-0000232 (Nobel); Zamora-Garcia Bond File at BF-0000061 (Ranger) (Ex. 11).

[40] Sandoval Bond File at BF-0000232 (Nobel); Zamora-Garcia Bond File at BF-0000061 (Ranger).

copy of the Nobel Application is in the Sandoval bond file.

- A Nobel/Ranger U.S. Immigration Bond Indemnity Agreement (the "Nobel/Ranger Indemnity Agreement").[41] The Nobel and Ranger versions of the Indemnity Agreements are virtually identical. Ms. Sandoval signed a copy of the Nobel Indemnity Agreement.

- A Promissory Note, obligating the Indemnitor to make monthly collateral payments to Aaron Bonding. Spanish versions of the same were sometimes provided in addition to the English version, and sometimes instead of the English version. Both versions are in the Sandoval bond file.[42]

- A Promissory Note obligating the Indemnitor to pay the full amount of the bond upon its breach.[43] Spanish versions of the same were sometimes provided in addition to the English version, and sometimes instead of the English version.[44] An English version is in the Sandoval bond file.

- A U.S. Immigration Bonds & Services Indemnity Agreement, obligating the Indemnitor to indemnify the Surety in the event of a breach of the immigration bond.[45] A Spanish version was sometimes provided in addition to the English version, and sometimes instead of the English version.[46] An English version is in the Sandoval bond file.

- A Nobel/Ranger Consent to Rate Application.[47] The Nobel and Ranger versions are identical in every respect but for the name of the Surety. Ms. Sandoval signed a Nobel version.

- A Terms and Conditions Under Immigration Bond.[48] These are identical whether used in connection with Ranger or Nobel bonds. Ms. Sandoval signed a copy.

22. These documents were provided to the Indemnitors in one packet.[49] The documents

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[41] Sandoval Bond File at BF-0000241 (Nobel); Zamora-Garcia Bond File at BF-0000129 (Ranger) (Ex. 11).

[42] *See* Sandoval Bond File at BF-0000236 (English), BF-00002336 (Spanish).

[43] *See* Sandoval Bond File at BF-0000239.

[44] *See* Salinas Bond File at BF-0000319 (Ex. 25).

[45] *See* Sandoval Bond File at BF-0000240.

[46] *See* Salinas Bond File at BF-0000317.

[47] *See* Sandoval Bond File at BF-0000237 (Nobel); Zamora-Garcia Bond File BF-0000140 (Ranger).

[48] *See* Sandoval Bond File at BF-0000238 (used in connection with a Nobel bond); Zamora-Garcia Bond File at BF-0000170 (used in connection with a Ranger bond).

[49] *See* Lopez Dep. at 67:4-23 (Ex. 26).

were not provided to the Indemnitors until after they had paid their fees.[50]

23. The Sureties have brought counterclaims in this litigation against Ms. Sandoval based on the Nobel Indemnity Agreement and the U.S. Immigration Bonds & Services Indemnity Agreement.[51] They have sought leave of Court to bring counterclaims against all members of the Indemnitor Notice Class based on the Nobel/Ranger Indemnity Agreement and the U.S. Immigration Bonds & Services Indemnity Agreement.[52]

The Bonding Defendants' Practice of not Providing Notice of Surrender Dates for Deportation

24. The Bonding Defendants may receive notice from the INS in a Form I-340 that an alien released on a surety bond is to be surrendered to the INS for deportation.[53] On June 6, 2002, Aaron Bonding received an I-340 for the surrender of Mr. Sandoval for deportation.[54]

25. The Bonding Defendants historically did not provide notice of their receipt of an I-340 for deportation of an alien to, at least, the alien.[55] If an alien asked Aaron Bonding whether a notice for deportation had been issued, Aaron Bonding would inform them that no notice had been issued, regardless of whether that was true.[56]

26. The Bonding Defendants did not provide notice of Mr. Sandoval's appearance date for deportation to either Mr. or Ms. Sandoval.[57]

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[50] *See* B. Manzano Dep. (*In the Estate of Don Vannerson,* Cause No. 345,829-402 (Harris County Probate Court, Sept. 13, 2005) at 14 (under questioning by Mr. Irelan, testifying that she worked in "almost every department there has been" at Aaron Bonding and that she worked there from 1997 to her deposition), 97 (contract documents not provided to Indemnitors until after they paid their fees) (Ex. 27).

[51] *See* Sureties' First Amended Answer at ¶ 113 (Dkt. # 174).

[52] *See* Defendants, Fairmont and Stonington's, [Proposed] First Amended Answer and Counterclaims to Plaintiffs' Sixth Amended Petition for Writ of Habeas Corpus and Class Action Complaint at ¶¶ 115, 118-19 (Dkt. # 145, Attachment # 1).

[53] *See, e.g.,* Sandoval Bond File at BF-0000217 (Ex. 1).

[54] *See id.*

[55] *See* Surety Bond Class Order at 20; Petition for Leave to File an Interlocutory Appeal Under Fed. R. Civ. P. 23(f) at 1 ("The bonding 'agency' concedes it followed a policy of withholding notice of deportation from the alien.") (Ex. 28).

[56] *See* Cuayahuitl Dep. at 68:9-22 (Ex. 10 to the January 25, 2008 Declaration of Elisaveta Dolghih, Dkt. # 172).

[57] *See* Manuel Sandoval Declaration (Sept. 20, 2002) (Ex. 16 to the January 25, 2008 Declaration of Elisaveta Dolghih, Dkt. # 172).; Irma Sandoval Declaration (Sept. 20, 2002) (Ex. 14 to the January 25, 2008 Declaration of Elisaveta Dolghih, Dkt. # 172).

27. Fairmont, currently operating what remains of Aaron Bonding's immigration bond business, does not provide notice of deportation dates to aliens.[58]

ARGUMENT

I. A PLAINTIFF MAY SUCCESSFULLY OBTAIN PARTIAL SUMMARY JUDGMENT ON LIABILITY WHERE SHE CAN DEMONSTRATE THAT THERE IS NO GENUINE ISSUE OF MATERIAL FACT AND THAT SHE IS THUS ENTITLED TO JUDGMENT AS A MATTER OF LAW.

"Rule 56 of the Federal Rules of Civil Procedure mandates the entry of summary judgment, after adequate time for discovery and upon motion, if 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits filed in support of the motion, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'"[59] Once the moving party has satisfied her burden of proof on an issue, the nonmovant "may not rest on mere allegation or denials in its pleadings, but must instead produce affirmative evidence and specific facts" showing that there is a genuine issue for trial.[60]

The Federal Rules specifically provide for adjudication of liability on a motion for partial summary judgment, leaving the adjudication of damages for another time.[61] Moreover, the Federal Rules provide that "[i]f summary judgment is not rendered on the whole action, the court should, to the extent practicable, determine what material facts are not genuinely at issue" and issue an order establishing those facts for the action.[62]

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[58] *See* Klimaszewski Dep. at 194:18-21(Ex. 8 to the to the January 25, 2008 Declaration of Elisaveta Dolghih (Dkt. # 170), filed under seal).

[59] *Principal Life Ins. Co. v. Renaissance Healthcare Sys., Inc.,* Civ. Case No. H-06-2973, 2007 WL 3228103 at *1 (S.D. Tex. Oct. 30, 2007) (granting summary judgment for plaintiff on breach of contract action) (quoting Fed.R.Civ.P. 56(c)).

[60] *Schaefer v. Gulf Coast Reg'l Blood Ctr.,* 10 F.3d 327, 330 (5th Cir.1994).

[61] Fed. R. Civ. Proc. 56(d)(2).

[62] Fed. R. Civ. Proc. 56(d)(1).

II. THE SURETIES ARE BOUND BY THE NOTICE PROVISION.

The bonding contracts between the Bonding Defendants and the Indemnitors consist of a variety of materially uniform documents, all presented to the Indemnitors in a single bundle of documents.[63] These documents included documents the Sureties agree they are bound by (such as the Nobel/Ranger Indemnity Agreements and the Nobel/Ranger Receipts) and other documents they contend were side-agreements between Aaron Bonding and the Indemnitors to which they were not parties, including the Terms and Conditions agreement. Plaintiffs demonstrate herein that either through ratification or agency principles, the Sureties are bound by the Terms and Conditions agreement and are liable for any breach of the Notice Provision.

Ratification: The Sureties have willingly taken on the responsibility of administering the outstanding bonds posted by Vannerson, have retained the benefits of the bonding contracts, and have neither repudiated the bonding contracts nor any portion thereof. In fact, they have brought a counterclaim against Plaintiff Sandoval under the bonding contracts, and they have sought to bring counterclaims against all Class members under the bonding contracts.[64] The undisputed evidence in this case demonstrates that the Sureties have ratified the bonding contracts—including the Notice Provision—and are bound by them. *See infra* Section II.A.

