IN THE UNITED STATES DISTRICT COURT
FOR THE 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,	§	
	§	C.A. No. M-05-331
v.	§	
MARC MOORE, DISTRICT DIRECTOR FOR INTERIOR ENFORCEMENT, DEPARTMENT OF HOMELAND SECURITY, et al.,	§	

BONDING DEFENDANTS' MOTION TO DECERTIFY THE SURETY BOND CLASSES AND MEMORANDUM IN SUPPORT

Howard L. Close
Thomas C. Wright
Jessica Zavadil
Kathleen Rose
Andrew Cobb Cook
WRIGHT BROWN & CLOSE, LLP
Three Riverway, Suite 600
Houston, Texas 77056
Telephone: (713) 572-4321
Facsimile: (713) 572-4320

Brad Irelan
IRELAN HARGIS, LLP
440 Louisiana Street, Suite 1800
Houston, Texas 77002-1652
Telephone: (713) 222-7666
Facsimile: (713) 222-7669

Daniel K. Worthington
Atlas & Hall, LLP
818 Pecan Blvd.
P. O. Box 3725
McAllen, Texas 78501
Telephone: (956) 682-5501
Facsimile: (956) 686-6109

Date: September 24, 2008

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

IN THE UNITED STATES DISTRICT COURT
FOR THE 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,	§	
	§	C.A. No. M-05-331
v.	§	
MARC MOORE, DISTRICT DIRECTOR FOR INTERIOR ENFORCEMENT, DEPARTMENT OF HOMELAND SECURITY, et al.,	§	

BONDING DEFENDANTS' MOTION TO DECERTIFY THE SURETY BOND CLASSES AND MEMORANDUM IN SUPPORT

Defendants Fairmont Specialty Insurance Company f/k/a Ranger Insurance Company; Stonington Insurance Company f/k/a Nobel Insurance Company; and Michael Padilla, as Independent Administrator for the Estate of Don Vannerson; (collectively referred to as "Bonding Defendants") file this Motion to Decertify the Surety Bond Classes, and respectfully request that the Court revisit and vacate its order of certification entered on April 25, 2007 ("the Certification Order", Docket Entry no. 139) as to these two classes

I. INTRODUCTION

This Court certified two classes under Federal Rule Civil Procedure 23 for claims against the Bonding Defendants: the Indemnitor Notice Class[1] and the Bonded Immigrant Class.[2]

Continued developments in Fifth Circuit class action law and fundamental changes in the facts of this case require a re-evaluation of the class certification decision. Recent Fifth Circuit cases make it clear that the plaintiffs have the burden of proof on disputed facts that relate to class certification even if those facts also impact liability issues. Moreover, during the discovery period that just closed, it became clear that there are individual issues that predominate over common issues and that the classes certified have conflicting interests within and between the classes. These legal and factual developments require reassessment–and decertification–of the classes regarding the Bonding Defendants.

Some of the most important factual developments came as a result of the Motion

---

[1] **The Indemnitor Notice Class** is represented by Irma Sandoval and is 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, and

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

(c) where the Bonding Defendant's records indicate that on or after April 16, 1998, it received a "Notice to Obligor to Deliver Alien" indicating that the INS/DHS 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.

Exh. 1, Certification Order at 28.

[2] **The Bonded Immigrant Class** is represented by Petra Carranza de Salinas and is 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 still outstanding.

Exh. 1, Certification Order at 28.

for Intervention filed in June 2008 by Deanna Arevalo and Dominica Rodriguez. Bonding Defendants conducted discovery as to those putative intervenors. The depositions of these putative intervenors revealed important individual issues as to these persons. When the remainder of the bond files are reviewed with those issues in mind, these individual issues clearly predominate.

The evidence now demonstrates that individual issues of fact predominate over common ones so that the classes should now be decertified. As explained below, individual issues exist on: (a) whether the indemnitor paid the up-front fees complained about—rather than the bonded immigrant or some other third person—and thus has any claim; (b) whether the indemnitor signed the Terms and Conditions Agreement at issue—and thus has any rights to assert based upon that agreement; (c) what kind of notice (mail, phone, personal contact, or other) would be most effective to ensure that the immigrants or indemnitors knew of the appearance date in order to increase, rather than decrease, the possibility that the immigrant would appear as ordered; (d) whether the Bonding Defendants actually provided notice of the I-340 deportation document to some of the bonded immigrants or indemnitors, thereby performing the Terms & Conditions contract even under the class plaintiffs' theory; and (e) whether Aaron Federal Bonding's alleged breach caused, and whether individual class members suffered, any damages because the bond was not breached, or the immigrant knew of the appearance date and had decided not to appear anyway, or it would have been impossible for the immigrant to appear as ordered. Further, numerous individual issues exist on Bonding Defendants' affirmative defenses such as whether the immigrants' failure to update their contact information impeded Bonding Defendants' ability to provide effective notice.

Finally, pursuant to Court order, the Plaintiffs sent the class notice by certified mail. The results of this mailing are that most of the class has not received notice, confirming what Bonding Defendants have believed all along – that trying to send any notice by mail to bonded immigrants or the indemnitors is unlikely to be effective.[3]

The Bonding Defendants request that the Court set this matter for an oral hearing in early October at which these issues and the trial plan for the November trial setting may be discussed. There will not be sufficient time to prepare the pretrial order between the date currently set for the hearing on all pending motions–October 17, and the date the pretrial order is due—October 27, nor sufficient time to prepare for the November 5 trial date, absent an earlier hearing and resolution of these issues.

II. APPLICABLE STANDARDS OF REVIEW FOR DECERTIFICATION

Federal Rule of Civil Procedure 23(c)(1)(C) provides: "An order that grants or denies class certification may be altered or amended before final judgment."[4] The Fifth Circuit has recognized that "[u]nder Rule 23, the district court is charged with the duty of monitoring its class decisions in light of the evidentiary development of the case. The district judge must define, redefine, subclass, and decertify as appropriate in response to

---

3 The data on the class notice shows that 64% of the letters were returned as "undeliverable." *See* Exh. 3, Declaration of Terry Heuman; see also Exh. 55, Pie Chart.

4 FED. R. CIV. P. 23(c)(1)(C); *Officers For Justice v. Civil Serv. Comm'n,* 688 F.2d 615, 633 (9th Cir. 1982)

the progression of the case from assertion to facts."[5] "[C]ertification is always contingent on subsequent events and information that may require the court to revisit its decision."[6]

"[T]he litigant's right to seek a Rule 23(c)(1)(C) alteration is not limited to a certain period. An application—by definition—is timely when the factual development within the litigation so changes that the change renders 'the original determination . . . unsound.'"[7] In considering the appropriateness of decertification, the standard of review is the same as a motion for class certification: whether the Rule 23 requirements are met.[8]

Of course, the standards under Rule 23 are well settled. Rule 23(a) requires that class members demonstrate numerosity, commonality, typicality, and adequate representation of the class interest.[9] Rule 23(b)(3) additionally requires that the Court find that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."[10]

To determine whether common issues predominate, this Court must consider how

---

[5] *Richardson v. Byrd*, 709 F.2d 1016, 1019 (5th Cir. 1983).

[6] *Denney v. Jenkens & Gilchrist*, 230 F.R.D. 317, 348 n. 207 (S.D.N.Y. 2005), *rev'd in part on other grounds*, 412 F.3d 58 (2d Cir. 2005).

[7] *In re FleetBoston Fin. Corp. Secs. Lit.*, 2007 U.S. Dist. Lexis 87425, *18 (D.N.J. Nov. 28, 2007) (quoting Advisory Committee Notes to Fed. R. Civ. P. 23(c)(1)); *see also McNamara v. Felderhof*, 410 F.3d 277, 280 (5th Cir. 2005) (rejecting argument that a motion to reconsider class certification has time limits).

[8] *O'Connor v. Boeing N. Am., Inc.*, 197 F.R.D. 404, 410 (C.D. Cal. 2000).

[9] FED. R. CIV. P. 23(a); *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992).

[10] FED. R. CIV. P. 23(b)(3).

a trial on the merits would be conducted if a class were certified.[11] Class-wide issues predominate only if resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof.[12]

The predominance and superiority requirements are "far more demanding" than the commonality requirement.[13] The predominance requirement demands a rigorous inquiry that "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation."[14] To satisfy this requirement, it is not enough simply that common questions of law or fact exist; *predominance is a comparative concept that calls for measuring the relative balance of common issues to individual ones.*[15]

The Fifth Circuit has decided two key cases since the certification order that make clear the burden of proof the plaintiff bears. In *Oscar Private Equity Investments v. Allegiance Telecom*, the court required that a plaintiff bringing a securities class action prove at the class certification stage the element of loss causation in order to rely on the fraud on the market theory to sustain class viability of a securities claim.[16] While the instant case is obviously not a securities case, the principle to be derived from *Oscar* is

---

[11] *Sandwich Chef of Tex. v. Reliance Nat'l Indem. Ins. Co.*, 319 F.3d 205, 218 (5th Cir. 2003).

[12] *In re Visa Check/Mastermoney Antitrust Lit.*, 280 F.3d 124, 136 (2d Cir. 2001).

