UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION

ARACELY ZAMORA-GARCIA, *et al*,	§	
	§	
Plaintiff,	§	
VS.	§	CIVIL ACTION NO. M-05-331
	§	
MARC MOORE, *et al*,	§	
	§	
Defendant.	§	

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION TO CERTIFY SURETY BOND CLASSES

I. Introduction

Now before the Court is Plaintiffs'/Petitioners' Motion for Class Certification. (Doc. 112). Plaintiffs/Petitioners seek to certify three classes with claims against Bonding Defendants[1] ("Surety Bond" Classes) and four classes with claims against Federal Defendants/Respondents[2] ("Federal" Classes). *Id.* The Court will consider the certification of Plaintiffs' Surety Bond Classes herein.

Plaintiffs'/Petitioners' Sixth Amended Petition for Writ of Habeas Corpus and Class Action Complaint for Injunctive and Declaratory Relief asserts claims for breach of contract against Bonding Defendants arising out of said Defendants' alleged mishandling of immigration surety bonds. (Doc. 114 at ¶¶ 112-33). More specifically, Plaintiffs allege that Defendants Fairmont

[1] Bonding Defendants include Fairmont Specialty Insurance Company (f/k/a Ranger Insurance Company)("Fairmont"); Stonington Insurance Company (f/k/a Nobel Insurance Company)("Stonington"); and Michael W. Padilla, in his capacity as Independent Administrator with Will Annexed of the Estate of Don Vannerson, d/b/a Aaron Federal Bonding Agency ("Aaron Bonding"). (Doc. 114 at ¶¶ 16-18).

[2] Federal Defendants/Respondents include Marc Moore, District Director for Interior Enforcement, Department of Homeland Security; and Alberto Gonzales, U.S. Attorney General, The United States of America. (Doc. 114 at ¶¶ 13-15). Federal Defendants/Respondents are sued in their official capacity. *Id.*

and Stonington ("Insurer Defendants"), through their agent, Aaron Bonding,[3] enter into surety contracts with the indemnitor Plaintiffs,[4] wherein Bonding Defendants[5] agree to post surety bonds for the surety bonded immigrant Plaintiffs with the Department of Homeland Security ("DHS")(or its predecessor in relevant respects, the Immigration and Naturalization Service, or "INS") to enable the bonded immigrants to leave confinement while their removal proceedings are pending. *Id.* at ¶¶ 1-2. For these services, the indemnitors pay up-front, non-refundable fees equal to half of the total bond and agree to indemnify Bonding Defendants for the full amount of the bond should the bond be breached for failure of the bonded immigrant to attend a DHS-scheduled appearance. *Id.* at ¶ 2. Moreover, Bonding Defendants require the indemnitors to pay, or guarantee the payment of, roughly half the amount of the bond in monthly installments into a "Build-Up Fund," or collateral account, that Bonding Defendants may draw from in paying on the bond to DHS in the event the bond is breached. *Id.* According to Plaintiffs, Bonding Defendants contractually agree to provide notice to both the indemnitors and bonded immigrants of all appearances scheduled by DHS of which Bonding Defendants receive notice but "never provide advance notice of DHS-scheduled appearances" to either, thus resulting in bond breaches. *Id.* at ¶¶ 2, 5. In addition, Plaintiffs allege that although the surety bond contracts at issue require Bonding Defendants to return the collateral posted after Federal Defendants cancel a bond, Bonding Defendants' policy is to silently retain the collateral. *Id.* at ¶ 8. Plaintiffs claim that Bonding Defendants' failure to provide notice of DHS-scheduled appearances and failure to return the collateral posted in the event of bond cancellation constitute actionable breaches of

[3] Plaintiffs allege that Aaron Bonding is sometimes known as U.S. Immigration Bonds and Services. (Doc. 114 at ¶ 1).

[4] Plaintiffs allege that the indemnitor Plaintiffs are usually friends or relatives of the immigrants in removal proceedings. (Doc. 114 at ¶ 2).

[5] The Court refers to "Aaron Bonding" and "Bonding Defendants" interchangeably throughout this order. However, the Court notes that whether Insurer Defendants Fairmont and Stonington are liable for Aaron Bonding's conduct is an issue yet to be resolved.

contract for which Plaintiffs seek damages and equitable relief. *Id.* at ¶¶ 112-33. Plaintiffs seek class-wide relief with respect to their breach of contract claims and propose to certify the following classes pursuant to Federal Rule of Civil Procedure 23: (1) Indemnitor Notice Class; (2) Indemnitor Collateral Class; and (3) Bonded Immigrant Class. (Doc. 112).

II. Analysis

A. Class Certification Standard of Review

To certify a class action under Federal Rule of Civil Procedure 23, Plaintiffs must fulfill the four requirements set forth in Rule 23(a) and at least one of the three requirements enumerated in Rule 23(b). *E.g.*, *Vizena v. Union Pac. R.R. Co.*, 360 F.3d 496, 502 (5th Cir. 2004). Plaintiffs bear the burden of establishing that all of the applicable Rule 23 requirements have been satisfied. *Steering Comm. v. Exxon Mobil Corp.*, 461 F.3d 598, 601 (5th Cir. 2006); *Unger v. Amedisys Inc.*, 401 F.3d 316, 320 (5th Cir. 2005). Here, Plaintiffs contend that the Indemnitor Notice and Indemnitor Collateral Classes fulfill the requirements of Rule 23(b)(3), and that the Bonded Immigrant Class satisfies Rule 23(b)(2). (Doc. 112).

1. FED. R. CIV. P. 23(a)

a. Numerosity

Pursuant to Rule 23(a), Plaintiffs must first show that "the class is so numerous that joinder of all members is impracticable." FED. R. CIV. P. 23(a)(1). "Impracticable" need not mean "impossible," but rather that it is "extremely difficult or inconvenient" to join all members of the class. WRIGHT, CHARLES ALAN & MILLER, ET AL., FEDERAL PRACTICE & PROCEDURE: FEDERAL RULES OF CIVIL PROCEDURE § 1762 (2006). By itself, the mere allegation that a class is too numerous to make joinder practicable is insufficient to satisfy the "numerosity" prong. *Pederson v. La. State Univ.*, 213 F.3d 858, 868 (5th Cir. 2000). Rather,