Agency: When an agent acting within the scope of his authority makes a contract on behalf of a principal, the principal is a party to the contract and is bound by its provisions.[65] The undisputed facts in this case demonstrate that Vannerson acted within

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[63] *See* Statements of Fact 21-22, *supra.*

[64] *See* Statement of Fact 23, *supra.*

[65] Restatement (Third) of Agency § 6.01, § 6.03 (Ex. 29A-B).

the scope of this authority and on behalf of the Sureties in entering the bonding contracts—including the Notice Provision—and thus the Notice Provision is a contractual term binding the Sureties, the breach of which the Sureties are liable for. *See infra* Section II.B.

A. The Sureties Ratified the Terms and Conditions Agreement.

"Ratification is the adoption or confirmation by a person with knowledge of all material facts of a prior act that did not then legally bind him and that he had the right to repudiate. Such approval can be given through act, word, or conduct. . . . 'One may ratify the acts or contracts of another . . . whether the other was his agent and exceeded his authority as such or was not his agent at all.'"[66] Here, the Sureties ratified the bonding contracts, including the Terms and Conditions agreement, in two ways.

First, the Sureties have brought suit against Ms. Sandoval under the Nobel Indemnity Agreement, and they have attempted to bring suit against the absentee Class members.

> One of the most unequivocal methods of showing a ratification of an agent's unauthorized act is where the principal brings a suit on a contract made by an agent. If the principal, with full knowledge of all the material facts of the case, attempts to enforce a contract made by the agent without authority, by commencing an action against the third party involved, this action constitutes a ratification of the agreement.[67]

The Sureties cannot sue on those parts of the bonding contracts they like—the Nobel/Ranger Indemnity Agreements—and avoid those parts they do not like—such as

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[66] *Willis v. Donnelly,* 118 S.W.3d 10, 26 (Tex. Ct. App. 2003) (citations omitted).

[67] 3 Tex. Jur. 3d Agency § 143 (Ex. 29C).

the Terms and Conditions Agreement.[68] Because all the documents the Bonding Defendants used in contracting with the Indemnitors were provided to the Indemnitors in one packet, they should all be treated together as one contract.

Second, the Sureties have purposefully taken on the immigration bond business of Aaron Bonding with full knowledge that Vannerson used the Terms and Conditions agreements in contracting with the Indemnitors. As a result of a settlement reached between Fairmont, Stonington, and Vannerson's heirs, Fairmont (which has succeeded to all of the interest Nobel/Stonington had in its immigration bond business[69]) handles every aspect of the administration of the bonds and the bonding contracts, including both Nobel and Ranger bonds. According to Michael Padilla, the independent administrator of the Vannerson estate and an employee of Fairmont,[70] Fairmont is currently responsible for administering the outstanding bonds posted by Vannerson.[71] Fairmont currently has possession of all of Aaron Bonding's files.[72] The federal government sends I-340 notices (the notice at issue in this case) to Fairmont, not to Aaron Bonding.[73] Whether or not the aliens and Indemnitors are provided with any notice of an I-340 is an issue handled by Fairmont.[74] Aaron Bonding's mail has been forwarded to Fairmont, as well as Aaron Bonding's phone lines.[75] There are currently 615 immigration bonds outstanding,[76] and

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[68] 3 Tex. Jur. 3d Agency § 127 (Ex. 29D).

[69] *See* Plaintiffs' Opp. to Fairmont's Motion for Summary Judgment (Jan. 24, 2008) at 5-15 (Dkt. # 168).

[70] *See* Padilla Dep. at 29:17-23 (Ex. 17).

[71] *See id.* at 44:15-45:3; 47:3-10.

[72] *See id.* at 53:1-4.

[73] *See id.* at 53:11-54:3.

[74] *See id.* at 54:4-55:7.

[75] *See id.* at 57:4-12.

[76] *See* February 26, 2008, Declaration of Jodie Mow at ¶¶ 4, 5 (192 + 423) (Ex. 7); February 27, 2008 Declaration of J. Benjamin King at ¶ 3.

the Terms and Conditions document was used in the vast majority of the bonding contracts relating to those bonds.[77] After taking on Aaron Bonding's business, Fairmont did nothing to repudiate the Terms and Conditions agreement. It has not contacted the Indemnitors to inform them that a portion of their agreements is unenforceable, and it has not attempted to return to the Indemnitors the fees they paid Aaron Bonding—not even the portion of the fees Vannerson passed along to the Sureties.[78] Having retained the benefits of Aaron Bonding's contracts with the Indemnitors with full knowledge of the terms of those contracts,[79] and having willfully taken on the responsibility of administering the bonding contracts, Fairmont has ratified and is bound by the bonding contracts.

"Ratification is equivalent to prior authority and operates retroactively. In other words, a principal's ratification of its agent's act relates back to the inception of the transaction and renders it valid, as though the agent had been fully authorized in the first instance."[80] Thus, Fairmont's ratification of the bonding contracts operates retroactively so that Fairmont is bound by both the Notice Provisions it has already breached and those it has yet to breach.[81] There is no genuine issue of material fact on any of these issues.

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[77] *See* February 26, 2008, Declaration of Jodie Mow at ¶¶ 4, 5.

[78] Ranger/Vannerson Agreement at BF 0000535, ¶ 7 (setting forth portion of fees to be paid to Ranger) (Ex. 10); Klimaszewski Dep. at 126:19-127:5; Ranger Insurance Co.'s First Amended Petition, *In the Estate of Don Vannerson* (Cause No. 345,829-401) (Aug. 20, 2004) at PTF-VAN00591 (describing Ranger's fee) (Ex. 24).

[79] 3 Tex. Jur. 3d Agency § 144 (Ex. 29E).

[80] 3 Tex. Jur. 3d Agency § 128 (Ex. 29F).

[81] *See Warburton v. Wilkinson,* 182 S.W. 711 (Tex. Ct. Civ. App. 1916) (holding undisclosed principal bound by ratification of contract entered by agent so that principal was liable for the breach of the contract).

B. Because Vannerson was the Sureties' Agent and Acted Within the Scope of his Authority in Entering the Terms and Conditions Agreement, the Sureties are Bound by the Notice Provision.

When an agent acting within the scope of his authority makes a contract on behalf of a principal, the principal is a party to the contract and is bound by its provisions. This is true whether or not the contract counterparty knows of the agency relationship[82] and whether or not the identity of the principal is known to the counterparty.[83] It is irrelevant whether the contract specifically binds the principal, so long as it binds the agent: "a contract negotiated by the agent in the agent's own name but within the scope of the agent's authority is generally treated as the principal's contract."[84] In fact, the law presumes that the principal is a party to the agreement unless explicitly excluded.[85]

For example, in *Krumtum v. Burr,* an agent entered a contract with a third-party by which the agent agreed to perform some paving work.[86] The contract was signed only by the agent and the third-party; the principal was not listed anywhere on the contract.[87] When the principal failed to perform the contract, the third-party brought a claim for breach of contract. The principal claimed it was not liable on the contract, his name being nowhere on it.[88] The court rejected this argument, citing to the Restatement (Second) of Agency § 149:

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[82] *See* Restatement (Third) of Agency § 6.01 (disclosed principal bound by agent's contracts) (Ex. 29A); Restatement (Third) of Agency § 6.03 (undisclosed principal bound by agent's contracts) (Ex. 29B).

[83] *See* Restatement (Third) of Agency § 6.02 (unidentified principal bound by agent's contracts) (Ex. 29G).

[84] *See* 3 Tex. Jur. 3d Agency § 238 (Ex. 27H); Restatement (Second) of Agency § 149 (Ex. 29I).

[85] *See* Restatement (Third) of Agency § 6.03 (principal a party to a contract made by an agent "unless excluded by the contract") (Ex. 29B).

[86] 487 P.2d 435, 435-36 (Ariz. Ct. App. 1971).

[87] *Id.* at 436.

[88] *Id.* at 436.

> A disclosed or partially disclosed principal is subject to liability upon an authorized contract in writing, if not negotiable or sealed, although it purports to be a contract of the agent, unless the principal is excluded as a party by the terms of the instrument or by agreement of the parties.[89]

Numerous cases stand for the same proposition.[90]

Here, Vannerson entered into the Terms and Conditions agreement on behalf of the Sureties and within the scope of his authority. ***First,*** Vannerson was the Sureties' "Local Recording Agent" under Texas law and had the plenary authority to bind the Sureties. This fact alone binds the Sureties to the Notice Provision. ***Second,*** even apart from his status as their Local Recording Agent, under general principles of agency law, Vannerson was the agent of the Sureties for the purposes of contracting with the Indemnitors. ***Third,*** Vannerson did the business of the Sureties in entering the Terms and Conditions agreement. ***Fourth,*** Vannerson operated within the scope of his actual authority in agreeing to the Terms and Conditions document and the Notice Provision. Like the principal in *Krumtum,* the Sureties are bound by the contracts their agent entered, and the Sureties are liable if the notice promised in the Notice Provision was not provided.