[13] *Amchem Prods. v. Windsor*, 521 U.S. 591, 624 (1997).

[14] *Id.* at 623-24.

[15] *See id.*

[16] *Oscar Private Equity Investments v. Allegiance Telecom* 487 F.3d 261 (5th Cir. 2007)(vacating class certification order).

that any element of class certification must be established by a preponderance of the evidence at the class certification stage, even if the decision on certification bears on the merits of the case.[17] The Fifth Circuit confirmed this decision in *Luskin v. Intervoice-Brite, Inc.*,[18] applying *Oscar*'s holding to another class action decision in a securities case.

As shown below, once the evidence that now exists is reviewed, Plaintiffs cannot establish by a preponderance of the evidence that the class action requirements have been met. Instead, the evidence clearly shows that individual issues in this matter predominate, requiring decertification.

III. ARGUMENT AND AUTHORITIES

The Court certified two classes to bring breach of contract claims over the Terms and Conditions Agreement. The Court correctly identified the elements of breach of contract as:

(1) existence of a valid contract;

(2) performance or tendered performance by the plaintiff;

(3) breach of the contract by the defendant; and

(4) damages sustained by the plaintiff as a result of the defendant's breach.[19]

Decertification is proper *where continuing review* establishes individual issues

---

[17] *Id.* at 269.

[18] *Luskin v. Intervoice-Brite, Inc.*,261 Fed. Appx. 697, 702 (5th Cir. 2008). These authorities are especially salient here because Plaintiff's Motion for Class Certification supported many of their factual claims by reference only to their complaint. *See* Exh. 25, Plaintiffs' Opposed Motion for Class Certification (Docket Entry no. 93, filed 7/19/06; without attachments).

[19] Exh. 1, Certification Order at 16.

predominate over common issues.[20] It is now clear that individual issues on each of these elements of the class claims will of necessity predominate over common issues.

A. The Indemnitor Notice Class should be decertified because individual issues predominate as to the class members and their breach of contract claims.

As discussed in more detail below, the Indemnitor Notice Class should be decertified because discovery has revealed the following individual issues that defeat class commonality and predominance:

- Approximately 31% percent of the potential class members did not fully pay the up-front, non-refundable fee or did not sign the Terms and Conditions Agreement, and thus lack standing;
- The putative intervenors and the class representatives either did not themselves pay the up-front fee or were reimbursed for that fee by the bonded immigrant—a fact the bond file will not show and about which plaintiffs and class representatives Irma Sandoval and Petra Salinas have refused to provide discovery;
- Not every alleged breach is material, and whether any alleged breach in failing to give notice was material is a fact question under Texas law;
- Aaron Federal Bonding, the receiver for the Estate of Don Vannerson, and Fairmont (at relevant times) in fact provided notice in various ways of the I-340 notice to appear for deportation to some of the bonded immigrants and to some of the indemnitors;
- Some indemnitors and bonded immigrants received notice of the request to appear for deportation through other means (such as a notice from the Government or through their attorney), and the bonded immigrant still failed to appear, therefore making it impossible to show that any alleged lack of a duplicative notice by Aaron Federal Bonding caused any damages;
- Many class members failed to update their address information with Aaron Federal Bonding (as required under the Terms and Conditions Agreement).

[20] *Nichols v. Mobile Bd. of Realtors, Inc.*, 675 F.2d 671, 675-79 (5th Cir. 1982) (emphasis added).

Therefore any notice sent to an obsolete address given to Aaron Federal Bonding would have been futile. Also, the indemnitor's failure to update the information hindered, and thereby excused, Aaron Federal Bonding's performance under that Agreement; and

- Not all of the bond files include the Terms and Conditions Agreement which contains the "notice provision" that is the sole basis for the class members' breach of contract claim.

- Not every bond was "breached" (i.e., called upon to pay) by the Government. If a bond was not breached, the indemnitor suffered no harm for any alleged lack of notice for the alien to appear.

1. The Indemnitor Notice Class should be decertified because there are individual issues on whether each class member paid the up-front fee and was not reimbursed.

The Indemnitor Notice Class is defined to include "those who served or are serving as Indemnitors on a surety bond ... who have fully paid their up-front, non-reimbursable fees."[21] The Court apparently believed, as the parties may have believed, that one could determine whether an indemnitor fully paid the up-front, non-reimbursable fee from the bond files. However, new evidence shows that individual proof beyond documents in the bond files will be required to establish who paid the up-front fee and whether that person has already been reimbursed. To establish the breach of contract claim, the class member must establish, *inter alia*, that he or she in fact ultimately paid the up-front fees (and was not reimbursed). A class member who was paid back the up-front money has no more of a claim than a person who did not make the up-front payment in the first place. Moreover, the Court's definition of the class includes the

[21] Exh. 1, Certification Order at 28. The class definition is of critical importance because it identifies the persons (1) entitled to relief, (2), bound by a final judgment, and (3) entitled to notice in a Rule 23(b)(3) action. *See In re United States Liquids Secs. Litig.*, 2002 U.S. Dist. Lexis 26713, * 11 (S.D. Tex. June 12, 2002) (citing MANUAL ON COMPLEX LITIGATION, § 30.14 at 217 (1995)).

requirement that the indemnitor have fully paid the "non-reimbursable" fee. If the fee paid by a particular indemnitor was in fact reimbursed, then that indemnitor does not meet the definition set out by the Court. But individualized discovery and proof will be needed to determine whether an indemnitor has been reimbursed.

The development of this evidence began when Deanna Arevalo and Dominica Rodriguez moved to intervene in June 2008. Defendants took their depositions, which revealed that Arevalo and Rodriguez do not fit the class definition because they did not fully pay—or were repaid—the up-front fee. Arevalo filed a sworn declaration that she paid the up-front fees and never received any refund from Aaron Federal Bonding, but on deposition she testified that she did not expect to be "out" the up-front money, and in fact she was reimbursed some of the amount, but cannot remember how much.[22] She cannot point to any evidence that she has suffered any loss, or how much, and therefore cannot show she has any standing to make a claim. This information, however, is not ascertainable from the bond file—Bonding Defendants only found out about this repayment during Arevalo's deposition.[23] The other potential class representative—Dominica Rodriguez— also submitted a declaration that she paid the up-front fee,[24] yet

[22] *See* Exh. 12, Declaration of Deanna Arevalo at 13 (Docket Entry no. 218-9); Exh. 16, Deposition of Deanna Arevalo at 33-34.

[23] Indeed, at her deposition, Ms. Arevalo testified that someone perhaps Jorge or Mirna Escobar or the immigrant Hernandez was to repay her the full amount of the up-front fee. Exh. 16, Deposition of Deanna Arevalo at 31. When Defendants noticed Mr. Arevalo's deposition, Plaintiffs moved to quash it. Defendants then agreed to pay for Plaintiffs' costs to take the Escobar depositions, and the Escobars pointed to another person—Mirna Escobar's sister—and the girlfriend of the alien—as the possible source of reimbursement for Ms. Arevalo. Exh. 17, Deposition of Jorge Escobar at 18.

[24] Exh. 18, Deposition of Dominica Rodriguez at 59.

upon her deposition she could not recall having done so[25], and in fact, her husband (who is not an Indemnitor, and thus not a class member) testified that *he* paid the fee.[26]

Arevalo's and Rodriguez's deposition testimony opened up the individual issue of who actually paid the up-front fees, resulting in a re-review of a statistically relevant sample of bond files on that issue. The results of that review to date show that out of 428 files reviewed, in 133 cases someone other than the named Indemnitor paid some or all of the up-front, non-refundable fee.[27] The data on the files reviewed can be extrapolated to the entire population of bond files at issue with a confidence level in excess of 95%.[28] Thus, between 29.5% and 31% of the total bond files will have Indemnitors who did not fully pay the fee and do not fit the class definition.

In addition, it is very likely that more Indemnitors were reimbursed than will be shown by the bond files themselves.[29] Indeed, with proposed intervenor Arevalo, the information was disclosed only by her testimony.[30] The issues of who actually paid the fees, where the funds came from, what agreements were made to repay, who received

---

[25] Exh. 18, Deposition of Dominica Rodriguez at 6.

[26] *See* Exh. 19, Deposition of Raymond Acevedo at 21.

[27] *See* Exh. 2, Spreadsheet Analysis of Sample Bonds; Exh. 9, Declaration of Jessica Zavadil at 11 (supporting Spreadsheet Analysis of Sample Bonds); see also Exh. 56, Bar Graph.

[28] Exh. 4, Declaration of Financial Expert Jeff Harfenist of UHY at ¶5.

[29] Other examples of refunds are found in the files attached as Exh. 20-22. The file of immigrant Ronaldo Delgado-Lopez shows that any money the indemnitor paid to Aaron Federal Bonding was refunded by Aaron Federal Bonding. Exh. 20, Bond File of Ronaldo Delgado-Lopez at BFE520930; *see also* Exh. 21, Bond File of Miguel Rubio-Flores at BFE640411 (stating: "Need to refund Alberto Rubio $2500"); Exh. 22, Bond File of Jose Suarez-Sanchez. (file notes that the indemnitor received a refund of $2000 but does not explain the basis of this refund).