"'a plaintiff must ordinarily demonstrate some evidence or reasonable estimate of the number of purported class members.'" *Id.* (quoting *Zeidman v. J. Ray McDermott & Co., Inc.*, 651 F.2d 1030, 1038 (5th Cir. 1981)). The Fifth Circuit has also noted that, when conducting a numerosity analysis, the district court must not focus on sheer numbers alone but also on whether joinder of all members is practicable in view of all other relevant factors. *Id.* at 868 n.11. "Practicability of joinder depends on size of the class, ease of identifying its members and determining their addresses, facility of making service on them if joined and their geographic dispersion." *Garcia v. Gloor*, 618 F.2d 264, 267 (5th Cir. 1980). The Fifth Circuit has indicated that a district court may draw reasonable inferences regarding these factors notwithstanding the lack of any direct evidence. *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 624-25 (5th Cir. 1999). The inclusion of future members in the class definition is also a factor to consider in determining if joinder is impracticable; in fact, that the class includes unknown, unnamed future members weighs in favor of certification. *Pederson*, 213 F.3d at 868 n.11.

b. Commonality

Second, Plaintiffs must show that "there are questions of law or fact common to the class." FED. R. CIV. P. 23(a)(2). The test for "commonality" is not a demanding one, as it requires the presence of only one common question of law or fact whose resolution will affect all or a significant number of the putative class members. *James v. City of Dallas*, 254 F.3d 551, 570 (5th Cir. 2001); *see also Jenkins v. Raymark Indus.*, 782 F.2d 468, 472 (5th Cir. 1986)(threshold of commonality "is not high"). That some of the putative class members may have claims that require some individualized analysis is not fatal to commonality. *James*, 254 F.3d at 570; *see also Forbush v. J.C. Penney Co., Inc.*, 994 F.2d 1101, 1106 (5th Cir. 1993)(necessity for even somewhat complex calculations of individual awards does not defeat commonality requirement).

c. Typicality

Third, Plaintiffs must show that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." FED. R. CIV. P. 23(a)(3). The "typicality" inquiry "'focuses on the similarity between the named plaintiffs' legal and remedial theories and the theories of those whom they purport to represent.'" *James*, 254 F.3d at 571 (quoting *Mullen*, 186 F.3d at 625). Like commonality, the test for typicality is not demanding, as it does not require a complete identity of claims. *Id.* "'Rather, the critical inquiry is whether the class representative's claims have the same essential characteristics of those of the putative class. If the claims arise from a similar course of conduct and share the same legal theory, factual differences will not defeat typicality.'" *Id.* (quoting 5 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 23.24[4] (3d ed. 2000)).

d. Adequacy

Fourth, Plaintiffs must demonstrate that "the representative parties will fairly and adequately protect the interests of the class." FED. R. CIV. P. 23(a)(4). In considering the "adequacy" requirement, the Court should evaluate whether the class representatives have a sufficient stake in the outcome of the litigation and whether they have interests antagonistic to the unnamed class members. *See Jenkins*, 782 F.2d at 472. In addition, the Court should inquire into the zeal and competence of counsel for the class representatives as well as the class representatives' willingness and ability to take an active role in the litigation and to protect the interests of the absent class members. *Berger v. Compaq Computer Corp.*, 257 F.3d 475, 479 (5th Cir. 2001). Generally, class representatives should "possess a sufficient level of knowledge and understanding to be capable of 'controlling' or 'prosecuting' the litigation." *Id.* at 482-83. They need to know more than that they were "'involved in a bad business deal'"; however, they "need

not be legal scholars and are entitled to rely on counsel...." *Id.* at 483 (quoting *Kelley v. Mid-America Racing Stables, Inc.*, 139 F.R.D. 405, 410 (W.D.Okla. 1990)). Differences between the class representatives and other class members do not defeat the adequacy requirement so long as those differences do not "'create conflicts between the named plaintiffs' interests and the class members' interests.'" *James*, 254 F.3d at 571 (quoting *Mullen*, 186 F.3d at 625-26).

2. FED. R. CIV. P. 23(b)

a. Rule 23(b)(2)

Rule 23(b)(2) authorizes the certification of a class satisfying all the requirements of Rule 23(a) where "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class a whole." FED. R. CIV. P. 23(b)(2). A Rule 23(b)(2) class is characterized by harm of a "group nature" and relief of a "broad character," such that "the (b)(2) class is, by its very nature,...a homogenous and cohesive group with few conflicting interests among its members." *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 413 (5th Cir. 1998). The Fifth Circuit has further noted that "[a]ctions for class-wide injunctive or declaratory relief are intended for (b)(2) certification precisely because they involve group remedies." *Id.* at 414.

b. Rule 23(b)(3)

Pursuant to Rule 23(b)(3), a class satisfying all the requirements of Rule 23(a) may be certified where "the court finds that the 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." FED. R. CIV. P. 23(b)(3). Rule 23(b)(3) also provides that "matters pertinent to the findings

include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; [and] (D) the difficulties likely to be encountered in the management of a class action." *Id.*

Assessing whether the "predominance" and "superiority" requirements of Rule 23(b)(3) are met "requires [the court's] understanding of the relevant claims, defenses, facts, and substantive law presented in the case." *Allison*, 151 F.3d at 419 (citing *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 744 (5th Cir. 1996)). The court must identify the substantive issues that will control the outcome of the case, assess which will predominate, and determine whether the issues are common to the class. *O'Sullivan v. Countrywide Home Loans, Inc.*, 319 F.3d 732, 738 (5th Cir. 2003). The court's analysis regarding whether common issues predominate is meant to "prevent[] the class from degenerating into a series of individual trials." *Id.* The greater the number of individual-specific issues, the less likely it is that the class action device is the superior method for resolving those issues. *See Allison*, 151 F.3d at 419. Although similar to the commonality requirement of Rule 23(a)(2), the predominance and superiority requirements are "'far more demanding.'" *O'Sullivan*, 319 F.3d at 738 (quoting *Amchem Prods., Inc. v. Windsor*, 52 U.S. 591, 617 (1997)).

B. Indemnitor Notice Class

Plaintiffs Irma Sandoval and Alberta Rubio seek to represent the "Indemnitor Notice Class," described 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 received notice that the DHS has scheduled an appearance for the Bonded Immigrant before it, on or after April 16, 1998, and where the Bonding Defendant failed to provide notification of the scheduled appearance to either the Indemnitor or the Bonded Immigrant.

(Doc. 112).

Plaintiffs request, on their own behalf and on behalf of the class they seek to represent, damages equal to the value of all non-refundable, up-front fees paid to Bonding Defendants when entering into the surety contracts at issue. (Doc. 114 at ¶ 122).