1. Under Texas insurance law, Vannerson had power co-extensive with that of the Sureties themselves to bind the Sureties.

Vannerson was licensed as a Local Recording Agent with the Texas Department of Insurance.[91] Nobel and Ranger both appointed Vannerson as their agent with the

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[89] *Id.* at 436 (quotation marks omitted).

[90] *See Comind, Companhia de Seguros v. Sikorsky Aircraft Div. of United Technologies Corp.,* 116 F.R.D. 397, 407 (D. Conn. 1987); *Alfano v. BDO Seidman,* 925 A.2d 22, 27 (N.J. App. Div. 2007); *Sanger v. Warren,* 44 S.W. 477, 478 (Tex. 1898); *S. Pac. Co. v. U.S.,* 192 F.2d 438, 440 (3d Cir. 1951); *Sims v. Callihan,* 39 S.W.2d 153, 155 (Tex. Ct. Civ. App. 1931).

[91] *See* Texas Dep. of Ins., License Certificate (BF 0003645) (Vannerson licensed as Local Recording Agent) (Ex. 30).

Texas Department of Insurance.[92] Indeed, Ranger's contract with Vannerson required him to "remain a duly licensed and qualified Local Recording Agent in Texas as required by law."[93]

The Texas Insurance Code historically provided a statutory category of insurance agents, as follows:

> "Local Recording Agent" means a person or firm engaged in soliciting and writing insurance, being authorized by an insurance company or insurance carrier, including fidelity and surety companies, to solicit business and to write, sign, execute, and deliver policies of insurance, and to bind companies on insurance risks, and who maintain an office and a record of such business and the transactions which are involved, who collect premiums on such business and otherwise perform the customary duties of a local recording agent representing an insurance carrier in its relation with the public . . . ."[94]

The Fifth Circuit held that this provision "'vest[ed] local recording agents with authority co-extensive with that of the company insofar as writing insurance is concerned ***and to remove all questions of the local agent's actual or apparent authority*** from the field of cavil or dispute.'"[95] "There seems little doubt that the Texas courts, as well as this Court, have construed Article 21.14 and its predecessors as vesting the local recording agent with authority as extensive as that which the company possesses under its charter."[96]

Because Local Recording Agents had authority co-extensive with that of the insurer, an insurer would be bound by risks underwritten by the Local Recording Agent,

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[92] Texas Dep. of Ins., Individual Information Inquiry (Feb. 12, 2008), listing Don Vannerson as appointed agent of Stonington beginning Aug. 26, 1996, and of Fairmont beginning Feb. 14, 1996 (PTF-VAN 04617-619) (Ex. 31).

[93] Ranger/Vannerson Agreement at ¶ 2 (Ex. 10).

[94] Tex. Ins. Code (2001) § 21.14 (Ex. 32). *Compare* Tex. Ins. Code (2002) (Ex. 32).

[95] *Blakely v. Am. Employers' Ins. Co.*, 424 F.2d 758, 732 (5th Cir. 1970) (quoting *Shaller v. Comm. Standard Ins. Co.*, 309 S.W.2d 59, 63 (Tex. 1958)) (emphasis added).

[96] *Blakely*, 424 F.2d at 732.

even if the insurer expressly forbid him from underwriting the risk.[97] Similarly, a Local Recording Agent could waive stipulations and conditions in an insurance policy and thereby bind the insurer by the waiver.[98] Here, Vannerson had "plenary authority to bind" the Sureties,[99] and he bound them to the Terms and Conditions agreement.

2. Even apart from Vannerson's status as their Local Recording Agent, under general agency principles Vannerson was the agent of the Sureties for the purposes of contracting with the Indemnitors.

"An agent is one who is authorized by a person or entity to transact business or manage some affair for the person or entity. . . . The critical element of an agency relationship is the right to control, and the principal must have control of both the means and details of the process by which the agent is to accomplish his task in order for an agency relationship to exist."[100] Whether or not a principal-agent relationship exists under established facts is a question of law for the Court to decide.[101]

a. Vannerson did the business of the Sureties in executing and administering their admittedly approved documents.

The Sureties agree that Vannerson had authority to use the documents they admittedly approved of: the Ranger/Nobel Indemnity Agreements, the Nobel/Ranger Receipt, the Nobel/Ranger Application, and the Nobel/Ranger Power of Attorney.[102]

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[97] *See Shaller v. Comm. Standard Ins. Co.,* 309 S.W.2d 59, 62-63 (Tex. 1958) (although insurer's Local Recording Agent had been specifically instructed not to write the risk at issue, insurer was bound by policy issued covering risk).

[98] *See Preferred Risk Mut. Ins. Co. v. Rabun,* 561 S.W.2d 239, 244-45 (Tex. Ct. Civ. App. 1978).

[99] *Am. Nat'l Life Ins. Co. of Tex. v. Montgomery,* 640 S.W.2d 346, 351 (Tex. Ct. App. 1982).

[100] *Coleman v. Klockner & Co. AG,* 180 S.W.3d 577, 588 (Tex. App. 2005).

[101] *First Nat. Acceptance Co. v. Bishop,* 187 S.W.3d 710, 714 (Tex. App. 2006).

[102] *See* Klimaszewski Dep. at 140:14-17 (Ex. 8 to the January 25, 2008 Declaration of Elisaveta Dolghih (Dkt. # 170, under seal)); Ramos Dep. at 85:11-20 (Ex. 7 to the January 25, 2008 Declaration of Elisaveta Dolghih (Dkt. # 170, under seal)).

Vannerson performed all the business of the Sureties relating to these admittedly approved documents:

- The Nobel/Ranger Indemnity Agreements state that "[c]redit checks are made on all indemnitors."[103] Vannerson performed those credit checks.[104]

- The Nobel/Ranger Indemnity Agreements state that the Indemnitors will pay the Surety "the annual premium for such suretyship as billed by SURETY."[105] The Sureties depended on Vannerson to collect those premiums and communicate the amount of the premium to the Indemnitors.[106]

- The Nobel/Ranger Indemnity Agreements state that the Indemnitors will pay the Surety for any loss the Surety may incur by reason of the suretyship.[107] The Sureties depended on Vannerson to collect these indemnity payments.[108]

- The Nobel/Ranger Indemnity Agreements state that the Sureties may cancel the bond if the Indemnitor furnishes "incorrect information to SURETY" or fails "to furnish information when requested by SURETY."[109] The Sureties depended on Vannerson to collect all information from the Indemnitors and depended on Vannerson for all necessary interaction with the Indemnitors.[110]

- The Nobel/Ranger Indemnity Agreements state that the Indemnitors would provide updated contact information.[111] The Sureties expected that the Indemnitors would provide this information to Vannerson, not directly to them.[112]

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[103] Nobel/Ranger Indemnity Agreements, top of page. *See* Sandoval Bond File at BF-0000241 (Nobel) (Ex. 1); Zamora-Garcia Bond File at BF-0000129 (Ranger) (Ex. 11).

[104] *See, e.g.,* Sandoval Bond File at BF-0000234 (credit report run for Aaron Bonding).

[105] Nobel/Ranger Indemnity Agreements at ¶ 1(b).

[106] *See* Klimaszewski Dep. at 93:12-94:4; Ramos Dep. at 130:11-13.

[107] Nobel/Ranger Indemnity Agreements at ¶ 1(a).

[108] *See* Klimaszewski Dep. at 97:15-98:10; Ramos Dep. at 133:3-13.

[109] Nobel/Ranger Indemnity Agreements at ¶ 8.

[110] *See* Klimaszewski Dep. at 39:15-40:5, 95:7-19, 96:17-97:14; Ramos Dep. at 55:9-14, 131:16-23, 132:20-133:2.

[111] Nobel/Ranger Indemnity Agreements at ¶ 9.

[112] *See* Klimaszewski Dep. at 99:16-22; Ramos Dep. at 133:17-134:13.