[30] *See* Exh. 9, Declaration of Jessica Zavadil at 11 (stating that the bond file reflected that Arevalo paid the up-front fee and did not reflect that she had been reimbursed by the bonded immigrant).

refunds, and the extent of those refunds are all issues that will require individual testimony from each member of the class, and may also require third-party testimony.

The need to analyze whether indemnitors in fact paid the up-front fees as an individual issue is further demonstrated by the recent deposition testimony of Beatriz Manzano, a former accounting department employee of Aaron Federal Bonding. Ms. Manzano testified that, in the *majority of cases*, the collateral payments on the bond were paid not by the indemnitor but by the bonded immigrant or a third party.[31] While the up-front payment is not the same as the collateral payment, if the immigrant made the collateral payments, which is an obligation of the indemnitor, it stands to reason that, at least in some cases, the immigrant was either the original source of the up-front fees or reimbursed the indemnitor for the up-front payment (as in the case of Deanna Arevalo). This is a key individual issue, on which the proof will vary, that goes to the heart of this case.

It will be necessary for each member of the proposed class to prove that they fully paid the up-front fee, and that they were not reimbursed by the immigrant or a third party to qualify for the class as defined by the Court.[32] The Court will have to conduct mini-trials just to determine who fits within the class definition.[33] Because of the large number

[31] Exh. 23, Deposition of Beatriz Manzano at 133-34; *see also* Exh. 24, Deposition of Laura Calderon Cuayahuitl at 60-61 (confirming that the immigrant typically made the collateral payments).

[32] "If the members of the proposed class need to present evidence that varies from member to member to make a prima facie showing of a given question, then it is an individual question. If the same evidence will suffice for each member to make a prima facie showing, then it is a common question." *Blades v. Monsanto Co.,* 400 F.3d 562, 566 (8th Cir. 2005)(citing *Amchem*, 521 U.S. at 615).

[33] *See Saey v. CompUSA, Inc.*, 174 F.R.D. 448, at *11 (E.D. Mo. 1997) (declining to certify class on the basis that if the class was certified, the court would have to conduct mini-trials just to determine who

of individual indemnitors that do not meet the class definition, common issues will not predominate and proceeding as a class action will not be superior to other procedures. Thus the class should be decertified on this basis alone.

2. The Indemnitor Notice Class should be decertified because the class representative may not be a member of the class as defined, and her claims would not be typical of the class she purports to represent.

The assumption under which the Court was proceeding when it certified the classes was, as Plaintiffs repeatedly represented to the Court, that the indemnitors paid the up-front fee.[34] For example, in the original motion for class certification, Plaintiffs claimed "each of the indemnitors was required to pay an upfront non-refundable fee of 40%-50% of the total bond amount."[35] In their supplement to this motion, Plaintiffs, describing Ms. Sandoval, stated: "she wants to recover the money she paid to post the bond because Aaron Federal Bonding did not notify her or her father of the appointment with INS."[36] This supplement also states: "the Bonding Defendants charged indemnitors. . ."[37] The Plaintiffs also imply that Irma Sandoval paid the collateral on this bond—this fact has also been proven false.[38]

---

fit within the class definition).

[34] *See* Exh. 25, Plaintiffs' Opposed Motion for Class Certification (Docket Entry no. 93, filed 7/19/06; without attachments), Exh. 26, Plaintiffs' Supplement to Motion for Class Certification (Docket Entry no. 99, filed 8/14/06; without attachments); Exh. 27, Dominica Rodriguez and Deanna Arevalo's Corrected and Opposed Motion for Intervention, for Appointment as Class Representatives (Docket Entry no. 218, filed 7/8/08; without attachments).

[35] *See* Exh. 25, Plaintiffs' Opposed Motion for Class Certification at 7 (Docket Entry no. 93).

[36] *See* Exh. 26, Plaintiffs' Supplement to Motion for Class Certification at 3 (Docket Entry no. 99).

[37] *Id.* at 2.

[38] Plaintiffs state: ". . . the Bonding Defendants as a matter of practice do not return the indemnitors

Once the discrepancy in the testimony about payment of the up-front fee became apparent, Bonding Defendants asked Irma Sandoval and Petra Salinas, the current class representatives, for documents relating to any reimbursement of the up-front fees that they allege they paid. Production has been refused as irrelevant.[39] Not only is this discovery relevant, Plaintiffs should be required to prove that Sandoval was not reimbursed—and not simply "prove" this by one more inconsistent declaration. Sandoval's objection to furnishing information is hardly surprising, given the significant inconsistency in the declarations previously filed, in which she said that she, as indemnitor, agreed with Aaron "that *I* would give them $750 at the time [that the bonding contracts were entered into];"[40] while her father, the bonded immigrant, swore that the agreement was "*we* would give them $750."[41] Prior to the proposed intervention and subsequent depositions of the proposed intervenors, this discrepancy might have seemed minor; the depositions have demonstrated, however, that there is a serious problem about divergent facts among purported class members.

If Ms. Sandoval did not pay or was reimbursed the up-front fee, she has no standing to bring the claim on her own behalf and certainly not as a representative (and

collateral absent a demand." *Id.* at p. 3. On page 25 of the supplemental motion, Plaintiffs describe Irma Sandoval and state: "she also demonstrated knowledge of the basis for her legal claims by stating that she wants to recover the money she paid to post the bond because Aaron Federal Bonding did not notify her or her father of the appointment with INS." *Id.* at p. 25; see also Exh. 15, Bond File of Manuel Sandoval with receipts from Manuel Sandoval for collateral payments.

[39] *See* Exh. 28, Irma Sandoval's Response to Request for Production No. 3, at pg. 2; Exh. 29, Petra Salinas's Response to Request for Production No. 3 at pg. 2.

[40] *See* Exh. 13, Declaration of Irma Sandoval at pg. 1 (Docket Entry no. 93-12; emphasis added).

[41] *See* Exh. 14, Declaration of Manuel Sandoval at pg. 1 (Docket Entry no. 93-11; emphasis added).

not even a member) of the class the Court certified. Her claims would not be typical of the claims of the class certified by the Court.

3. The Indemnitor Notice Class should be decertified because of individual issues on whether Bonding Defendants materially breached a contract or breached it at all

a. Whether any alleged lack of notice was a material breach is an issue that will have to be individually tried.

Both Plaintiff and putative Intervenors have pleaded that the Bonding Defendants materially breached their agreements by not providing notice to the indemnitor or the alien of the notice to appear for deportation.[42] Materiality of a breach of contract is a fact issue under Texas law that will require individualized proof.[43]

There is ample proof that any breach was not material to the Terms And Conditions Agreement. The purpose for which the Indemnitor signed that Agreement was to induce Aaron Federal Bonding to post the surety bond to secure the release of the immigrant from detention.[44] The materiality of any breach for not receiving one of possibly many notices, if that happened, is an issue that depends on the individual facts and circumstances of each case. Some viewed the bond money as "the cost of doing business"; they never expected to receive the money back and knew that the immigrant

---

[42] *See* Exh. 30, Plaintiffs' and Counter Defendant Irma Sandoval's Answer to Fairmont and Stonington's Counterclaims at pg. 2-3. (Docket Entry no. 178); Exh. 27.

[43] *Fedgess Shopping Ctrs., Ltd. v. MNC SSP, Inc.*, 2007 Tex. App. Lexis 9802, * 8 (Tex. App.—Houston [14th Dist.] Dec. 18, 2007, no writ)("[T]he issue of whether a breach rises to the level of a material breach is generally a fact question.").

[44] *See* Exh. 16, Deposition of Deanna Arevalo at 40-41.

was never going to appear for any hearing.[45] Some indemnitors were repaid and thus had no continuing interest in receiving notice (and no standing to bring a claim). Some immigrants had no intention of appearing for deportation, or could not have arranged to appear for deportation because of the travel involved.[46] Whether any failure to provide notice was a "material breach" as Plaintiffs allege is an individual issue.

b. There are individual issues about the notice the Bonding Defendants provided, and the Bonding Defendants or their independent recovery agents sometimes gave notice to certain indemnitors, certain aliens, or both.

The practices of the Bonding Defendants concerning giving notice vary because during the time period for which Plaintiffs are seeking to hold the Bonding Defendants responsible, four different entities have had control of the operations.[47] First, Aaron Federal Bonding was a "dba" of Don Vannerson from the inception of the class period (April 16, 1998) until Vannerson's death in March 2004.[48] After Vannerson's death, Aaron ceased to exist as a legal entity – because it was neither a corporation, nor a partnership, but a sole proprietorship.[49] For a few months after Don Vannerson's death, his son Rodney was operating Aaron under an informal and temporary arrangement. Then the probate court appointed a receiver who conducted the affairs of the estate of

[45] Exh. 31, Deposition of Plaintiffs' Immigration Expert Jodi Goodwin at 66.

[46] *See* Exh. 32, Expert Report of Jack Kessell, at 2, and Exh. 8, Declaration in Support of Report.