1. FED. R. CIV. P. 23(a)

a. Numerosity

In support of their contention that the Indemnitor Notice Class is sufficiently numerous, Plaintiffs point out that Bonding Defendants have admitted to the existence of nearly 8,000 bond files for surety bonds issued by Aaron Bonding for Insurer Defendants after May 7, 1998. (Doc. 112 (citing Doc. 93, Ex. CC 16)). According to Plaintiffs, Bonding Defendants received a "Notice to Obligor to Deliver Alien,"–that is, the form notifying Bonding Defendants of a demand on the surety bonded immigrant's bond by DHS–"in most cases." (Doc. 112). More specifically, Plaintiffs note that of 63 random bond files produced by Aaron Bonding to Plaintiffs, a Notice to Obligor to Deliver Alien appeared in 51 of them. (Doc. 112 (citing Doc. 93, Ex. CC 8)). As discussed *infra*, the evidence submitted to the Court also indicates that Bonding Defendants have not consistently provided notice to indemnitors and bonded immigrants of these demands on the bonded immigrants' bonds. As such, Plaintiffs estimate that the Indemnitor Notice Class numbers in the thousands. (Doc. 112).

Bonding Defendants do not attempt to dispute numerosity. (Docs. 121, 125). Given the evidence submitted regarding the number of individuals who have served as indemnitors on surety bonds posted by Bonding Defendants, and of Bonding Defendants' failure to provide

notice to indemnitors and bonded immigrants of demands on those bonds, the Court finds that joinder of these individuals would be impracticable, and thus the numerosity requirement is satisfied.

b. Commonality

Plaintiffs contend that numerous questions of law or fact are common to the proposed Indemnitor Notice Class, including: (1) whether Texas law applies to Plaintiffs' breach of contract claim; (2) whether Insurer Defendants can be required to answer for Aaron Bonding's conduct; (3) whether the bond contracts required Bonding Defendants to provide notice of DHS-scheduled appearances directly to the bonded immigrants; (4) whether the bond contracts required Bonding Defendants to provide notice of DHS-scheduled appearances directly to the indemnitors; (5) whether Bonding Defendants failed to provide notice to the bonded immigrants; (6) whether Bonding Defendants failed to provide notice to the indemnitors; (7) whether the failure to provide notice to both the bonded immigrants and the indemnitors constituted a breach of the bond contracts; (8) whether the failure to provide notice caused damage to the indemnitors; and (9) whether the breach entitles the indemnitors to a return of all or a portion of the non-refundable fees paid for the bond. (Doc. 112). According to Plaintiffs, "[t]he answer to these questions will not vary from class member to class member, given the uniform contracts, uniform conduct, and uniform governing standards." *Id.*

Bonding Defendants offer no argument challenging Plaintiffs' purported showing of commonality, choosing rather to focus their efforts on disputing whether common issues predominate so as to render a class action the most appropriate method for resolving these issues. (Docs. 121, 125); *see* FED. R. CIV. P. 23(b)(3). At this stage of its inquiry, the Court notes that Plaintiffs have shown that at least one common question of law or fact exists whose resolution

will affect all or a significant number of the putative class members. As such, the Court finds that the Indemnitor Notice Class satisfies the commonality requirement.

c. Typicality

Plaintiffs claim that the similarities between named class representatives Irma Sandoval and Alberta Rubio and the proposed class members are apparent. (Doc. 112). Specifically, Plaintiffs submit evidence indicating that Ms. Sandoval and Ms. Rubio are both indemnitors who contracted with Bonding Defendants to secure the release from federal detention of a bonded immigrant (bonded immigrant Plaintiffs Manuel Sandoval and Miguel Rubio, respectively). (Doc. 112 (citing Doc. 93, Exs. CC 5, CC 6)). According to Plaintiffs, the evidence also shows that Bonding Defendants received notices for appearance for both Mr. Sandoval and Mr. Rubio but did not relay this notice to any of the Sandovals or the Rubios. (Doc. 112 (citing Doc. 93, Exs. CC 5 at BF-217, CC 6 at BF-285; Doc. 114 at ¶¶ 69, 74)).

Again, Bonding Defendants do not dispute that the requisite typicality exists. (Docs. 121, 125). As Ms. Sandoval and Ms. Rubio both challenge the lack of notice of DHS demands on surety bonds issued by Bonding Defendants of which these Defendants had notice, the Court finds that the named class representatives' claims have the same essential characteristics of those of the putative class. Therefore, Plaintiffs have fulfilled the typicality requirement.

d. Adequacy

Plaintiffs claim that both Ms. Sandoval and Ms. Rubio have demonstrated that they are adequate representatives of the proposed Indemnitor Notice Class. (Doc. 112). According to Plaintiffs, Ms. Sandoval's deposition testimony and sworn declaration show that she: (1) knew that Aaron Bonding had been the bond company for her father; (2) believed Aaron Bonding would provide her father with notice of court dates by mail; (3) remembered Aaron Bonding's

representative telling her that she would receive half of her fee back if her father showed up for his appointments; and (4) knew that she was responsible for making sure her father appeared for his appointments. (Doc. 112 (citing Doc. 93, Ex. CC 10 at ¶¶ 2, 4; Doc. 99, Ex. CC 21 at pp. 13-14, 19-20, 23, 35-36)). Additionally, Plaintiffs point to Ms. Sandoval's interrogatory responses in which she stated that she believed Aaron Bonding would fulfill all of its promises in the contract and that Aaron Bonding would let her know of every appearance requested so that she could make sure her father appeared. (Doc. 112 (citing Doc. 99, Ex. CC 22 at No.6)). Plaintiffs further submit that Ms. Sandoval has shown knowledge of the basis for her legal claims by testifying that she wants to recover the money she paid to post the bond because Aaron Bonding did not notify her of any appearance requested of her father. (Doc. 112 (citing Doc. 99, Ex. CC 21 at p. 35)). According to Plaintiffs, Ms. Sandoval has also demonstrated that she is an active participant in the present litigation by timely appearing for her deposition, stating that she would be willing to travel to Houston to pursue her claims, if necessary, and regularly keeping in contact with class counsel. (Doc. 112 (citing Doc. 99, Ex. CC 21 at pp. 44-45)).