- The Nobel/Ranger Receipts would memorialize the Indemnitor's obligation to make collateral payments.[113] The Sureties depended on Vannerson to collect these collateral payments.[114]

- Although the Sureties had the authority to direct Vannerson not to post bond for an alien, Vannerson generally determined whether a Ranger or Nobel bond would be posted for particular aliens.[115]

Thus, Vannerson was no mere clearinghouse for bonds or wholesaler of the Sureties' paper. Rather, he transacted their business and performed every task relating to the Sureties' admittedly approved documents.

b. Vannerson did the business of the Sureties in entering the Terms and Conditions agreements.

As demonstrated above, Vannerson did the business of the Sureties in using and administering the Nobel/Ranger Indemnity Agreements. Vannerson also did the business of the Sureties in entering the Terms and Conditions agreements. In the Terms and Conditions agreement, Aaron Bonding and the Indemnitors agreed to certain procedures designed to help fulfill the requirements set forth in the Nobel/Ranger Indemnity Agreements:

- The Terms and Conditions agreement required the aliens and the Indemnitors to check in with Aaron Bonding once every thirty days. *See* T&C Agr. ¶ 1 (Sandoval Bond File at BF-0000238). This provision is obviously designed to help Aaron Bonding keep tabs on the aliens and the Indemnitors so that the bond will not be breached.

- The Terms and Conditions agreement required the alien and the Indemnitor to provide updated contact information. The Terms and Conditions document also required updated contact information for the Indemnitor's and alien's employer and attorney, as well as information on the alien's immigration status and any departure from the United States. *See* T&C Agr. ¶ 2. This requirement is more detailed and extensive than the related requirement in the Nobel/Ranger

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[113] *See, e.g.,* Sandoval Bond File at BF-0000232.

[114] *See* Klimaszewski Dep. at 97:15-98:14.

[115] *See* Nobel/Guillory Agreement at ¶5, sentence 1 (Ex. 2); Guillory/Vannerson Agreement at ¶5, sentence 1; at ¶ 5, sentence 1 (Ex. 3); Klimaszewski Dep. at 122:2-12.

Indemnity Agreements that the Indemnitor "notify the surety in writing within forty-eight (48) hours when there is a change of address and/or change of names." Nobel/Ranger Indemnity Agreement at ¶ 9. Again, this provision is obviously designed to help the Bonding Defendants keep tabs on the aliens and the Indemnitors so that the bond will not be breached.

- The Notice Provision itself is designed to ensure that the alien and the Indemnitor have information regarding requested INS appearances, so that they can ensure the alien's appearance and avoid any breach of the bond. *See* T&C Agr. ¶ 4. There is no other way the Indemnitor can "absolutely guarantee the appearance" of the alien without this notice. *See* Nobel/Ranger Indemnity Agreement at ¶ 10.

- Under the Terms and Conditions document, Aaron Bonding also agreed to notify the alien's attorney of "all appearances requested" by the INS. *See* T&C Agr. at ¶ 5. Again, this paragraph is clearly designed to allow the Indemnitor to effectively "absolutely guarantee the appearance" of the alien. *See* Nobel/Ranger Indemnity Agreement at ¶ 10.

- "AGENCY and SURETY" had the ability to verify all information given to them to determine the Indemnitor's and alien's eligibility for a bond and to determine either's whereabouts. *See* T&C Agr. at ¶ 8. This provision is thus similar to yet broader than the provision in the Nobel/Ranger Indemnity Agreement providing for credit checks on the Indemnitors.

The Terms and Conditions document gave the Sureties additional rights designed to help them protect their interest in not paying on the bond:

- The Terms and Conditions agreement gave the Sureties the ability to "require[] the PRINCIPAL and INDEMNITOR to appear in AGENCY'S office." *See* T&C Agr. at ¶ 6.

- The Terms and Conditions agreement purported to give "AGENCY and SURETY" the right, under certain conditions, "to enter the PRINCIPAL'S and/or INDEMNITOR'S home, place of employment, or any other location where the PRINCIPAL may be found in order to effect the PRINCIPAL'S rearrest, with or without warrant." T&C Agr. at ¶ 9.

- The Terms and Conditions agreement purported to release "AGENCY and SURETY of any and all liability or damages as a direct and/or indirect result of the PRINCIPAL'S rearrest." T&C Agr. at ¶ 9.

- In case these rights were not enough, the Terms and Conditions document purportedly gave Aaron Bonding and the Sureties the right to issue additional "term and conditions" not set forth in the document. *See* T&C Agr. at second unnumbered paragraph.

Thus, all of the provisions in the Terms and Conditions document are geared toward preventing a breach of the bond and protecting the rights of the Sureties, and many of the provisions are extensions of provisions found in the Nobel/Ranger Indemnity Agreements. Vannerson was thus doing the business of the Sureties and acting on their behalves in entering the Terms and Conditions agreement.

c. The Sureties had the power to control Vannerson in contracting with the Indemnitors.

"The critical element of an agency relationship is the right to control, and the principal must have control of both the means and details of the process by which the agent is to accomplish his task in order for an agency relationship to exist."[116] The right of control is the critical issue, not whether control was actually exercised.[117] "[A] a person may be an independent contractor under some circumstances yet may be an agent or employee in connection with other work or activities."[118]

Here, as discussed below, the contracts between the Sureties and Vannerson gave the Sureties extensive control over how Vannerson contracted with the Indemnitors and how he administered the bonding contracts. This just makes sense. According to Vannerson's electronic records, Vannerson posted nearly $15 million in Nobel bonds and $35.9 million in Ranger bonds—over ***$50 million*** in potential liability.[119] It just makes sense that the Sureties would make sure they retained the power to exercise control over Vannerson as they thought necessary.

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[116] *Coleman v. Klockner & Co. AG,* 180 S.W.3d 577, 588 (Tex. App. 2005).

[117] *See Farrell v. Greater Houston Transp. Co.,* 908 S.W.2d 1, 3 (Tex. App. 1995); *Morante v. Am. Gen. Fin. Center,* 157 F.3d 1006, 1009 (5th Cir. 1998).

[118] *Royal Mortg. Corp. v. Montague,* 41 S.W.3d 721, 733 (Tex. Ct. App. 2001); 3 Tex. Jur. 3d Agency § 13 ("A party who contracts to act on behalf of another and is subject to the other's control except with respect to his or her physical conduct is an agent and also an independent contractor.") (Ex. 29J).

[119] *See* February 26, 2008, Declaration of Jodie Mow at ¶ 3.b, d (Ex. 7).

In fact, the Sureties agree that they had the power to control Vannerson. In the Vannerson Probate Proceedings, Ranger filed a "Motion to Delegate Managerial Duties to Ranger Insurance Company." There, in attempting to convince the probate court that Ranger should be placed in charge of the run-off business of Aaron Bonding, Ranger claimed: "Under the terms of [its contract with Vannerson], Ranger enjoys broad powers and authority with respect to the business of Aaron."[120] Nobel had the same ability to control Vannerson as did Ranger, and thus the same "broad powers and authority."

i. Nobel's contractual power to control Vannerson.

Nobel's relationship with Vannerson was governed by three principal documents: (i) the Nobel/Guillory Agreement (Ex. 2); (ii) the Guillory/Vannerson Agreement (Ex. 3); and (iii) the Nobel/Vannerson Agreement (Ex. 6). Nobel contracted with the Indemnitors through a general agent (Guillory) and a subagent (Vannerson). Nobel ceased writing immigration bonds on June 30, 1999,[121] and on June 28, 2000, Nobel and Vannerson entered the Nobel/Vannerson Agreement. Although Vannerson would not produce any new Nobel bonds under the Nobel/Vannerson Agreement, Nobel retained extensive control over Vannerson's business.

Throughout their relationship, Nobel had the power to control Vannerson in his contracting with the Indemnitors:

1. Nobel could control the number and amount of bonds Guillory and his sub-agents, including Vannerson, could issue.[122]

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[120] Motion to Delegate Managerial Duties to Ranger Ins. Co., *In the Estate of Don Vannerson,* Cause No. 345,829-402 (Harris County Probate Court, Aug. 23, 2004) (PTF-VAN 00580-588, at 581) (Ex. 13).

[121] *See* Statement of Fact 8, *supra.*

[122] *See* Nobel/Guillory Agreement at ¶4, sentence 1, ¶5, sentence 2; Guillory/Vannerson Agreement at ¶ 4, sentence 1.