[47] *See* Exh. 57, Timeline for an explanation of the Relevant Time Periods.

[48] Exh. 33, Receiver's Inventory from Vannerson's Estate in Probate at 8 (listing business as a sole proprietorship).

[49] Exh. 34, Order Appointing Glenn Johnson as Receiver. Under Texas law, a sole proprietorship has no separate legal existence apart from the sole proprietor. *Ideal Lease Serv., Inc.*, 662 S.W.2d at 951, 952 (Tex. 1983). The law treats the sole proprietor and the sole proprietorship as one and the same person. *See id. See also* Exh. 35, Inventory and Appraisement, at pg. 8, Schedule D.

Don Vannerson and did not give Fairmont control of Aaron's files.[50] After a settlement agreement in April of 2006, the bond files have been maintained and handled by Fairmont.[51] The Fairmont employees currently handling the files were not involved in the origination of these contracts and had no information as to who was actually paying these fees in the beginning other than the documents that are contained in the bond files.[52] This background is important because one key piece of evidence the Court relied on in the Certification Order was a statement of Michael Padilla, a current Fairmont employee, about whether notice was routinely given to immigrants. That evidence relates only to the last time period after Fairmont gained control of the files and the operations relating to the bonding business. Plaintiffs still must prove that, uniformly, notice was not given to the immigrants during the eight years of the other regimes that ran the business.

The Court noted in its order certifying the indemnitor notice class: "the excerpts of deposition testimony and affidavits submitted by Bonding Defendants in no way indicate that notice of requested appearance for deportation has ever been provided to the bonded immigrant."[53] This conclusion puts the burden on the wrong party. Plaintiffs bear the burden of proof by a preponderance of the evidence at the class certification stage and of course at trial.[54] Moreover, the deposition of Eluid Salinas, which the Court discusses in its order, specifically says that he gave notice to the *alien* of *deportation*

[50] *See* Exh. 34. Order Appointing Receiver Glenn Johnson.

[51] Exh. 5, Declaration of Rick Klimaszewski at 6-7.

[52] *Id.* at 4.

[53] Exh. 1, Certification Order at 21.

[54] *See Oscar*, 487 F.3d at 269.

dates in response to receiving a notice to appear for deportation from the Government.[55] Salinas testified that he would call the immigrant by telephone to let them know of the deportation date.[56] The document Salinas was being asked about—page 217 of Exhibit 1 to his deposition—is a notice to appear for deportation (Form I-340).[57]

Salinas also confirmed that Abby Lopez—who began working with Aaron Federal Bonding in 2000 and was responsible for the deportation notices—would contact the indemnitors regarding dates because they "could not depend on immigration doing that."[58] Salinas's testimony is consistent with the testimony taken of two witnesses after the Court's certification order. These two witnesses—recovery agents who performed services for Aaron Federal Bonding, Santiago Sol and Daniel Espinoza—similarly testified that they would call the indemnitor first to try and locate the immigrant and would explain why they were trying to locate the immigrant.[59]

Indeed, Sol explained that the first action a recovery agent such as himself would take, upon receiving a recovery file, would be to contact the indemnitor and attempt to locate the bonded immigrant.[60] Salinas also testified that when the recovery agents such as he, would speak with the indemnitors in trying to find the bonded immigrant, they

---

[55] *See* Exh. 36, Deposition of Eliud Salinas at 51-52.

[56] *Id.*

[57] *Id.*; Exh. 37, I-340 Form, Exhibit 1 to Eliud Salinas Deposition.

[58] *Id.* at 59.

[59] *See* Exh. 38, Deposition Santiago Sol at 27; *see also* Exh. 6, Declaration of Daniel Espinoza at ¶5.

[60] Exh. 38, Deposition of Santiago Sol at 9-10, 21-30.

would typically provide the indemnitor with the surrender date as well.[61] Espinoza stated that it was his standard practice to call the indemnitor after receiving a file from Aaron Federal Bonding.[62] If he could not locate the indemnitor, Espinoza would attempt to call the references that the indemnitor listed on the bond application.[63] Salinas confirms this procedure in his deposition. He testified that the recovery agents such as himself would contact the indemnitors more than eighty percent of the time.[64]

Review of the bond files confirms this testimony. The bond files contain handwritten notes showing that contact was attempted but was unsuccessful because the contact information had not been updated by the immigrant or the indemnitor as required by the Terms and Conditions Agreement.[65] For example, the file of Basilio Guzman-Maldonado shows several attempted contacts with the indemnitor—Marcos Guzman. However, at the number provided by Guzman.[66] A woman answered and replied that she did not know him.[67] Another file—Luis Alberto Lopez-Siguencia—notes on the I-340: "talked to surety [indemnitor] Gloria Calle said will tell def. [immigrant] about court. L.H."[68] Despite that notice, Mr. Lopez-Siguencia did not appear for his deportation

---

[61] *See* Exh. 36, Deposition of Eliud Salinas at 119.

[62] Exh. 6, Declaration of Daniel Espinoza at ¶5.

[63] *Id.*

[64] *See* Exh. 36, Deposition of Eliud Salinas at 117-119, 122.

[65] Exh. 9, Declaration of Jessica Zavadil; Exh. 2, Spreadsheet Analysis of Sample Bond Files.

[66] Exh. 39, Bond File of Guzman-Maldonado at 68.

[67] Exh. 39, Bond File of Guzman-Maldonado at 68.

[68] *See* Exh. 40, Bond File of Luis Alberto Lopez-Siguencia at 7.

hearing and the bond was breached.[69] These are but a few examples of many possibilities of situations where contact was attempted by Aaron Federal Bonding or its recovery agents, and where the contact still failed to prevent breach of the bond. These files also show that contact was frequently made through visits from recovery agents—trying to find the immigrant to inform him or her about the deportation hearing, and thereafter—under the words of the I-340 notice itself—"surrender" the immigrant.[70]

The Bonding Defendants gave or attempted to give notice of a deportation order to the bonded immigrant or the indemnitor by phone, letter, or through a personal visit from a recovery agent. Thus, whether Aaron Federal Bonding complied with the Terms and Conditions Agreement even as Plaintiffs interpret it, are individual issues which the Bonding Defendants are entitled to have determined by a jury on a case-by-case basis.[71] These individual issues predominate over any common issue.

Finally, the Court's certification order at pages 19-21 discusses the then-existing evidence about notice to the indemnitors and apparently concludes that there were too many individual issues about notice to indemnitors, but that notice or lack thereof to the bonded immigrant of requested appearances for deportation could be tried class-wide. If the indemnitor received the notice, how can that indemnitor complain that the bonded immigrant did not receive notice? Such an indemnitor lacks standing to complain about

---

[69] *Id.* at 42.

[70] *See* Exh. 9, Declaration of Jessica Zavadil, at 14.

[71] *See Hunter v. Exxon Corp.*, 2005 U.S. Dist. Lexis 228, *13 (W.D. Tex. Jan. 7, 2005) ("[U]nder the present certification Order, a 'series of individual trials' will likely be necessary to determine whether each individual royalty interest holder was damaged by Defendant's practices, and in doing this each individual lease will have to be examined.").

the bonded immigrant's rights. Moreover, there is a serious causation issue about any damage to an indemnitor who got notice but failed to advise the bonded immigrant for whom they signed indemnity papers. Causation is an individual issue requiring a finding as to whether each indemnitor received notice and as to whether the indemnitor told the immigrant about the requested appearance.

c. There are very few class members who meet the Court's definition of the Indemnitor Notice Class.

The Court's Certification Order provides in relevant part, "...where the Bonding Defendant did not provide notice . . . to either the Indemnitor or the Bonded Immigrant." Read literally, this definition requires that the Bonding Defendants provide notice either to the Indemnitor or to the Bonded Immigrant. As the Certification Order acknowledges, and as more fully explained in this Motion, there is ample evidence that Bonding Defendants provided notice to the Indemnitor. Thus, if the Indemnitor received notice from Bonding Defendants, then the Indemnitor does not meet the class definition.

4. The Indemnitor Notice Class should be decertified because there are individual issues on causation and the fact of damages.

The indemnitor notice class must prove that the breach they complain of caused damages. This point is not about the *amount* of damages but about the *fact* of damages. As many Texas courts have put it, "[U]ncertainty as to the amount of damages is not fatal to recovery, but lack of evidence as to the fact of damage will defeat recovery."[72] In *Davis*, the plaintiff sued for failure to make a loan, but the plaintiff arranged alternative

[72] *Davis v. Small Business Inv. Co.*, 535 S.W.2d 740, 743 (Tex. Civ. App.—Texarkana 1976, writ ref'd n.r.e.).

financing within the time period he claimed the defendant was supposed to loan the money. The court held that there was "no causally related loss in that regard."[73]

In this case, there are comparable individual issues about the fact of damage, that is, about whether the class members were in fact damaged at all (apart from *how much*). The class representatives were not damaged in that the immigrants connected with the class representatives were able to exercise all of their rights before the Government and the appropriate courts.[74] As for the supposed indemnitor class members, several different scenarios exist: (1) the bond was not breached even after the alien failed to appear; (2) the alien appeared despite allegedly not getting notice from Aaron Federal Bonding; or (3) the bond was breached but the Government reversed itself on appeal and cancelled the bond instead.[75] Even if Plaintiffs argue that each Indemnitor has been damaged despite these contrary facts, the Bonding Defendants are entitled to a trial on each of these issues.[76]

a. Notice was often mailed directly to the Alien or the Indemnitor.