In support of Plaintiffs' claim that Alberto Rubio is a proper class representative, Plaintiffs submit evidence indicating that Ms. Rubio paid $4,000 on a $3,000 bond to secure the release of her son. (Doc. 112 (citing Doc. 93, Ex. CC 6 at BF-268, BF-304)). Although Plaintiffs admit that Ms. Rubio is "an unsophisticated plaintiff," Plaintiffs point out that Ms. Rubio has met with counsel many times regarding her case and has timely appeared for her deposition, where she testified that she knows she is attempting to recover her money from the bond company. (Doc. 112 (citing Doc. 99, Ex. CC 23 at p. 33; Doc. 112, Exs. CC 35, CC 35 A)). In addition, Ms. Rubio stated in a declaration submitted to this Court that she understands that she is attempting to represent the interests of people like her and that she has a responsibility to protect their

interests. (Doc. 112 (citing Doc. 112, Exs. CC 35, CC 35 A)).

Bonding Defendants dispute that the named class representatives of the Indemnitor Notice Class are adequate on the grounds that these plaintiffs know "very little" about the facts of their own cases and "much less about the putative class [they] seek to represent." (Doc. 121). Bonding Defendants contend that although the surety bond contract is "undeniably the most critical document" in Plaintiffs' breach of contract action against Bonding Defendants, Ms. Sandoval has not demonstrated that she knows what the contract says. *Id.* More specifically, Bonding Defendants point to Ms. Sandoval's testimony that although she reads only Spanish, the contract, which is written in English, has never been translated to her. (Doc. 121 (citing Doc. 121, Ex. 6 at pp. 16-19)). Bonding Defendants further assert that Ms. Sandoval is an inadequate class representative because she was unaware of Insurer Defendants' Motion to Transfer Venue to Houston, Texas and testified that she would be willing to pursue her claims in Houston without knowing how a transfer of venue might impact her fellow class members. (Doc. 121 (citing Doc. 121, Ex. 6 at p. 24)). In addition, Bonding Defendants point to Ms. Sandoval's admitted lack of knowledge regarding Insurer Defendants' connection to the bond issued by Aaron Bonding, as well as her confusion regarding the difference between Aaron Bonding and the federal authorities, as indicative of her inadequacy as a class representative. (Doc. 121 (citing Doc. 121, Ex. 6 at pp. 24-25, 38-39)). According to Bonding Defendants, the declaration submitted by Ms. Sandoval regarding her understanding of her role as a class representative is lacking in specificity and inconsistent with her deposition testimony in which she demonstrated that she knew little about the facts of her case. (Doc. 121 (citing Doc. 121, Ex. 7)).

Bonding Defendants also claim that Ms. Rubio's declaration fails to demonstrate her adequacy as a class representative because of its lack of specificity and inconsistency with Ms.

Rubio's testimony. (Doc. 121 (citing Doc. 121, Ex. 8)). Bonding Defendants further assert that Ms. Rubio's deposition testimony shows that she is unable to read English, can read only a little Spanish, and in fact she cannot read anything because her eyesight is poor and her eyes need an operation. (Doc. 121 (citing Doc. 121, Ex. 5 at pp. 12-13, 44)). Bonding Defendants contend that because "[t]his is a document intensive case, and Plaintiffs' class action is premised on the alleged existence of uniform documentation," Ms. Rubio's apparent inability to review documents and thus assist counsel in prosecuting and controlling the present litigation demonstrates that she cannot adequately represent the Indemnitor Notice Class. (Doc. 121). Bonding Defendants also point out that Ms. Rubio testified that she does not remember the name of the bonding company that issued her son's bond, that she does not understand the document she signed was a contract, and that she does not know if any promises were made in the contract, or that any promises were broken. *Id.* (citing Doc. 121, Ex. 5 at pp. 9, 38).

Upon considering the parties' arguments, the Court finds that the evidence submitted demonstrates that Ms. Sandoval sufficiently understands the factual and legal bases for the breach of contract claim to be prosecuted by the Indemnitor Notice Class. Although Ms. Sandoval testified that the entirety of the bond contract has not been translated to her, she also attested that an Aaron Bonding employee told her that the contract would make her responsible if her father did not appear in court, and that she would recover half of the money she paid to Aaron Bonding if she fulfilled her responsibilities. (Doc. 121, Ex. 6 at pp. 16-19). In other words, she has demonstrated that she has an understanding of her own obligations, as well as the asserted obligations of Aaron Bonding, under the contract. The evidence further shows that Ms. Sandoval knows that she paid money to Aaron Bonding to secure the release of her father, and that she did so with the understanding that Aaron Bonding would notify her of any appearances

requested of her father. She has also exhibited an understanding of the recovery sought by the class–that is, the return of money paid to Aaron Bonding.

Were the Court to find Ms. Sandoval to be an inadequate class representative due to her lack of knowledge regarding Insurer Defendants' filing of a motion to transfer venue, it would be requiring her to possess knowledge of the case akin to that expected of counsel. In addition, that she expressed that she would be willing to travel to Houston to prosecute the case provides further evidence of her willingness to take an active role in the litigation. Furthermore, the Court finds that Ms. Sandoval's lack of knowledge regarding any connection between Aaron Bonding and Insurer Defendants is not fatal to a showing of adequacy. Plaintiffs assert that Insurer Defendants acted in the name of Aaron Bonding, their agent, such that an indemnitor contracting with Aaron Bonding could not be expected to know of Insurer Defendants by name. Here, the Court finds that it is sufficient that Plaintiff has demonstrated specific knowledge of her dealings with Aaron Bonding. The Court also notes that the surety bond process involves both Aaron Bonding and Federal Defendants; therefore, it is hardly surprising that Ms. Sandoval admitted some confusion regarding the difference between the two. Finally, the Court finds that Ms. Sandoval's declaration expressing her general understanding of her role as a class representative provides some additional evidence of her willingness to take an active role in the litigation and to protect the interests of the class members she seeks to represent. As such, the Court finds that Plaintiff Irma Sandoval is an adequate representative of the Indemnitor Notice Class.

Although Plaintiffs have provided evidence that Ms. Rubio's claims are typical of those of the Indemnitor Notice Class, the Court finds troubling that Ms. Rubio's testimony indicates a lack of personal knowledge regarding the facts of her case and the claims of the class members she seeks to represent. Plaintiffs point to evidence that Ms. Rubio knows that she is attempting

to recover her money from a bond company; however, Ms. Rubio testified that she does not remember who the bond company is. (Doc. 99, Ex. CC 23 at p. 9). Ms. Rubio further testified that her daughter may have been "the one who filled [out a paper]" for Ms. Rubio to sign in order to secure the bond. *Id.* at p. 11. According to Ms. Rubio's testimony, she did not know that this document was a contract, she does not remember what the document said, and she does not know what "had to happen" for her to get some of the money back that she had paid for the bond. *Id.* at pp. 14, 18, 38. When asked whether she thought the bonding company would tell her when her son needed to go to court or meet with "immigration," Ms. Rubio responded in the negative. *Id.* at p. 32. Furthermore, she indicated that she did not know whether the document she signed contained any promises from the bonding company or whether any of those promises were broken. *Id.* at p. 38.