2. Guillory had the power to require Vannerson to return any unused "Powers of Attorney" (the documents that gave Vannerson the authority to post bonds) to Guillory upon his request.[123]

3. Nobel could control which forms Guillory and the sub-agents would use in contracting with Indemnitors.[124]

4. Nobel had the power to direct Vannerson, through Guillory, to not bond out particular aliens.[125]

5. Nobel had the power to direct Vannerson, through Guillory, to collect such collateral as Nobel "shall authorize and/or direct from time to time."[126]

6. Vannerson's business accounts were an open book to Nobel. While Vannerson was actively writing Nobel bonds, Nobel had the authority to inspect immediately all of Guillory's collateral accounts, "along with any general business account(s)."[127] Guillory had a corresponding authority over Vannerson.[128] The Nobel/Vannerson Agreement gave this power directly to Nobel.[129]

7. Nobel had the authority to set the rates Vannerson could charge the public.[130]

8. While Vannerson was writing Nobel bonds, Guillory was required to "maintain such documents and records and deliver to [Nobel] such documents, records and/or reports as shall from time to time be authorized and/or directed by [Nobel]."[131] Vannerson was subject to a corresponding requirement.[132] The Nobel/Vannerson Agreement made this an obligation owed directly by Vannerson to Nobel.[133]

9. While Vannerson was writing Nobel bonds, Guillory was required to keep his files "open and available for inspection by [Nobel] at all times."[134] Vannerson

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[123] *See* Guillory/Vannerson Agreement at ¶4, sentence 3.

[124] *See* Guillory/Vannerson Agreement at ¶4, sentence 2; Ramos Dep. at 81:23-82:11, 83:5-17, 85:11-86:5, 91:24-92:24 (Ex. 7 to the January 25, 2008 Declaration of Elisaveta Dolghih (Dkt. # 170, under seal)).

[125] *See* Nobel/Guillory Agreement at ¶5, sentence 1; Guillory/Vannerson Agreement at ¶5, sentence 1.

[126] *See* Nobel/Guillory Agreement at ¶6, sentence 1; Guillory/Vannerson Agreement at ¶6, sentence 1.

[127] *See* Nobel/Guillory Agreement at ¶6, sentence 4.

[128] *See* Guillory/Vannerson Agreement at ¶6, sentence 3.

[129] *See* Nobel/Vannerson Agreement at ¶ 4, sentence 4.

[130] *See* Nobel/Guillory Agreement at ¶7; Guillory/Vannerson Agreement at ¶7.

[131] *See* Nobel/Guillory Agreement at ¶12, sentence 1.

[132] *See* Guillory/Vannerson Agreement at ¶12, sentence 1.

[133] *See* Nobel/Vannerson Agreement at ¶ 9, sentence 1.

[134] *See* Nobel/Guillory Agreement at ¶12, sentence 2.

was required to keep his files open and available to Guillory.[135] The Nobel/Vannerson Agreement made this an obligation owed directly to Nobel.[136]

10. Guillory recognized Nobel's "superior claim" to Guillory's files.[137] Vannerson likewise recognized Guillory's superior claim to Vannerson's files.[138] He subsequently recognized Nobel's direct and superior claim to his files.[139]

11. Nobel had the authority to direct Guillory in the conduct of his business: "Agent shall comply with any and all procedural directions, rules, regulations and the like from time to time given and/or adopted by [Nobel]."[140] Guillory had the exact same authority over Vannerson.[141] Once they entered the Nobel/Vannerson Agreement, Nobel had the same control directly over Vannerson.[142]

12. Guillory was forbidden from making any "alteration, modification or amendment of any obligation or document of [Nobel]."[143] Likewise, Vannerson was similarly forbidden.[144] Under the Nobel/Vannerson Agreement, Nobel had the same control directly.[145]

The similarities between the provisions in the Nobel/Guillory Agreement and the Guillory/Vannerson Agreement are no coincidence. Under the Nobel/Guillory Agreement, Nobel had control over the language of Guillory's contracts with the sub-agents: "[Nobel] and [Guillory] will jointly establish and maintain a direct contractual relationship with Sub Agents using contract wording acceptable to [Nobel]."[146] Whether

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[135] *See* Guillory/Vannerson Agreement at ¶12, sentence 1.

[136] *See* Nobel/Vannerson Agreement at ¶ 9, sentence 2.

[137] *See* Nobel/Guillory Agreement at ¶12, sentence 3.

[138] *See* Guillory/Vannerson Agreement at ¶12, sentence 2.

[139] *See* Nobel/Vannerson Agreement at ¶ 9, sentence 3.

[140] *See* Nobel/Guillory Agreement at ¶14, sentence 1.

[141] *See* Guillory/Vannerson Agreement at ¶14, sentence 1.

[142] *See* Nobel/Vannerson Agreement at ¶ 11, sentence 1.

[143] *See* Nobel/Guillory Agreement at ¶14, sentence 1.

[144] *See* Guillory/Vannerson Agreement at ¶14, sentence 1.

[145] *See* Nobel/Vannerson Agreement at ¶ ¶ 11, sentence 1.

[146] Guillory/Vannerson Agreement at ¶ 34.

Vannerson was Nobel's agent or subagent is irrelevant because where a principal authorizes an agent to appoint a subagent, the principal will be bound by the acts of the subagent within the scope of his authority.[147]

ii. Ranger's contractual power to control Vannerson.

On June 29, 1999, Ranger and Vannerson entered the Ranger/Vannerson Agreement (Ex. 10). Ranger's power to control Vannerson was nearly identical to Nobel's:

1. Ranger could control the number and amount of bonds Vannerson sold.[148]
2. Ranger had the power to require Vannerson to return any unused powers of attorney on demand.[149]
3. Ranger could control which forms Vannerson could use in contracting with the Indemnitors.[150]
4. Vannerson was prohibited from posting Ranger bonds without obtaining sufficient collateral first.[151]
5. Ranger had the power to direct Vannerson not to post bond for particular aliens.[152]
6. The Ranger/Vannerson Agreement provided specific requirements as to how much collateral Vannerson must deliver to Ranger on each bond.[153]
7. Ranger had the right to inspect on demand Vannerson's collateral account and any other business accounts.[154]

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[147] *See Dallas Nat. Bank v. Peaslee-Gaulbert Co.,* 35 S.W.2d 221, 225 (Tex. Ct. Civ. App. 1931).

[148] *See* Ranger/Vannerson Agreement at ¶ 4, sentence 4; *see also* Klimaszewski Dep. at 120:15-121:7.

[149] *See* Ranger/Vannerson Agreement at ¶ 4, sentence 7; *see also* Klimaszewski Dep. at 121:16-122:1.

[150] *See* Ranger/Vannerson Agreement at ¶ 4, sentence 1; *see also* Klimaszewski Dep. at 41:21-42:13, 45:5-25, 51:24-52:5.

[151] *See* Ranger/Vannerson Agreement at ¶ 4, sentence 5-6.

[152] *See* Ranger/Vannerson Agreement at ¶ 5, sentence 1; *see also* Klimaszewski Dep. at 122:2-12.

[153] *See* Ranger/Vannerson Agreement at ¶ 6, sentence 1-2.

[154] *See* Ranger/Vannerson Agreement at ¶ 6, sentence 6.

8. Ranger controlled what sort of collateral receipt forms Vannerson would provide the indemnitors.[155]

9. Ranger had the power to fix the rates Vannerson would charge the public.[156]

10. Vannerson was required to "maintain all files and records concerning each and every [Ranger] bond which has been executed by Agent." "Such records shall include, but not be limited to, Applications and Contracts for Immigration Bonds, Indemnity Agreements, Promissory Notes, receipts for collateral taken on bonds, complete description of the collateral, statement of the value of collateral at the time of receipt, documents showing the current location and condition of such collateral, and any form or written communication associated with the writing of [Ranger] bonds (hereinafter '[Ranger] files')."[157]

11. Ranger had the power to inspect the "[Ranger] files" at any time.[158]

12. Vannerson recognized Ranger's superior claim to the "[Ranger] files."[159]

13. Ranger had the power to issue further directives to Vannerson not covered by their agreement: "Agent will comply with any and all procedural directions, rules, and regulations distributed by [Ranger] for adoption by Agent."[160]

14. Vannerson was forbidden from making any "alteration, modification or amendment to any obligation or document" of Ranger.[161]

15. Ranger had the right to demand Vannerson to provide personal financial information at the Company's request, and Ranger had the right to perform credit checks on Vannerson.[162]

16. Finally, for the first three years of their relationship, Vannerson could only write Ranger immigration bonds.[163]

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[155] *See* Ranger/Vannerson Agreement at ¶ 6, sentence 11.

[156] *See* Ranger/Vannerson Agreement at ¶ 7; *see also* Klimaszewski Dep. at 125:8-16.

[157] *See* Ranger/Vannerson Agreement at ¶ 12, sentence 1-2.

[158] *See id.* at ¶ 12, sentence 3.

[159] *See id.* at ¶ 12, sentence 4.

[160] *See id.* at ¶ 14, sentence 1.

[161] *See id.* at ¶ 14, sentence 2.