There are instances in which the immigrant or the indemnitor received notice from another source. The Court in its certification order rejected this latter issue as

[73] *Id.*

[74] *See* Exh. 41, Expert Report of Immigration Expert Magali Candler at 57; *see also* Exh. 7, Declaration of Magali Candler.

[75] *Id.*

[76] *See Hunter v. Exxon Corp.* 2005 U.S. Dist. LEXIS 228, (W.D. Tex. Jan. 7, 2005), cited in footnote 71, *supra*.

"irrelevant."[77] However, under Texas law, if the plaintiff has suffered no injury caused by a breach, there is no cause of action.[78] Thus, in order to establish liability for breach of contract, each indemnitor will have to prove that neither they nor the immigrant for whom they signed received notice, and that had the notice been received from Aaron Federal Bonding, there would have been no breach of the bond for which the Indemnitor became liable.

For example, one of the potential intervenors—Arevalo—admitted that the federal Government sent an I-166 notice for the deportation of the immigrant on whose bond she was the indemnitor.[79] While she does not dispute that this notice came to her home and was signed for by her husband, she essentially conceded that she as the Indemnitor would not have taken any steps to notify the immigrant because it was not *she*, but her *husband* that received the notice.[80] While Arevalo swore under oath that she would have contacted the bonded immigrant if Aaron Federal Bonding had provided the required notice, she could not recall whether she or her husband contacted the immigrant after receiving the *same* notice from the Government.[81]

This issue also led to further file review. In at least 62 of the 428 files reviewed so

---

[77] *See* Certification Order at 25.

[78] *McKnight v. Hill & Hill Exter, Inc.*, 689 S.W.2d 206, 209 (Tex. 1985)(Stating that "in order to recover compensatory damages, a breach-of-contract plaintiff must establish that he or she suffered some loss as a result of the breach".)

[79] *See* Exh. 16, Deposition of Deanna Arevalo at 61-62; 63-65l; *see also* Exh. 52, I-166 produced from government.

[80] *See* Exh.16, Deposition of Deanna Arevalo at 61-62, 63-65, 68-69, and 98.

[81] *See* Exh.16, Deposition of Deanna Arevalo at 63-64, 68-69, 98-99, and 101.

far, there is evidence that the Government sent I-166 notices to the last known address of the alien or immigrant.[82] This fact, however, will not be in many of the bond files – it was not in Ms. Arevalo's file.[83] The Government's "A" file for each alien will have to be obtained by discovery or FOIA request to ascertain whether, in some cases, an I-166 notice was sent and signed for by the alien or the immigrant, as in the case of the Arevalos.[84]

Eluid Salinas' deposition testimony establishes that the Government frequently sent such an I-166 notice (commonly known as a "run letter") directly to the indemnitor, the bonded immigrant, the immigrant's lawyer, or some combination of the three.[85] Indeed, the Plaintiffs' immigration-lawyer expert, Jodi Goodwin, testified in her deposition that she would sometimes receive I-166 notices for her clients.[86] Furthermore, the Government's representative Marc Moore also testified that the Government sends I-340 notice to the alien (in addition to the obligor) and I-166 letters to the aliens on a case-by-case basis.[87]

---

[82] *See* Exh. 2, Spreadsheet Analysis of Sample Bond Files; Exh. 9, Declaration of Jessica Zavadil at 12.

[83] Exh. 9, Declaration of Jessica Zavadil at 12; *see also* Exh. 42, Bond file of Roberto Juarez-Hernandez.

[84] The Federal Defendants recently produced ten abbreviated Alien Files (A-Files) in response to the Surety Defendants' request for production. Of these files, 60% contained at least some evidence that notice of appearance for deportation—via either an I-340 or an I-166—was provided by the Government to the bonded immigrant, the immigrants attorney, or the indemnitor. *See* Exh. 52, "A" Files from United States Department of Justice. *See* Exh. 10, Declaration of Howard Close, at 18.

[85] Exh. 36, Deposition of Eliud Salinas at 81-82.

[86] *See* Exh. 31, Deposition of Jodi Goodwin at 28-29, 42-43.

[87] *See* Exh. 43, Deposition of Marc Moore at 5, 46-47, 158.

b. Notices for deportation were often provided to counsel for the alien.

The immigrant in Ms. Arevalo's case was represented by counsel and this counsel received notice on behalf of the alien of any hearings, including any deportation hearings.[88] The notice that was sent to Arevalo copied the immigrant's lawyer—Rosemary Deleon—and the notice was sent a month before the immigrant had to appear for deportation in Los Fresnos, Texas.[89] In addition, Petra Carranza de Salinas (the class representative for the Bonded Immigrant Class) testified that her attorney gave her notice of all hearings.[90] Irma Sandoval (the class representative for the Indemnitor Notice Class) testified that her father—Manual Sandoval, the bonded immigrant—had a lawyer and the lawyer told her father when to go to court.[91] In 111 of the 428 files reviewed, the immigrant was represented by counsel.[92] Whether counsel received and conveyed notice to the immigrant, as seems likely based on the evidence, will require individual proof. If the Government, or an indemnitor, or the immigrant's lawyer notified the immigrant of the order to appear for deportation, then any notice that Aaron Federal Bonding would have given would have been redundant. If the immigrant did not appear for deportation as ordered after receiving notice from another source, it would have been futile for Aaron

[88] The same is true of many other aliens—they had counsel who may have received notice. Exh. 9, Declaration of Jessica Zavadil at 15; Exh. 2, Spreadsheet Analysis of Sample Bond Files.

[89] Exh. 52, A-File of Roberto Juarez-Hernandez, at BFE655473.

[90] Exh. 44, Deposition of Petra Salinas at 38-39, 45-46, 73-74.

[91] *See* Exh. 45, Deposition of Irma Sandoval at 20-21.

[92] *See* Exh. 2, Spreadsheet Analysis of Sample Bond Files; Exh. 9 Declaration of Jessica Zavadil at 15.

to send a similar notice by mail for example. The law does not require futile acts.[93]

Those indemnitors that received notice of the deportation hearing directly from some source other than Aaron Federal Bonding cannot claim any injury in fact or the "fact of damages" resulting from Aaron Federal Bonding's alleged failure to provide duplicate notice. Determining whether each class member actually received notice from someone, and thereafter did nothing to ensure appearance of the bonded immigrant, will require trial of individual issues of causation that will predominate over any common issues among the class.[94]

5. The Indemnitor Notice Class should be decertified because many of the potential class members failed to update their contact information with Aaron Federal Bonding, not only making attempted notice futile, but also preventing the Bonding Defendants from performing under the contract.

To the extent the indemnitor and the bonded immigrants signed the Terms and Conditions Agreement, they were bound to these terms of that Agreement:

> 1. PRINCIPAL {the bonded immigrant} and INDEMNITOR must report to AGENCY {Aaron Federal Bonding} every thirty (30) days

---

[93] *Alliance, Wolff & Munier, Inc. v. Whiting-Turner Contr. Co.*, 946 F.2d 1003, 1009 (2d Cir. 1991 (stating that a party to contract may be excused from complying with a ***notice requirement*** if notice would have been a useless gesture (citing *Craddock v. Greenhut Constr. Co., Inc.,* 423 F.2d 111, 115 (5th Cir. 1970)) (emphasis added)); *Metals, Inc. of Atlanta v. Hinley Indus.*, 222 F.3d 895, 905 (11th Cir. 2000) (stating that the "futility doctrine flows out of the principle that the law does not require the performance of vain or useless things").

[94] *See Bell Atlantic Corp. v. AT&T Corp.,* 339 F.3d 294, 303-04(5th Cir. 2003)("[W]here fact of damage cannot be established for every class member through proof common to the class, the need to establish antitrust liability for individual class members defeats Rule 23(b)(3) predominance."); *O'Neil v. Appel,* 165 F.R.D. 479, 499 (W.D. Mich. 1996) (denying class certification and stating that "[W]here numerous mini-trials are necessary to resolve individual questions of reliance and causation, the benefits of a class action disappear"); *Noble v. 93 Univ. Place Corp.*, 224 F.R.D. 330, 341-42 (S.D.N.Y. 2004) (rejecting class definition when it requires addressing the central issue of liability in a case and therefore the inquiry into "whether a person is a class member essentially require[s] a mini hearing on the merits of each [plaintiff's] case").