Lack of notice is integral to the claims of the Indemnitor Notice Class, as evidenced by the name given to the class by Plaintiffs. Here, where Ms. Rubio has demonstrated a lack of knowledge regarding any obligation of notice on the part of the bonding company, the Court cannot find that she possesses the requisite level of knowledge to control or prosecute the litigation. When coupled with this lack of knowledge, her inability to read documents relevant to a document-intensive case provides further indication that Ms. Rubio is an inadequate class representative. Given the above, that Ms. Rubio signed a declaration indicating her general understanding of her role as a class representative carries little weight. As such, the Court finds that Ms. Rubio is not an adequate representative of the Indemnitor Notice Class.

In sum, the Court concludes that Ms. Sandoval, but not Ms. Rubio, is an adequate representative of the Indemnitor Notice Class. As Bonding Defendants have not disputed the adequacy of counsel to prosecute the claims of the class (Docs. 121, 125), and in fact the Court is

satisfied that counsel for Plaintiffs is sufficiently zealous and competent to do so (Doc. 93, Exs. CC 18, CC 19; Doc. 112, Ex. CC 33), the Court finds that Plaintiffs have satisfied all of the requirements of Rule 23(a).

2. FED. R. CIV. P. 23(b)(3)

Plaintiffs assert that the Indemnitor Notice Class is appropriate for certification under Rule 23(b)(3) because issues common to the class predominate over any individual issues. (Doc. 112). In addition, Plaintiffs contend that a class action is the superior method for adjudicating these issues. *Id.* As noted *supra*, the proposed Indemnitor Notice Class asserts a claim against Bonding Defendants for breach of contract. (Doc. 114 at ¶¶ 112-22). Under Texas law, the elements of a breach of contract cause of action are: (1) the 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. *E.g.*, *McLaughlin, Inc. v. Northstar Drilling Tech, Inc.*, 138 S.W.3d 24, 27 (Tex.App.-San Antonio 2004, no pet.); *Prime Prods., Inc. v. S.S.I. Plastics, Inc.*, 97 S.W.3d 631, 636 (Tex.App.-Houston [1st Dist.] 2002, pet. denied); *Lewis v. Bank of Am. NA*, 343 F.3d 540, 544-45 (5th Cir. 2003). Here, Plaintiffs' breach of contract claim concerns a uniform, written contract between the indemnitor Plaintiffs and Bonding Defendants. (Doc. 114 at ¶¶ 113). Plaintiffs' proposed Indemnitor Notice Class includes those indemnitors who allegedly have performed, or, in the alternative, have substantially performed their obligations under the contract by paying the amounts due under the contracts, including payment of the up-front, non-reimbursable fees they seek to recover. *Id.* at ¶¶ 114, 122. According to Plaintiffs, the breach of the surety contract consists of Bonding Defendants' routine failure to abide by the contract's express provision that "[BONDED IMMIGRANT] and INDEMNITOR will be notified by AGENCY of all

appearances requested by the U.S. IMMIGRATION AND NATURALIZATION SERVICE of which AGENCY receives notice." *Id.* at ¶¶ 46, 115-20. Plaintiffs claim that they have been damaged by Bonding Defendants' breach in the amount of the up-front, non-refundable fees paid to Bonding Defendants when entering into the surety contracts. *Id.* at ¶¶ 121-22. Plaintiffs further claim that the payment of these fees can be established by documents in the bond files, and that the bond files can be used to construct a uniform damages model. (Doc. 112). As such, Plaintiffs contend that their breach of contract claim presents overriding common questions and that any individual issues will not predominate and can easily be managed through the bond files. *Id.*

In applying the four factors set forth by Rule 23(b)(3) to aid a court in determining whether a class action is superior to other available methods of adjudication, Plaintiffs first assert that the members of the Indemnitor Notice Class "have no interest in proceeding individually." *Id.*; *see* FED. R. CIV. P. 23(b)(3)(A). Plaintiffs contend that the relatively small amount of damages suffered by each indemnitor, and the fact that the conduct alleged to have caused such damages is uniform and affects a large number of indemnitors, point to the desirability of proceeding with a class action as opposed to individual actions. (Doc. 112). Plaintiffs also state that they are unaware of any litigation concerning the controversy already commenced by members of the class, and that the Court's "extensive experience" with the case renders the forum a desirable one. *Id.*; *see* FED. R. CIV. P. 23(b)(3)(B)-(C). Finally, Plaintiffs propose that the litigation of the class is manageable, as class members can be identified easily from Aaron Bonding's records, Bonding Defendants' liability may be determined on a class-wide basis, and individual class member damages may be determined by reference to the bond files and Aaron Bonding's computer records. (Doc. 112); *see* FED. R. CIV. P. 23(b)(3)(D). Plaintiffs claim that once

common questions are resolved, the remainder of the case may be disposed of through a relatively quick claims process. (Doc. 112).

Bonding Defendants do not dispute that the surety contract at issue is uniform and includes the above-cited notice provision. (Docs. 121). However, Bonding Defendants claim that numerous issues are specific to each class member and predominate over any common issues of law or fact. Bonding Defendants contend that the predominance of individual issues, as well as the unmanageable nature of the class as defined, demonstrate that a class action is not the superior method of adjudicating the breach of contract claim asserted by the Indemnitor Notice Class. *Id.*

a. Issues Identified by Bonding Defendants as Specific to Each Class Member

i. Whether Bonding Defendants Breached the Surety Bond Contract

Bonding Defendants first claim that an issue specific to each class member is whether Bonding Defendants in fact breached the bond contract. (Doc. 121). As noted *supra*, the breach at issue is Bonding Defendants' alleged failure to provide contractually required notice of demands on bonds to indemnitors. Whereas Plaintiffs contend that Bonding Defendants routinely fail to provide such notice upon receiving the "Notice to Obligor to Deliver Alien," and that the indemnitors who have not received notice can thus be identified easily, Bonding Defendants claim that notice of requested appearances has been provided, and is being provided, in some cases. (Doc. 112, 121, 14, 125, 127). Bonding Defendants further argue that the evidence shows that ascertaining which indemnitors have received notice could not be achieved by consulting Aaron Bonding's logbooks. (Doc. 125). In sum, Bonding Defendants contend that since they do not have a uniform policy of failing to give notice, and because Aaron's logbooks will not accurately reflect whether notice was given, whether Bonding Defendants breached the

contract by failing to provide notice needs to be determined on a case-by-case basis. *Id.*