[162] *See id.* at ¶ 23.

[163] *See id.* at ¶ 33(a).

iii. The Sureties' control over Vannerson conclusively establishes that he was their agent for the purposes of contracting with the Indemnitors.

As noted above, under Texas law a person can be an agent of a person or organization for some purposes but an independent contractor for other purposes. "[A] a person may be an independent contractor under some circumstances yet may be an agent or employee in connection with other work or activities."[164] For example, while a client may not control a broker's movements, a broker may be "recognized as an agent employed to make or negotiate bargains or contracts."[165] Similarly, a traveling diamond salesman, over whom the principal had control of the price of the goods but not the hours of his work, was a "semi-independent agent."[166]

Here, the Sureties controlled every significant aspect of Vannerson's contracting with the indemnitors, including the following:

- The Sureties controlled the number and amount of bonds Vannerson could sell.
- The Sureties could withdraw any and all Powers of Attorney that it issued Vannerson before he used them to post a bond.
- The Sureties could control which forms Vannerson used in contracting with the Indemnitors.
- The Sureties could set the rate Vannerson would charge for the bonds.
- The Sureties could prevent Vannerson from posting bonds for particular aliens.

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[164] *Royal Mortg. Corp. v. Montague,* 41 S.W.3d 721, 733 (Tex. Ct. App. 2001); 3 Tex. Jur. 3d Agency § 13 (Ex. 29J).

[165] *Robles v. Consolidated Graphics, Inc.,* 965 S.W.2d 552, 557 (Tex. Ct. App. 1997). *See also Magnum Corp. v. Lehman Bros. Kuhn Loeb, Inc.,* 794 F.2d 198, 200 (5th Cir. 1986) ("The relationship between a securities broker and its customer is that of principal and agent.").

[166] *Hanover Fire Ins. Co. v. Block Jewelry Co.,* 435 S.W.2d 909, 915 (Tex. Civ. App. 1968).

- The Sureties had the right to keep tabs on Vannerson by reviewing his books at any time.
- The Sureties controlled what records of the contracts with the Indemnitors Vannerson would keep.
- The Sureties had the right to view Vannerson's files on demand.
- The Sureties each included a "catch-all" provision that allowed them to regulate Vannerson's business in any way they saw fit: Vannerson agreed to "comply with any and all procedural directions, rules, and regulations" promulgated by the Sureties for him to adopt.

Thus, Vannerson was not an "independent contractor" as the contracts with the Sureties claim—at least not with respect to the business of contracting with Indemnitors.[167] He was their agent, and they are bound by any contracts he enters on their behalves within the scope of his agency.

3. Vannerson acted within the scope of his actual authority in entering the Terms and Conditions agreements and the Notice Provision.

Vannerson was the Sureties' agent for the purposes of contracting with the Indemnitors. *See supra* Section II.B.1-2. He acted on behalf of the Sureties in using both the documents admittedly approved by the Sureties (*see supra* Section II.B.2.a) and in using the Terms and Conditions agreement (*see supra* Section II.B.2.b). As discussed below, he also acted within the scope of his actual authority in entering the Terms and Conditions agreement.

First, Vannerson was the Sureties' Local Recording Agent, and as such he had plenary authority to bind the Sureties. He had the authority, under Texas law, to enter any agreements that the Sureties could enter. Thus, as a matter of Texas law, agreeing to the Notice Provision was within the scope of his authority. *See supra* Section II.B.1.

[167] A written contract describing the agent as an independent contractor is not conclusive; the key inquiry is the principal's right to control the agent. *Morante*, 157 F.3d at 1009.

Second, even apart from the authority of a Local Recording Agent, the scope of an agent's actual authority includes those actions necessary or incidental to achieving the principal's objectives that have been implied by the principal's manifestations.[168] A principal may communicate actual authority by acquiescence—by failing to object to the agent's conduct when the principal knew or should have known of the agent's conduct.[169] The Sureties had either actual or imputed knowledge that Vannerson used the Terms and Conditions agreement, and by allowing Vannerson to contract with the Indemnitors using this document, they gave him actual authority to use the documents in contracting with the Indemnitors (even if they did not expressly communicate their authority to him).

a. The Sureties had actual knowledge that Vannerson was using the Terms and Conditions agreement.

Over a span of six years or more, Vannerson used the Terms and Conditions agreement in thousands of bonding contracts he entered on behalf of the Sureties that exposed the Sureties to over fifty million dollars in potential liability to the federal government. The Sureties had the absolute contractual authority to review the files Vannerson maintained on the Indemnitors whenever they wished.[170] The Sureties had the "superior claim" to the files, and, in fact, the Ranger/Vannerson Agreement referred to

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[168] *See* Restatement (Third) of Agency § 2.02 (Ex. 29K); 3 Tex. Jur. 3d Agency § 58 (Ex. 29L); CJS Agency § 45 ("Agency may be implied where the principal recognizes and acquiesces in the act done by the agent, or has recognized and acquiesced in the doing of previous similar acts by him or her.") (Ex. 29M); *Esso Int'l, Inc. v. SS Captain John,* 442 F.2d 1144, 1146 (5th Cir. 1971) ("An express agency is an actual agency created as a result of the oral or written agreement of the parties, and an implied agency is also an actual agency, the existence of which as a fact is proved by deductions or inferences from the other facts and circumstances of the particular case, including the words and conduct of the parties.") (quotation marks and citation omitted).

[169] *See Esso Int'l,* 443 F.2d at 1148; *Liberty Mut. Ins. Co. v. Enjay Chem. Co.,* 316 A.2d 219, 222 (Del. Sup. Ct. 1974) (holding that implied authority "may be proved by evidence of acquiescence with knowledge of the Agent's acts, and such knowledge and acquiescence may be shown by evidence of the Agent's course of dealing for so long a period of time that acquiescence may be assumed"); *Montgomery v. Achenbach,* C.A. No. 04C-11-048 WLW, 2007 WL 3105812, at *2 (Del. Sup. Ct. July 26, 2007) (same).

[170] *See supra* footnotes 131-39 and 157-59, and accompanying text.

the files maintained by Vannerson as "the Company's [Ranger's] files."[171] It is unreasonable to believe that the Sureties did not, in fact, review Vannerson's files. When they did, they discovered Vannerson's use of the Terms and Conditions document, apparent in the vast majority of files.[172]

Documentary evidence demonstrates that Ranger did, in fact, review the files. On June 28, 1999, right before the parties entered the Ranger/Vannerson Agreement, David Grobmeier, Assistant Vice-President for Ranger, wrote Vannerson as follows:

> Dear Don:
>
> It was good seeing you again on Friday and I appreciate you taking the time needed for me to do a file review. You and your staff are to be commended ***for the meticulous condition in which you keep the files.***[173]

Even a cursory review of Vannerson's files would have demonstrated the existence of the Terms and Conditions document, let alone a "meticulous review."

Plaintiffs' expert, Jerry Watson, is one of the foremost national authorities on surety appearance bonds. Mr. Watson has provided an expert report in this case opining that, in light of the risks presented by the immigration bond business and other factors, the Sureties would have exercised their authority over Vannerson and conducted an audit of Vannerson's files and become aware of the documents Vannerson used in contracting with the Indemnitors.[174]

Moreover, the evidence establishes that, for a three-month period after Vannerson's death, Ranger was well aware that Vannerson's son continued to use the

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[171] *See id.*

[172] *See* February 26, 2008, Declaration of Jodie Mow at ¶¶ 2, 4, 5 (Ex. 7).

[173] June 28, 1999 Letter from Grobmeier to Vannerson (BF-0003632) (emphasis added) (Ex. 33).

[174] *See* Amended Expert Report of Jerry Watson at 5 (Ex. 34).

Terms and Conditions document, and Ranger acquiesced in his use of the document. After Vannerson died on March 1, 2004, his son, Rodney Vannerson, continued to write Ranger immigration bonds until July 6, 2004. Rodney Vannerson's continued writing of Ranger immigration bonds was done with Ranger's full knowledge, consent, and participation.[175] According to Ranger: "Upon Don Vannerson's death in March of 2004, Ranger personnel participated in the day-to-day operations of Aaron."[176] During the period March-August 2004, Ranger's corporate representative "personally performed" an "extensive investigation of Aaron Federal Bonding."[177] Despite Ranger's participation during this March-July 2004 time period, Rodney Vannerson continued to use the Terms and Conditions agreement in contracting with the Indemnitors.[178] Ranger thus acquiesced in Vannerson's use of the Terms and Conditions agreement, conclusively demonstrating that Vannerson's entering the Notice Provision was within the scope of his authority.[179]

Finally, there is no admissible evidence in this case that the Sureties did not know of Vannerson's use of the Terms and Conditions document. The Sureties' Rule 30(b)(6) witnesses testified that their Companies did not know of Vannerson's use of the Terms and Conditions document, but a party's own 30(b)(6) testimony is inadmissible hearsay against an opposing party unless the 30(b)(6) witness was testifying as to his or her own

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[175] *See* Supplemental Aff. of Rick Klimaszewski, *In the Estate of Don Vannerson*, Cause No. 345,829-401 (Harris County Probate Court, July 5, 2005) at PTF-VAN 00322 (Ex. 12).