> commencing the ____ day of _____. PRINCIPAL and INDEMNITOR must report between the hours of 9:00 A.M. and 5:00 P.M. CST, Monday through Friday, or PRINCIPAL and INDEMNITOR may appear in person at AGENCY'S office during said hours on said days.
>
> 2. PRINCIPAL and INDEMNITOR must immediately notify AGENCY of any change in the following information:
> A. PRINCIPAL'S and/or INDEMNITOR'S address.
> B. PRINCIPAL'S and/or INDEMNITOR'S telephone number.
> C. PRINCIPAL'S and/or INDEMNITOR'S employer.
> D. PRINCIPAL'S and/or INDEMNITOR'S attorney.
> E. PRINCIPAL'S immigration status.
> F. PRINCIPAL'S departure from the United States.
>
> 3. PRINCIPAL must not move from [current address] even temporarily, without the AGENCY'S prior consent.

This Court addressed the factual issue of failure to comply by the Plaintiffs in its certification order, and concluded that because Aaron treated the contracts as ongoing, the Bonding Defendants are not excused from performing despite the Plaintiffs' breach of the contracts.[95] The legal principle—that the non-breaching party is put to an election of terminating or continuing the contract—is not so easily applied here, for two reasons. One potential breach—the failure of the alien or indemnitor to notify Aaron Federal Bonding of a change in address or phone number—will not be known until after the notice to appear for deportation is received. Similarly, a breach of the last obligation quoted above ("Principal must not move . . . without . . . prior consent") may not be known by Bonding Defendants until an attempt is made to contact the Indemnitor to give the notice Indemnitors are seeking. Bonding Defendants have no obligation to "elect" to

[95] Exh. 1, Certification Order at 23.

continue the contract or declare it terminated until they learn of a breach.[96] More fundamentally, Bonding Defendants cannot unilaterally cancel the bond agreement with the Government, and it would be illogical for them to cancel all their rights against the indemnitors, including the right to be repaid, while the bond obligation is still outstanding. And because there were separate Bond Defendant entities over the years that could respond in different ways to numerous failures by the class members to comply with their Terms and Conditions Agreements, there are multiple individual issues on the "waiver of material breach" theory.

There is a more fundamental problem with the Indemnitor Notice Class's failure to keep their contractual obligations. As this Court set out in the Certification Order, it is part of a plaintiff's prima facie case for breach of contract to prove that he or she performed or tendered performance[97]. Whether each Indemnitor and immigrant complied with the requirements quoted above will be a jury question, and the proof will vary among class members.

In addition, the law recognizes the defense of prevention of performance where the plaintiff has impaired the defendant's ability to perform. "It is a general principle of contract law that if one party to a contract prevents or makes impossible performance by the other party, the latter's failure to perform will be excused and the offending party will

---

[96] *Gupta v. Eastern Idaho Tumor Inst., Inc.*, 140 S.W.3d 747, 756 (Tex. App.—Houston [14th Dist.] 2004, pet. denied) (stating that after one party commits a material breach, the other party must elect between either continuing or ceasing performance).

[97] Exh. 1, Certification Order at 16.

not be permitted to recover damages for nonperformance."[98] "That doctrine excuses the performance of a contractual obligation in a case where a party to the agreement has, in some manner, actively hindered or impeded the attainment of a material part of the bargain."[99] "[It] is as effective an excuse of performance of a condition that the promissor has hindered performance as that he actually prevented it."[100]

There is ample evidence that the class members failed to notify Aaron Federal Bonding of changes in address, and in fact hid their actual addresses from Aaron and from the federal authorities. Abigail Lopez was an employee with Aaron Federal Bonding from December 1989 to September 2005 and was responsible for updating the bonded immigrants' files with current contact information whenever either the immigrant or indemnitor provided it.[101] Ms. Lopez testified that it was very common for the indemnitors and immigrants to falsify their applications, and it was very difficult to locate the immigrant at a later time because of the wrong information.[102]

---

[98] *Nitram v. Cretan Life,* 599 F.2d 1359, 1371 (5th Cir. 1979) (affirming district court's finding that the party's failure to provide an accurate tally of cargo because of the other party's speed of loading); *In re General Datacomm Ind.*, 407 F.3d 616, 625-26 (3d Cir.), *cert. denied,* 546 U.S. 1031 (2005) (J. Pollack, concurring) (stating that"[T]he prevention doctrine states that it is a principle of fundamental justice that if promissor is himself the cause of the failure of performance, either of an obligation due him or of a condition upon which his own liability depends, he cannot take advantage of the failure. (quoting 5 WILLISON ON CONTRACTS 3D, sec. 677, at 224).

[99] *Monegain v. Pilkington PLC,* 1995 U.S. Dist. Lexis 19938, *3 (E.D.N.C. Dec. 18, 1995) (internal quotations omitted).

[100] *Moore Bros. Co. v. Brown & Root*, 207 F.3d 717, 725 (4th Cir. 2000) (holding that Brown & Root hindered performance by misleading lenders about design changes, thereby making it less likely that the lenders would arrange additional financing to cover the changes) (citing, *inter alia*, 5 WILLISTON ON CONTRACTS 3D, sec. 677A).

[101] *See* Exh. 46, Deposition of Abigail Cavos Lopez at 8, 19-20, 123.

[102] *Id.* at 56.

Michael Padilla, the Loss Mitigation Specialist for Fairmont Specialty Insurance Company has been in charge of dealing with the recovery efforts for Fairmont since April of 2006.[103] He confirms in his declaration that the addresses given by indemnitors and aliens are not correct in most cases.[104]

The testimony of Marc Moore—the field office director for the San Antonio of Immigration Customs Enforcement Agency (ICE)—further demonstrates the difficulty in contacting an immigrant who has failed to update his or her contact information. In the San Antonio division of ICE alone there are currently over 77,000 fugitive aliens that four teams consisting of eight people each have been unable to capture for deportation.[105] It is apparent from the Government statistics that a number of the aliens, including aliens that are the subject of the bonds in this case, deliberately tried to avoid capture from either the bonding company or ICE.[106] If they are avoiding ICE, they are not going to voluntarily turn themselves in if one of the Bonding Defendants were to call or write asking them to "please appear."

Whether an immigrant would rather show up for deportation or take some other action depends on whether the immigrant has any legal basis to stay in the United States or to seek relief from removal. This issue will vary from case to case.[107] The results of the

---

[103] *See* Exh. 53, Declaration of Michael Padilla.

[104] *Id.*

[105] *See id.; see also* Exh. 43, Deposition of Marc Moore at 120-125.

[106] *Id.*

[107] See Exh. 41, Expert Report of Immigration Expert Magali Candler at 3-5, and Exh. 7, Declaration in Support.

recent pilot program in which ICE gave immigrants subject to a final deportation order the right to voluntarily depart the United States show the true situation:

> "Of almost 500,000 who were eligible nationwide, including about 30,000 in the five pilot cities, only eight showed up, according to U.S. Immigration and Customs Enforcement, which sponsored the three-week program."[108]

If only eight of thirty thousand actually show up to voluntarily deport, then Plaintiffs' contention that the bonded immigrants in this case would individually, or on a class-wide basis, voluntary appear for deportation if given notice has serious flaws.

The inability to give notice due to bad addresses has been dramatically demonstrated, class-wide, by the attempt to send notice to the class members. Of the 7607 notices that were sent out by certified mail pursuant to the Court's order, the majority, 4849 (64%) have been returned as "undeliverable"[109] to the class member. Had the envelope contained instead a letter from Aaron Federal Bonding enclosing the "notice to appear for deportation," a like non-receipt percentage would exist. This exercise has demonstrated the ineffectiveness, if not the futility, of sending written notice to the alien or indemnitor of the demand to appear for deportation and the hollowness of Plaintiff's claim that receipt of notice was or is material on anything approaching a class-wide basis.

In sum, the issues about whether sending advance written notice of the demand to appear for deportation would be effective in reaching the immigrant *and* would be

[108] *See* Exh. 47, Miriam Jordan, "Voluntary Deportation Program Attracts Few Participants," Wall Street Journal (August 14, 2008).

[109] *See* Exh. 3, Declaration of Terry Heuman.

effective in causing the immigrant to appear so the bond would not breach are highly individualized inquiries relevant to the issues of causation and the fact of damage that cannot simply be assumed against the Bonding Defendants. Plaintiffs bear the burden of proof at this stage (and also at trial) to demonstrate that advance notice to the last contact information given by the immigrant would (1) reach the immigrant and (2) even if received, cause him or her to appear as ordered or take other proper steps to avoid a breach of the bond. Based on this record, these individual issues predominate over any common issue.

6. The Indemnitor Notice Class must be decertified because the bond files do not all contain Terms and Conditions Agreements signed by the Immigrant and Indemnitor.

The uncertainties raised by the recent depositions led to the highlighting of additional individual issues that are critical to this case. The notice provision on which Plaintiffs rely is found in a "Terms and Conditions" agreement between Aaron Federal Bonding and (sometimes, but not always) the indemnitor. The sole basis for certification of the Surety Bond Classes arises from an alleged breach of that notice provision. The bond files reveal that the indemnitor was not consistently the person who signed the Terms and Conditions, meaning, the person who claims in this action to have paid for the alleged promise by Aaron Federal Bonding to him/her to notify the immigrant did not receive the promise and is not party to the agreement.[110] Persons in that situation are clearly not entitled to relief. An example is found in the file of bonded immigrant Maria

[110] Exh. 9, Declaration of Jessica Zavadil at 16.