Bonding Defendants represent that Defendant Fairmont is currently attempting to wind down the open liabilities resulting from bonds that remain outstanding since the death of Don Vannerson in 2004. (Doc. 125; *see also* Doc. 121, Ex. 1). According to the affidavit of Michael Padilla, Independent Administrator of the Estate of Mr. Vannerson and Loss Mitigation Specialist for Fairmont, Mr. Padilla and his staff "are attempting to notify aliens and indemnitors of all interviews and hearings requested by the Department of Homeland Security of which we receive notice...." (Doc. 121, Ex. 1). In addition, Bonding Defendants submit the deposition testimony of Aaron Bonding employees Eliud Salinas and Laura Cuayahuitl, as well as the affidavit of employee Santiago Sol, in support of their contention that Bonding Defendants have provided such notice in the past. (Doc. 125). According to Mr. Salinas, a manager for Aaron Bonding from 1980 until his termination in October 2005, Aaron Bonding was "supposed to" provide notice of hearings of which Bonding Defendants received notice. (Doc. 125, Ex. 17 at pp. 10-12, 48). Mr. Salinas testified that Aaron Bonding would provide notice to the bonded immigrant by "[p]hone call" and would "sometimes" send letters. *Id.* at p. 48. He also stated that, at least until about 2001 or 2002, an employee would place a "check mark" in the "general log" in each file to indicate that notice had been provided. *Id.* at pp. 48-49.[6] Mr. Salinas further testified that, "[t]o [his] knowledge," Aaron Bonding would also attempt to provide notice to the indemnitor through the phone and through mail. *Id.* at p. 51. Mr. Salinas also stated that Aaron Bonding would, "80 percent or more" of the time, contact the indemnitor to help recover the

[6] Bonding Defendants submit excerpts from Aaron Bonding's 2002 logbook showing check marks by the names of some bonded immigrants. (Doc. 125, Ex. 19). However, Mr. Salinas indicated that the check mark procedure may have been followed only until Abigail Lopez "took over the department" in 2001 or 2002. (Doc. 125, Ex. 17 at p. 49). When asked during her deposition whether Aaron Bonding's logbook contained any information about attempts to contact aliens with regard to hearing dates or deportation notices, Ms. Lopez responded, "No." (Doc. 125, Ex. 15 at p. 81).

bonded immigrant for purposes of deportation. *Id.* at pp. 107, 117, 119. Ms. Cuayahuitl testified that "[a]s far as [she] knew," a notice of deportation "would go to the pickup department, and the recovery agents would be in charge of finding the sureties [i.e., the indemnitors]...." (Doc. 125, Ex. 18 at pp. 70-71). Mr. Sol, who attests in his affidavit that he worked as a recovery agent for Aaron Bonding from February 2002 to March 2003, states that "I would frequently contact the indemnitors on the file, to ask if they would assist in locating the alien. If I was successful in contacting the indemnitor, I would tell the indemnitor about the deportation date, or the interview date, whichever it was, so that they would know that it was important to help locate the alien." (Doc. 121, Ex. 13). He estimates that he made an effort to contact the indemnitors "over 90% of the time," and that he was successful in doing so "over 50% of the time." *Id.*

The Court agrees with Bonding Defendants that some evidence exists that said Defendants have provided, and do provide, notice of some requested DHS-scheduled appearances, and that whether such notice has been given cannot be ascertained without conducting individual inquiries. However, the Court notes, as do Plaintiffs, that Mr. Padilla stated in his affidavit that "Fairmont does not notify aliens of deportations after their final orders of removal because of the high likelihood the aliens will flee.... Nothing in the [bond contract] required Aaron to give prior notice to the indemnitor and/or alien of a demand to surrender the alien for deportation." (Doc. 121, Ex. 1). In addition, the Court recognizes that counsel for Bonding Defendants represented at a hearing before this Court on November 17, 2006 that "[w]ith respect to deportation, no, we don't provide notice [to the alien]. Absolutely. And I think that is agreed, that that's uniform." (Doc. 130 at p. 39). Mr. Padilla's affidavit conflicts with the evidence submitted by Bonding Defendants indicating that notice of requested appearances for deportation has been provided in the past to indemnitors; however, it is consistent with the absence of evidence regarding notice to

the bonded immigrant. In other words, the excerpts of deposition testimony and affidavits submitted to the Court by Bonding Defendants in no way indicate that notice of requested appearances for deportation has ever been provided to the bonded immigrant. Pursuant to the above-cited language in the bond contract, the indemnitor Plaintiffs assert that Bonding Defendants are required to provide notice of "all appearances," including appearances for deportation, to the indemnitor *and* bonded immigrant. (Doc. 114 at ¶ 115; Doc. 127; Doc. 130 at p. 40). As the Indemnitor Notice Class is defined as those indemnitors on bond contracts where Bonding Defendants failed to provide notice to *either* the indemnitor *or* the bonded immigrant, Bonding Defendants' notice practice appears to be uniform with respect to each class member, *so long as the class definition pertains only to notice of requested appearances for deportation.* Plaintiffs have indicated their willingness to amend the definition of the class accordingly, and the Court finds that doing so would alleviate any problems concerning individual issues of notice. (Docs. 124, 127); *see also In re Monumental Life Ins. Co.*, 365 F.3d 408, 414 (5th Cir. 2004)(noting that "[d]istrict courts are permitted to limit or modify class definitions to provide the necessary precision").