[176] Motion to Delegate Managerial Duties to Ranger Ins. Co., *In the Estate of Don Vannerson,* Cause No. 345,829-402 (Harris County Probate Court, Aug. 23, 2004) (PTF-VAN 00580-588, at 581) (Ex. 13).

[177] Supplemental Aff. of Rick Klimaszewski at PTF-VAN 00319 (Ex. 12).

[178] *See* February 26, 2008, Declaration of Jodie Mow at ¶ 6 (Ex. 7).

[179] *See Esso Int'l,* 443 F.2d at 1147-48 (where ship owner knew company was contracting with vendor on owner's behalf, ship owner was bound by contracts, even though owner did not expressly approve company's acting on its behalf).

knowledge.[180] Stonington's corporate representative, Rex Ramos, did not become an employee of Stonington until January 2004, long after Vannerson had ceased writing Nobel immigration bonds.[181] Fairmont's corporate representative, Rick Klimaszewski, began working for Ranger in 2000,[182] but he can only testify as to his own awareness of the Terms and Conditions document.

Where a party moving for summary judgment has carried its burden of proof on an issue, and the opposing party has presented no contrary evidence, there is no genuine issue of material fact as to that issue.[183] Because the evidence in this case demonstrates that the Sureties knew of Vannerson's use of the Terms and Conditions document, Vannerson had implied actual authority to use the document.

b. Vannerson's knowledge that he used the Terms and Conditions document should be imputed to the Sureties.

Even if the Sureties did not know directly of Vannerson's use of the Terms and Conditions document, Vannerson's knowledge must be imputed to them.

> After a determination of agency is made, the general principles of agency law apply. The pertinent general principles are that acts of a local agent, which are within the scope of his delegated duties, are, as a matter of law, acts of the principal; that the principal is charged, as a matter of law, with knowledge of the agent's acts within his official duties; and conversely, that ***any knowledge acquired by or given to the agent in the performance of those duties is, as a matter of law, imputed to the principal.***[184]

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[180] *See L-3 Comms. Corp. v. OSI Sys., Inc.,* No. 02 Civ. 9144 (PAC), 2006 WL 988143, at *1 (S.D.N.Y. Apr. 13, 2006).

[181] *See* Ramos Dep. at 20:17-23.

[182] *See* Klimaszewski Dep. at 32.

[183] *Schaefer v. Gulf Coast Reg'l Blood Ctr.,* 10 F.3d 327, 330 (5th Cir.1994).

[184] *Bellefonte Underwriters Ins. Co. v. Brown,* 663 S.W.2d 562, 585-85 (Tex. Ct. App. 1984), *rev'd in part on other grounds,* 704 S.W.2d 742 (Tex. Feb 19, 1986) (emphasis added); *see also Maryland Ins. Co. v.*

Here, as discussed above, Vannerson was not merely the Sureties' agent for the purposes of contracting with the Indemnitors; he was also the Sureties' agent for the purposes of maintaining the bond files.[185] In the course of fulfilling his duties as the keeper-of-records, Vannerson included copies of the Terms and Conditions document in thousands of bond files, and his knowledge of those documents must be imputed to the Sureties. A contrary ruling would allow the Sureties to willfully turn a blind eye to the conduct of their agent, keeping the controls over him necessary to protect themselves while allowing him to run roughshod over the Sureties' own customers—the Indemnitors.

* * *

As demonstrated above, Vannerson was the Sureties' agent for the purposes of contracting with the Indemnitors. *See supra* Section II.B.1-2. In using the Terms and Conditions agreement as well as the documents the Sureties admit they approved, Vannerson was acting on the Sureties' behalves and doing the Sureties' business. *See supra* Section II.B.2.a-b. Vannerson's use of the Terms and Conditions document was within the scope of his agency. *See supra* Section II.B.3. It is black-letter law that when an agent acting within the scope of his authority makes a contract on behalf of a principal, the principal is bound by the contract. *See supra* footnotes 82-90, and accompanying text. Thus, the Terms and Conditions agreement sets forth contractual terms between the Sureties and the Indemnitors, and the Sureties are liable for their breach of the Notice Provision.

Head Industrial Coatings and Servs., Inc., 906 S.W.2d 218, 228-29 (Tex. Ct. App. 1995) (discussing imputation of knowledge of a local recording agent).

[185] *See* Nobel/Guillory Agreement at ¶ 12 (Ex. 2); Guillory/Vannerson Agreement at ¶ 12 (Ex. 3); Nobel/Vannerson Agreement at ¶ 9 (Ex. 6); Ranger/Vannerson Agreement at ¶ 12 (Ex. 10).

III. PLAINTIFF AND THE CLASS MEMBERS PERFORMED THEIR CONTRACTUAL OBLIGATIONS BY PAYING FEES.

The evidence is undisputed that Ms. Sandoval paid $900 in fees.[186] This Court defined the Indemnitor Notice Class to include only those Indemnitors "who have fully paid their up-front, non-reimbursable fees to the Bonding Defendants pursuant to the terms of the bonding contracts."[187] Thus, the only persons in the Class are those who have fulfilled their contractual obligation to pay fees. In fact, Aaron Bonding would not even send the contract documents to the Indemnitors until after they had paid their fees.[188] The Indemnitors having paid their fees, the Bonding Defendants were bound to fulfill their contractual obligations under the Notice Provision.

IV. THE NOTICE PROVISION REQUIRES NOTICE TO THE ALIEN AND THE INDEMNITOR OF ALL APPEARANCES REQUESTED BY THE INS, INCLUDING DEPORTATION DATES.

The Notice Provision provides as follows: "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." This Court already has familiarity with this provision. The Sureties moved to dismiss Plaintiff's contract claims on the grounds that a deportation date is not an "appearance."[189] This Court rejected this argument, ruling that the "Insurer Defendants' argument that this type of a demand on a bond does not request an 'appearance' before DHS/INS is not a reasonable interpretation of that term."[190] Plaintiff demonstrates below that the only

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[186] *See* Sandoval Bond File at BF-0000244, BF-0000251 (Ex. 1).

[187] Surety Bond Class Order at 28.

[188] *See* Statement of Fact 22, *supra.*

[189] *Zamora-Garcia v. Moore,* Civ. A. M-05-331, 2006 WL 2663802 at *8 (S.D. Tex. Sept. 15, 2006).

[190] *Id.*

reasonable interpretation of the Notice Provision includes appearances for deportation, and she and the Indemnitor Notice Class are entitled to summary judgment on this issue.

First, a common understanding of the term "appearances" requires interpreting the Notice Provision to include deportation dates. The main thing the INS wants when it issues an I-340 is for the alien to appear before it, either for deportation or another reason. "The language in an agreement is to be given its plain grammatical meaning unless to do so would defeat the parties' intent."[191]

Second, the term "appearance" is found elsewhere in the Terms and Conditions document in a context where it must include deportation dates. The first paragraph reads:

> WHEREAS the undersigned, _____, hereinafter called the INDEMNITOR, whether one of more or do now make application to Aaron Federal Bonding Agency, of an Immigration Bond in the sum of $_____ on behalf of _____, hereinafter called 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.[192]

Thus Aaron Bonding agreed to post an immigration bond with the INS, "guaranteeing the faithful appearance" of the alien. The majority of situations in which the INS directs the alien to appear are when the INS issues an I-340 for deportation.[193] Both corporate representatives of the Sureties recognized that "appearances" in this first paragraph

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[191] *DeWitt County Elec. Coop., Inc. v. Parks,* 1 S.W.3d 96, 101 (Tex. 1999).

[192] *See* Sandoval Bond File at BF-0000238 (emphasis added) (Ex. 1).