Ana Arevalo-Velasquez: the indemnitor on the bond application (and the one that appears to have made the up-front payment), was Santos Sarto, while the Terms and Conditions Agreement was signed by Gloria Lucana.[111] This issue of "who was the real promissee" is yet another issue that will have to be individually tried.

Moreover, 42 of the bond files reviewed do not contain a "Terms and Conditions" agreement, or the signature line was blank.[112] Therefore, no notice was required under those bonds because there was no contract requiring notice. Each potential class member will have to prove that he or she signed a Terms and Conditions Agreement in order to prevail at trial.

Finally, most of the Terms and Conditions Agreements have no signature of the bonded immigrant, although there is a blank for that signature.[113] Whether a written contract must be signed to be binding is an individual question of the parties' intent.[114]

7. The class should be decertified because several individual issues exist as to whether the bond was breached or cancelled.

During the Bonding Defendants' review of the bond files, another important individual issue arose. In 101 of the 428 files reviewed, the bond was not breached at all,

---

[111] *See* Exh. 54, Bond file of Maria Ana Velasquez at BFE141152; BFE141157.

[112] Exh. 9, Declaration of Jessica Zavadil at 17.

[113] *Id.* at 17-18.

[114] *See Scaife v. Associated Air Ctr. Inc.*, 100 F. 3d 406, 410 (5th Cir. 1996) (holding that signatures were required where, among other things, contract contained signature block, along with a provision that amendments had to be in signed writings); *Simmons & Simmons Constr. Co. v. Rea*, 155 Tex. 353, 355, 286 S.W.2d 415, 417 (Tex. 1955) (holding that signatures were required where, among other things, contract had signature block); *In re Bunzl USA, Inc.*, 155 S.W.3d 202, 209 (Tex. App.—El Paso 2004, no writ) (holding that, among other things, the blank signature block is evidence that the parties did not intend to be bound until both parties signed the Agreement).

or if it was breached, the breach was nullified when the bond was later cancelled on appeal by the Government.[115] If the bond was not breached or if it was cancelled, there is no harm to the indemnitor or the immigrant. This is an individual issue that will have to be individually tried.

B. The Bonded Immigrant Class should be decertified.

1. The Bonded Immigrant Class should be decertified because there is a conflict of interest between the class representative and one or more members of the class, and thus the class representative is not adequately representing the class.

In many cases, providing advance notice to an immigrant who has been ordered deported and must appear for deportation is more likely to result in the immigrant's flight rather than appearing as ordered. This will cause the bond to breach and the indemnitor to lose the collateral he or she deposited. Thus, the Indemnitor Notice class representative is taking a position that will ultimately be detrimental to the members of the class, and the Bonded Immigrant class representative is seeking injunctive relief that might be detrimental to the members of the Indemnitor Notice Class.

This conflict of interest is fatal to the maintenance of class action status. "It is axiomatic that a putative representative cannot adequately protect the class if his interests are antagonistic to or in conflict with the objectives of those he purports to represent."[116]

---

[115] *See* Exh. 2, Spreadsheet Analysis of Sample Bond Files; Exh. 9, Declaration of Jessica Zavadil at 19.

[116] Wright & Miller, 7A FEDERAL PRACTICE & PROCEDURE, § 1768, p. 326 (2d ed. 1986); *see also Berger v. Compaq Computer Corp.*, 257 F.3d 475, 479-80 (5th Cir. 2002) ("The adequacy requirement also 'serves to uncover conflicts of interest between the named plaintiffs and the class they seek to represent.' Furthermore, because absent class members are conclusively bound by the judgment in any class action brought on their behalf, the court must be especially vigilant to ensure that the due process rights of all class members are safeguarded through adequate representation at all

As the Eleventh Circuit held in *Pickett v. Iowa Beef Processors*, "[a] class cannot be certified when its members have opposing interests or when it consists of members who benefit from the same acts alleged to be harmful to other members of the class."[117] Relying on *Pickett*, the Eleventh Circuit elaborated: "A fundamental conflict exists where some party members claim to have been harmed by the same conduct that benefitted other members of the class. In such a situation, the named representatives cannot vigorously prosecute the interests of the class through qualified counsel because their interests are actually or potentially antagonistic to, or in conflict with, the interests and objectives of other class members."[118] The *Pickett* analysis fits this case exactly – it is obvious that *sometimes* physically picking up the immigrant without advance notice will benefit the indemnitor. How then is there a class of all indemnitors suing for failure to

---

times.) (citing *Amchem Products v. Windsor*, 521 U.S. 591, 625 (1997)); *Langbecker v. Electronic Data Systems, Inc.*, 476 F.3d 299, 314-16 (5th Cir. 2007) ("[T]he Rule 23 adequacy inquiry also uncovers conflicts of interest between the named plaintiffs and the class they seek to represent. Substantial conflicts exist among the class members, raising questions about the adequacy of the lead Plaintiffs' ability to represent the class." . . . Indeed, intraclass problems can present problems of constitutional magnitude.") (citations omitted).

[117] 209 F.3d 1276, 1280 (11th Cir. 2000).

[118] *Valley Drug Co. v. Geneva Farms*, 350 F.3d 1181, 1189 (11th Cir. 2003), *cert. denied*, 543 U.S. 939 (2004) (collecting cases; internal quotations omitted). In fact, "no circuit has approved of class certification where some class members derive a net economic benefit from the very same conduct alleged to be wrongful by the named representatives of the class." *Id.* at 1190; *see also Bieneman v. City of Chicago*, 864 F.2d 463, 465 (7th Cir. 1988) (affirming denial of class certification to a group of property owners surrounding O'Hare Airport because some putative class members "undoubtedly derive great benefit" and others were harmed from the airport); *Phillips v. Klassen*, 502 F.2d 362, 367 (D.C. Cir. 1974) (affirming refusal to certify class where the defendant's conduct "may be taken as conferring economic benefits or working economic harm, depending on the circumstances of the individual."); *Allied Orthopedic Appliances v. Tyco Healthcare*, 247 F.R.D. 156, 177-78 (C.D. Cal. 2007) ("[N]o circuit approves of class certification where some class members derive an economic benefit from the very same conduct alleged to be wrongful by the named representative of the class."; refusing to certify class where the alleged anticompetitive benefited some hospitals but not others); *Auto Ventures v. Moran*, 1997 U.S. Dist. Lexis 7037, *13 (S.D. Fla. 1997) (refusing to certify a class of Toyota dealers because "the class collapses into distinct groups of winners and losers.").

give advance notice?

In contrast, apprehension of the immigrant without advance notice in many if not most cases best protects the indemnitor's financial interest, which is to preserve the indemnitor's collateral rather than having it forfeited by the bond being breached. Not surprisingly then, this procedure is standard in the immigration bond industry, given the high likelihood that the bonded immigrant will flee rather than report for deportation if given advance notice.[119]

The recent testimony of Marc Moore, the San Antonio field office director for the Immigration and Customs Enforcement Agency, confirms that sending advance notice to the alien to appear for deportation—as the class representatives desire—commonly results in the failure of the alien's appearance, and therefore puts the Indemnitors at risk rather than protecting their interests.[120] The Court acknowledged this problem in its Order dated May 19, 2005.[121]

While Mr. Sandoval[122] expressed a desire to appear every time the Government asked for him, the evidence is that attitude is atypical. Indeed, Plaintiff's immigration expert, Jodi Goodwin, when asked why there were so many breaches of these

---

119 *See* Exh. 48, Deposition of Michael Padilla at 30 (testifying that in at least 90 percent of the cases when an immigrant under deportation order received advance notice, they would not be at home when Padilla arrived as a recovery agent); Exh. 49, Deposition of Recovery Agent Expert Jack Kessell at 118 (testifying that there is a high likelihood of immigrant fleeing if given advance notice of I-340).

120 *See* Exh. 43, Deposition of Expert Marc Moore at 138-139.

121 *See* Exh. 50, Court's Memorandum Opinion and Order dated May 19, 2005 at 5 (Docket Entry no. 135-2).

122 Mr. Sandoval is Irma Sandoval's father and the immigrant for whom she signed the indemnity agreement.

immigration bonds testified "People didn't want to go home . . . And I believe that people breach the bonds because it's . . . it's a cost of doing business . . ."[123] In addition, many aliens have no legal basis for remaining in the United States, so providing notice to them cannot help them "preserve" any legal rights.[124]

If the immigrant would rather flee than appear, then giving advance notice of a deportation is counterproductive to the indemnitor's financial interest. Before binding every class member to a ruling that might well be very detrimental to them, the Court should ensure that each class member wants the advance notice to the immigrant for which the Plaintiffs are asking.

2. The Class Representative did not sign the Agreement on which she is suing.

The class representative—Petra Carranza de Salinas—did not sign the Terms and Conditions Agreement she is seeking to enforce.[125] As stated above, when the party fails to sign the agreement, the question of whether a written contract must be signed to be binding is a question of the parties' intent.[126]

The issue of whether Ms. Salinas as well as all of the other bonded immigrants that failed to sign the terms and conditions agreement intended for this agreement to be a binding agreement will have to be individually tried as a question of fact.