ii. Whether the Indemnitor Performed His or Her Obligations Under the Contract

Bonding Defendants also claim, however, that ascertaining which individuals are entitled to class membership would require the Court to conduct "mini-trials" regarding which indemnitors performed their obligations under the contract. (Doc. 121). Bonding Defendants contend that the Indemnitor Notice Class cannot be defined as all those indemnitors who made their required payments under the contract, as the contract contains other obligations on the part of indemnitor, namely: (1) the obligation to report to Bonding Defendants every 30 days; and (2) the obligation to report any change of address, telephone number, employer, attorney, or immigration status, as

well as to report any departure from the United States by the bonded immigrant. *Id.* (citing Doc. 121, Exs. 2, 14). Bonding Defendants also point to provisions in the contract that allow Bonding Defendants to surrender the bonded immigrant back to custody where the indemnitor fails to fulfill any term of the contract, and to cancel the bond and not return the premium as a result of various actions, or inaction, of the indemnitor and/or bonded immigrant. *Id.* In addition, Bonding Defendants cite to a provision in the contract that provides that "[t]ime is specifically declared to be of essence in this Agreement." *Id.* Bonding Defendants assert that an indemnitor's failure to comply with any of the above obligations under the contract may constitute a material breach that excuses Bonding Defendants from further performance under the contract. (Doc. 121). In addition, Bonding Defendants claim that an indemnitor who fails to timely perform under the contract relinquishes his or her right to Bonding Defendants' performance. *Id.* As Bonding Defendants would then be excused from any obligation to inform the indemnitor or bonded immigrant of a demand on a bond, the indemnitor could not assert that any breach had occurred, and therefore would not be a proper class member. *Id.* Bonding Defendants claim that were the Court to certify the Indemnitor Notice Class, it would be forced to determine, on an individual basis, whether each member of the class had fulfilled his or her obligations under the contract. *Id.*

The Court recognizes that a party's material breach of a contract, or a party's failure to timely perform where time is of the essence to a contract, discharges or excuses the other party from further performance. *Mustang Pipeline Co., Inc. v. Driver Pipeline Co., Inc.*, 134 S.W.3d 195, 196 (Tex. 2004)(per curiam)(citing *Hernandez v. Gulf Group Lloyds*, 875 S.W.2d 691, 692 (Tex. 1994); *D.E.W., Inc. v. Depco Forms, Inc.*, 827 S.W.2d 379, 382 (Tex.App.-San Antonio 1992, no writ)). At this point, the non-breaching party is entitled to terminate the agreement and

sue for breach. *See Long Trusts v. Griffin*, 2006 WL 3524376, at *2 (Tex. 2006). However, "'[a] party who elects to treat a contract as continuing deprives himself of any excuse for ceasing performance on his own part.'" *Id.* (quoting *Hanks v. GAB Bus. Serve., Inc.*, 644 S.W.2d 707, 708 (Tex. 1982)). Here, Plaintiffs complain that regardless of any breach of the bond contract by the indemnitor, Bonding Defendants routinely fail to provide contractually mandated notice of a requested appearance for deportation. (Doc. 114 at ¶¶ 1-8). The Court notes that this scenario can only occur if the contract is continuing, as a demand on the bond is made only where the bond is still in effect. As such, membership in the Indemnitor Notice Class may be determined without investigating whether each indemnitor has complied with each and every obligation under the contract.

iii. Whether the Contract is Barred by the Affirmative Defenses of Waiver and Ratification

Bonding Defendants further contend that class certification under Rule 23(b)(3) is inappropriate because individual issues regarding whether each class member's breach of contract claim is barred by the affirmative defenses of waiver and ratification predominate over the common issues in the case. (Doc. 121). Under Texas law, waiver is the intentional relinquishment of a known right or intentional conduct inconsistent with claiming that right. *Jernigan v. Langley*, 111 S.W.3d 153, 156 (Tex. 2003); *Monumental Life Ins. Co. v. Hayes-Jenkins*, 403 F.3d 304, 312 (5th Cir. 2005). A waivable right may spring from a contract. *Tenneco Inc. v. Enterprise Prods. Co.*, 925 S.W.2d 640, 643 (Tex. 1996). In order to show waiver and ratification, Texas law requires proof that a party either (1) continued to accept benefits under a contract after becoming aware of a breach of that contract; or (2) conducted himself so as to recognize the contract as binding. *See Arroyo Shrimp Farm, Inc. v. Hung Shrimp Farm, Inc.*, 927 S.W.2d 146, 151-52 (Tex.App.-Corpus Christi 1996, no writ); *LSR Joint*

Venture No. 2. v. Callewart, 837 S.W.2d 693, 699 (Tex.App.-Dallas 1992, no writ); *Spangler v. Jones*, 797 S.W.2d 125, 131 (Tex.App.-Dallas 1990, writ denied). According to Bonding Defendants, that the proposed class representative Ms. Sandoval signed her bond contract with Aaron Bonding in 1997 but never complained of lack of notice by Aaron Bonding until she appeared in this lawsuit in 2003, shows that Ms. Sandoval's breach of contract claim, as well the breach of contract claim of other proposed class members, may be barred by waiver and ratification. (Doc. 121).[7] Here, the "known right" under the contract is the right to notice of requested appearances for deportation. Ms. Sandoval could not have known that this right had been denied to her, and/or to Mr. Sandoval, until after Mr. Sandoval had failed to appear, his bond was subsequently breached, and Bonding Defendants sought to arrest him and collect on the bond from Ms. Sandoval. (Doc. 114 at ¶¶ 65-72). At this point, Ms. Sandoval had already lost the benefit for which she had contracted–that is, the bond for Mr. Sandoval. In the context of this scenario, it would therefore be impossible for an indemnitor such as Ms. Sandoval to continue to accept benefits under the contract or to conduct herself so as to recognize the contract as binding. As such, the Court finds that whether each indemnitor waived the right to notice under the contract or ratified the contract is not an issue that predominates over the issues common to the class.

iv. Whether Any Breach of the Contract Caused Damages to the Indemnitor

Bonding Defendants also claim that another individual issue presented by the Indemnitor Notice Class is whether any breach of the bond contract by Bonding Defendants caused each proposed class member to sustain damages. (Doc. 121). According to Bonding Defendants, if

7 Bonding Defendants also claim that Ms. Rubio faces a similar challenge to her breach of contract claim. (Doc. 121). However, as the Rubios did not receive notice of an interview, as opposed to notice of a deportation date, Ms. Rubio is not a proper class member for that reason and the Court need not determine whether her contract claim, and the contract claim of individuals like her, would potentially be barred by the affirmative defenses of waiver and ratification. (Doc. 114 at ¶¶ 73-78).

an indemnitor, or a bonded immigrant, received actual notice of a DHS-requested appearance through some other means, then Bonding Defendants' alleged failure to provide notice could not be the cause of any harm to that class member. *Id.* Plaintiffs, on the other hand, argue that the harm for which the Indemnitor Notice Class seeks to recover arises from paying for a service that would never be provided, not from any consequential effects of Bonding Defendants' failure to provide the service. (Doc. 124).