[193] *See* Klimaszewski Dep. at 91:11-23 (Ex. 8 to the January 25, 2008 Declaration of Elisaveta Dolghih (Dkt. # 170, under seal)).

includes deportation dates.[194] There is no reason why "appearances" should not have the same meaning in the Notice Provision as in this paragraph.[195]

Third, the term appearances is likewise used in the Nobel/Ranger Indemnity Agreement, and it must there include appearances for deportation:

> The undersigned co-obligor(s), guarantor(s), and indemnitor(s) to surety for value received, does (do) hereby absolutely ***guarantee the appearance*** and full performance of the principal Applicant/Defendant in connection with the charged offense for which surety has been induced to act as bail according to the terms and conditions or rules and/or regulations of this one Indemnity Agreement.[196]

Both corporate representatives of the Sureties admitted that "appearance" here includes appearances for deportation.[197] In fact, the Sureties have brought counterclaims against Ms. Sandoval because Mr. Sandoval's bond breached when he did not appear.[198] There is no reason why appearances would mean something different in the Notice Provision than in Nobel/Ranger Indemnity Agreements.[199]

Fourth, the whole structure of the relationship between the Indemnitor, the alien, the INS, and Aaron Bonding means "appearance" has to include appearances for deportation. The Indemnitors agreed in the Nobel/Ranger Indemnity Agreement to indemnify the Surety in the event the bond is breached. It is impossible for the

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[194] *See* Ramos Dep. at 140:17-142:20 (Ex. 7 to the January 25, 2008 Declaration of Elisaveta Dolghih (Dkt. # 170, under seal)); Klimaszewski Dep. at 108:11-109:2.

[195] The term "appearance" also is found in the first paragraph of the Ranger Indemnity Agreement, and it there also includes appearances for deportation. *See* Klimaszewski Dep. at 90:20-92:8.

[196] *See* Sandoval Bond File at BF-0000241, ¶ 10 (Nobel) (emphasis added) (Ex. 1); Zamora-Garcia Bond File at BF-0000129, ¶ 10 (Ranger) (Ex. 11).

[197] *See* Ramos Dep. at 134:14-136:6; Klimaszewski Dep. at 90:20-92:8, 99:23-101:4.

[198] *See* Sureties' First Amended Answer at ¶ 113.

[199] *DeWitt County,* 1 S.W.3d at 102 ("Under generally accepted principles of contract interpretation, all writings that pertain to the same transaction will be considered together, even if they were executed at different times and do not expressly refer to one another.").

Indemnitor to "guarantee the appearance"[200] of the alien unless the Indemnitor and the alien have notice of the appearance. The Notice Provision is plainly designed to help the Indemnitor protect his or her interest in not having the Surety incur a loss on the bond so that the Indemnitor does not have to pay on the indemnity. Interpreting the Notice Provision to exclude appearances for deportation would simply be unreasonable.[201]

V. THE SURTIES BREACHED THE NOTICE PROVISION BY FAILING TO GIVE THE INDEMNITORS AND THE ALIENS NOTICE OF DEPORTATION DATES.

It is undisputed that the Bonding Defendants did not give notice to the aliens of their receipt of an I-340 for deportation. Counsel for the Bonding Defendants so admitted in a hearing before this Court.[202] The Bonding Defendants reaffirmed Aaron Bonding's failure to provide notice in their petition to the Fifth Circuit for interlocutory review: "The bonding 'agency' concedes it followed a policy of withholding notice of deportation from the alien."[203] Certainly the Sureties themselves did not provide any notice to the Indemnitors or the aliens.[204] The Independent Administrator for the Vannerson Estate has left all responsibility for providing notice to the aliens and the Indemnitors to Fairmont,[205] and Fairmont concedes that it currently does not provide notice of deportation dates to aliens.[206] The evidence in this case demonstrates that

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[200] Sandoval Bond File at BF-0000241, ¶ 10 (Nobel); Zamora-Garcia Bond File at BF-0000129, ¶ 10 (Ranger).

[201] *See Reilly v. Rangers Mgmt., Inc.*, 727 S.W.2d 527, 530 (Tex. 1987) (holding that, where possible, courts will avoid giving a contract an unreasonable interpretation).

[202] *See* Surety Bond Class Order at 20.

[203] *See* Petition for Leave to File an Interlocutory Appeal Under Fed. R. Civ. P. 23(f) at 1 (Ex. 28).

[204] *See* Klimaszewski Dep. at 73:18-74:7.

[205] *See* Padilla Dep. at 54:4-55:7 (Ex. 17).

[206] *See* Klimaszewski Dep. at 194:18-21.

Aaron Bonding did not provide notice of deportation dates to the Indemnitors, either,[207] but there is no dispute that notice was not and is not given to the aliens.

The Notice Provision requires notice of all appearances to both the alien and the Indemnitor. By failing to provide notice to the aliens, the Sureties breached the Notice Provision.

VI. THE INDEMNITORS SUFFERED DAMAGE IN AN AMOUNT TO BE TO BE DETERMINED AT TRIAL.

In granting certification of the Indemnitor Notice Class, this Court ruled that "Plaintiffs may seek to recover the difference between what they paid and what they received."[208] The evidence is undisputed that the Indemnitors suffered damage.

First, as discussed above, the Notice Provision had value to the Indemnitors because it provided them with protections against the breach of the bond. There is no evidence in this case that the Notice Provision was valueless. Here, no Indemnitor got what he or she paid for, and so each has suffered at least some damage.

Second, the evidence in this case is clear that the value of what the Indemnitors received is less than what they paid. The Sureties were required to seek approval from the Texas DOI of the rates or premiums they would charge the Indemnitors for the immigration bonds Vannerson posted.[209] These filed rates reflect the rate that the Surety believed is a fair price for the customer to pay and for the Surety to receive.[210] Indeed, when Nobel filed its rate with the Texas DOI, it wrote: "It is the judgment of our management that the proposed rates are adequate, non-excessive, not unfairly

[207] *See* Plaintiffs' Opposed Motion for Class Certification at 7-14 (Dkt. # 112).

[208] Surety Bond Class Order at 25.

[209] *See* Amended Expert Report of Jerry Watson at 3-4 (Ex. 34); Klimaszewski Dep. at 166:23-167:12; Ramos Dep. at 81:5-9.

[210] *See* Amended Expert Report of Jerry Watson at 3-4.

discriminatory and comply with the laws of the State of Texas."[211] Ranger's corporate representative admitted that Ranger believed 20% was an adequate rate.[212] Both Nobel and Ranger filed rates of 20%, meaning they would charge the public a premium of 20% of the penal amount of the bond.[213] However, the Bonding Defendants charged the Indemnitors 40-50% of the bond, or more.[214] Thus, whereas the Sureties told the Texas Department of Insurance that 20% was a fair rate for their products, they charged far more than that, and the value of what the Indemnitors received (at most 20% of the bond) was necessarily lower than the value of what they paid (40-50% of the bond, or more).

Because the undisputed evidence in this case is that the Indemnitors did not get what they paid for, Plaintiff and the Class are entitled to a judgment that they have suffered damage, the exact amount of which to be determined at trial.

VII. MS. SANDOVAL AND ALL THE MEMBERS OF THE INDEMNITOR NOTICE CLASS MAY RECOVER FROM FAIRMONT.

Stonington transferred all of its liability associated with its immigration bonds—including liability associated with Mr. Sandoval's bond and all the members of the Indemnitor Notice Class—to Fairmont. Fairmont willing took on that liability. As discussed at length in Plaintiffs' Opposition to Fairmont's Motion for Summary Judgment, Fairmont is now answerable to Ms. Sandoval and the Class members for any damages they suffered in connection with immigration bonds on which Nobel was the

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[211] Apr. 24, 1998 Letter from Nobel to Texas DOI (Ex. 20).

[212] *See* Klimaszewski Dep. at 173:19-174:8.

[213] *See id.* at 167:22-168:4.

[214] *See id.* at 92:19-93:22; Ranger Insurance Co.'s First Amended Petition, *In the Estate of Don Vannerson* (Cause No. 345,829-401) (Aug. 20, 2004) at PTF-VAN00591, 592 (admitting Vannerson charged "40% or more of the penal liability of the bond") (Ex. 24).

surety. To avoid needless repetition, Plaintiff incorporates by reference Plaintiffs' prior briefing on this topic.[215]

CONCLUSION

For all the reasons stated above, Plaintiff respectfully requests that this Court grant Plaintiff and the Class partial summary judgment against Fairmont and grant the Plaintiff and the Class members who contracted with Nobel partial summary judgment against Stonington. In the alternative, Plaintiff requests that this Court rule that there is no genuine issue of material fact on whatever elements of Plaintiff's and the Class's breach of contract claim as the Court finds established.

Date: Feb. 27, 2008.

Respectfully submitted,

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[215] *See* Plaintiffs' Opposition to Fairmont's Motion for Summary Judgment (Jan. 24, 2008) at 5-15 (Dkt. # 168, under seal).

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CERTIFICATE OF SERVICE

I hereby certify that on February 27, 2008, I caused a copy of the foregoing document to be sent via electronic mail to:

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