---

[123] Exh. *31*, Deposition of Jodi Goodwin at 66-67.

[124] *Id. at* 112-13, 141-44, 149-50.

[125] *See* Exh. 51, Bond File of Petra de Carranza Salinas at BFE640450.

[126] *See, e.g., Scaife*, 100 F.3d at 410; *ABB Kraftwerke Aktiengesellschaft v. Brownsville Barge & Crane, Inc.*, 115 S.W.3d 287, 292 (Tex. App.—Corpus Christi 2003, writ denied).

3. The Bonding Defendants did not refuse to act on grounds generally applicable to the class.

Rule 23(b)(2) requires that the Bonding Defendants "acted or refused to act on grounds generally applicable to the class."[127] "The term 'generally applicable' has been interpreted to mean that the party opposing the class has acted in a consistent manner towards members of the class so that his actions may be viewed as part of a pattern of activity, or to establish a regulatory scheme, to all members."[128] "What is necessary is that the challenged conduct or lack of conduct be premised on a ground that is applicable to the entire class."[129]

Rule 23(b)(2) is satisfied only where class treatment is clearly called for, for example, "in situations where a court, through a single injunction or declaration, can redress 'group, as opposed to individual, injuries . . . .'"[130] "A Rule 23(b)(2) action cannot resolve individualized issues of fact, nor provide different types of relief required to redress individual injuries."[131] In the instant case, no such "generally applicable" activity exists. As discussed above, not every immigrant signed a Terms and Conditions Agreement, the only agreement providing for notice to the bonded immigrant. Indeed, Petra Salinas, representative of this class, did not sign a Terms and Conditions

---

[127] FED. R. CIV. P. 23(b)(2).

[128] *In re Managed Care Lit.*, 209 F.R.D. 678, 686-87 (S.D.Fla. 2002), *rev'd on other grounds*, 538 U.S. 401 (2003). {Find a case that was not reversed}

[129] *Edmondson v. Simon*, 86 F.R.D. 375, 383 (N.D.Ill. 1980).

[130] *In re Methyl Tertiary Butyl Ether Prods. Liab. Lit.*, 209 F.R.D. 323, 341-42 (S.D.N.Y. 2002) (quoting *Holmes v. Cont'l Can Co.*, 706 F.2d 1144, 1155 (11th Cir. 1983)).

[131] *In re Managed Care Lit.*, 209 F.R.D. at 687 (citing 5 James Wm. Moore, et al., MOORE'S FED. PRAC. § 23.43(2)(b) at 23-195 (3d ed. 2000)).

Agreement[132]. And there is no showing that the Bonding Defendants uniformly failed to provide that notice. To the contrary, as illustrated above, in Section A.2, the Bonding Defendants have provided notice to the bonded immigrant (through several different means), including through the most effective type of notice—through a recovery agent.

C. There is a conflict of interest between the two classes which destroys adequate representation of the classes.

In addition, as discussed above, it is not clear that it is in the best interest of every indemnitor that Bonding Defendants provide advance notice to the bonded immigrant as such notice will likely cause him or her to flee. This divergence in interests between the two classes raises a serious question about the adequacy of representation. Under the adequacy requirement, "class counsel must be qualified and must serve the interests of the entire class."[133] To establish adequacy, "counsel representing the class must be qualified and capable and must advance the interests of the *entire class*, not just a group of one or another."[134]

The conflict between the two classes, and within the classes destroys the ability of the class representatives and class counsel to adequately represent the classes. "The existence of a conflict of interest affects class counsel's ability to conduct the litigation

---

[132] *See* Exh. 51, Bond file of Petra Salinas, at BFE640450.

[133] *Georgine v. Amchem Products*, 83 F.3d 610, 630 (3d Cir. 1996), *aff'd*, 521 U.S. 591 (1997).

[134] *In re Train Derailment Near Amite, Louisiana*, 2006 U.S. Dist. Lexis 32839, *45 (emphasis in original; citing *Georgine*, 83 F.3d at 630); *see also Council 31 v. Sally Ward*, 1989 U.S. Dist. Lexis 8972, *9 (N.D. Ill. 1989), *aff'd*, 169 F.3d 1068 (7th Cir. 1999) ("[T]he court must be assured that counsel will not face conflicts in representing the interests of the entire class."); *Carpenter v. Boeing Co.*, 456 F.3d 1183, 1204 (10th Cir. 2006) ("Resolution of two questions determines legal adequacy: (1) do the named plaintiffs and their counsel have any conflicts of interest with other class members . . . ") (internal quotations omitted).

zealously and competently. Accordingly, [c]lass counsel must act with unwavering and complete loyalty to the class members they represent, and the responsibility of class counsel to absent class members whose control over their attorneys is limited does not permit even the appearance of divided loyalties."[135]

The conflict within each class and between the two classes mandates decertification.

IV. CONCLUSION

In sum, the Indemnitor Notice Class and the Bonded Immigrant Class should be decertified because the Court will have to try these individual issues in order to reach a resolution of this case on the merits:

1. Whether the indemnitor signed the Terms and Conditions Agreement;
2. Whether the indemnitor fully paid the up-front fee;
3. Whether the indemnitor was partially or totally reimbursed by anyone for the up-front fee;
4. Whether the addresses provided to Bonding Defendants by the indemnitor and the immigrant were correct at the time an I-340 Notice to Deliver Alien for deportation was received by Bonding Defendants;
5. Whether Bonding Defendants gave any notice to the indemnitor or the immigrant of the I-340 appearance date;
6. Whether the indemnitor or the immigrant received notice of the appearance date from any other source – e.g., the Government or a lawyer;
7. Whether the bond was breached or cancelled by the Government;
8. Whether the immigrant could have appeared in compliance with the notice (i.e., whether the immigrant was still living in the United States at the

[135] *National Air Traffic Controllers Assoc. v. Dental Plans, Inc.*, 2006 U.S. Dist. Lexis 12544, *13 (N.D. Va. 2006) (quoting *Kayes v. Pacific Lumber Co.*, 51 F.3d 1449, 1465 (9th Cir. 1995)).

time);

9. Whether the immigrant would have appeared in compliance with the notice had he received it;

10. Whether any breach by Bonding Defendants was material; and

11. What the value is, if any, to each Indemnitor of what he received by posting the bond (including the immigrant's freedom), if the measure of damages is the difference between what the Indemnitor paid and what he received, as the Court has suggested.

Bonding Defendants have established that numerous individual issues exist within the class on the basic elements of their contract claim. These issues predominate over any common issue. In addition, there is a lack of adequate class representation of both classes. Therefore the Court should decertify the two classes.

Respectfully submitted,

By: ______________________________

Howard Louis Close
Attorney in Charge
State Bar No. 04406500
S.D. Tex. ID No. 13362
Thomas C. Wright
State Bar No. 22059400
S.D. Tex. ID No. 2729
Wright Brown & Close, LLP
Three Riverway, Suite 600
Houston, Texas 77056
713.572.4321 Telephone
713.572.4320 Facsimile
close@wrightbrownclose.com
wright@wrightbrownclose.com

Lead Counsel for Defendants Fairmont Specialty Insurance Company, f/k/a Ranger Insurance Company, and Stonington Insurance Company, f/k/a Nobel Insurance Company

OF COUNSEL:

Bradford W. Irelan
State Bar No. 10411550
Irelan Hargis, PLLC
440 Louisiana, Suite 1800
Houston, Texas 77002-1652
Telephone: (713) 222-7666
Facsimile: (713) 222-7669

Daniel K. Worthington

By [illegible] w/ permission

Daniel K. Worthington
Atlas & Hall, LLP
818 Pecan Blvd.
P. O. Box 3725
McAllen, Texas 78501
Telephone: (956) 682-5501
Facsimile: (956) 686-6109

Lead Counsel for Defendants Michael Padilla, as Independent Administrator for the Estate of Vannerson, and Santiago Sol

CERTIFICATE OF CONFERENCE

I certify that I have conferred with Plaintiffs' counsel and that they oppose this motion.

Howard L. Close

CERTIFICATE OF SERVICE

I certify that this filing has been served on all counsel of record by electronic service, email, fax, federal express, and/or U.S. mail on September 24, 2008 as follows:

Via Federal Express and Electronic Service

J. Benjamin King
Diamond McCarthy Taylor, Bryant & Lee, LLP
1201 Elm Street, 34th Floor
Dallas, Texas 75270-2102

Dan K. Worthington
Atlas & Hall
P. O. Drawer 3725
McAllen, TX 78502

Tucker Ronzetti, Esq.
Kozyak Tropin & Throckmorton, PA
2525 Ponce de Leon, Ninth Floor
Coral Gables, FL 33134

Rene Carlo Benavides
US Attorney's Office,
Southern District of Texas
1701 West Highway 83
McAllen, Texas 78501-5176

Elisabeth Lisa Brodyaga
17891 Landrum Park Road
San Benito, Texas 78586-7197

Stacey Young/Benjamin Zeitlin
U.S. Department of Justice
P.O. Box 878, Ben Franklin Station
Washington DC, 20044

Howard L. Close