As noted *supra*, a plaintiff asserting a breach of contract claim under Texas law must prove that he or she suffered damages as a result of the breach. Also as discussed *supra*, the breach at issue is Bonding Defendants' failure to notify indemnitors and/or bonded immigrants of requested appearances for deportation. Here, Plaintiffs do not seek consequential damages resulting directly from lack of notice, but rather their out-of-pocket damages–that is, the up-front, non-reimbursable fees they paid to Bonding Defendants to enter into the bond contract. (Doc. 124). The Court recognizes that the out-of-pocket measure of damages allows an injured party "to recover the actual injury suffered measured by the difference between the value of that which he has parted with, and the value of that which he has received." *Formosa Plastics Corp. USA v. Presidio Engineers & Contractors, Inc.*, 960 S.W.2d 41, 49 (Tex. 1998)(quoting *Leyendecker & Assocs., Inc. v. Wechter*, 683 S.W.2d 369, 373 (Tex. 1984))(emphasis and internal quotations omitted). Here, where the proposed class members paid up-front, non-reimbursable fees to enter into contracts under which they and the bonded immigrants were allegedly entitled to notice, and Bonding Defendants failed to provide such notice, Plaintiffs may seek to recover the difference between what they paid and what they received. That an indemnitor or bonded immigrant may have been notified of a deportation date in some other manner is therefore irrelevant, and the Indemnitor Notice Class thus presents no individual issues of causation.

v. Assessment of Damages

Finally, Bonding Defendants challenge the certification of the Indemnitor Notice Class under Rule 23(b)(3) on the grounds that each plaintiff's damages would be subject to an individual damage assessment. (Doc. 121). However, the Court notes that the fact that certification would require calculating damages on an individual basis, and even that "wide disparity among class members as to the amount of damages suffered" exists, will not necessarily preclude the certification of a class under Rule 23(b)(3). *Bell Atl. Corp. v. AT&T Corp.*, 339 F.3d 294, 306 (5th Cir. 2003); *Steering*, 461 F.3d at 602; *see also Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 456 (1977)(noting that "the necessity for calculation of damages on an individual basis should not preclude class determination where the common issues which determine liability predominate"). "However, where individual damages cannot be determined by reference to a mathematical or formulaic calculation, the damages issue may predominate over any common issues shared by the class." *Steering*, 461 F.3d at 602 (citing *Bell*, 339 F.3d at 308). Here, the damages sought by the proposed class members concern only the up-front, non-reimbursable fees they paid to enter into the bond contract. The Court finds that Plaintiffs have produced evidence to show that this amount can be ascertained by consulting each bond file–that is, by consulting the same evidence needed to identify each class member. (Doc. 93, Ex. CC 5). This method of assessing individual damages is therefore uniform with respect to the class as a whole and does not present the danger of predominating over issues common to the class.

As the Court recognized in its discussion of commonality, Plaintiffs have identified a number of issues of law and fact whose resolution would affect the Indemnitor Notice Class as a whole, most notably because the dispute between members of the class and Bonding Defendants concerns the interpretation of a form contract. For the reasons discussed *supra*, the Court finds

that these issues predominate over any individual issues, so long as the class is amended so as to concern only notice of DHS-requested appearances for deportation. *See Smilow v. Southwestern Bell Mobile Sys.*, 323 F.3d 32, 42 (1st Cir. 2003)(common issues of law and fact predominated where case turned on interpretation of form contract executed by all class members and defendant); *Durrett v. John Deere Co.*, 150 F.R.D. 555, 560 (N.D.Tex. 1993)(questions of law and fact predominated where all arose out of "similar if not identical" contracts).

b. Superiority

The Court also finds that Plaintiffs have shown that a class action is the superior method for adjudicating the breach of contract claim asserted by the Indemnitor Notice Class. Although the proposed members of the class could conceivably pursue their breach of contract claims individually, the Court finds that the amounts at stake are so small that separate suits would be impracticable. *See Amchem Prods., Inc.*, 521 U.S. at 616 (interest in conducting separate lawsuits may be theoretical, not practical, where amount at stake is small).[8] That the issues of liability presented by the class are identical further demonstrates that the prosecution of individual actions would be inefficient. *See Durrett*, 150 F.R.D. at 559 (interest of potential class members in controlling their own litigation in separate suits "should be subordinated to the advantages of having a defendant's liability determined in one proceeding when virtually all legal and factual issues are common to the class members"). In addition, no showing has been made that litigation concerning the controversy presented here has already been commenced, nor

8 As the Supreme Court recognized,

> "The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor."

Amchem Prods., Inc., 521 U.S. at 617 (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (1997)).

can the Court discern any reason why proceeding with the case in this forum would be undesirable. Finally, Plaintiffs have sufficiently demonstrated that prosecuting these Plaintiffs' breach of contract claims as a class action would be manageable. As discussed *supra*, issues of Bonding Defendants' liability may be determined on a class-wide basis, and the identification of class members and the calculation of damages may be accomplished by consulting Aaron Bonding's bond files. For all of these reasons, the Court concludes that the certification of the Indemnitor Notice Class under Rule 23(b)(3) is appropriate.

3. Conclusion

Therefore, the Court **ORDERS** that Plaintiffs' Motion for Class Certification is **GRANTED** with respect to the Indemnitor Notice Class, represented by Plaintiff Irma Sandoval and 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.

C. Indemnitor Collateral Class

Plaintiff Alberta Rubio seeks to represent the "Indemnitor Collateral Class," described as follows:

> (a) those who have served as Indemnitors on a surety bond posted by a Bonding Defendant to secure the release of a Bonded Immigrant detained by the Federal Defendants, and
> (b) where the Bonded Immigrant's bond has been cancelled by the Federal Defendants, and
> (c) where the Bonding Defendants have failed to return any collateral, net of fees validly charged under the bonding contracts, deposited with the Bonding Defendants to either the Indemnitor or the Bonded Immigrant on the bonding contract.

(Doc. 112).

Ms. Rubio requests, individually and on behalf of the class she seeks to represent, damages equal to the value of all collateral deposited with Bonding Defendants, less any fees or expenses that may be validly charged against the collateral under the terms of the bonding contract. (Doc. 114 at ¶ 128).

1. FED. R. CIV. P. 23(a)

Bonding Defendants contend that because Plaintiffs fail to establish that Plaintiff Alberta Rubio ever paid collateral on the surety bond she secured for her son, Miguel Rubio, Plaintiffs cannot establish the commonality, typicality, or adequacy requirements of Rule 23(a). (Docs. 121, 125). The Court notes, as do Bonding Defendants, that Plaintiffs' Motion for Class Certification indicates that the claims of the Indemnitor Collateral Class are premised upon the existence of document entitled "Promissory Note" (or "Pagare" or "Nota de Pago" in Spanish) contained in each surety bond contract which allegedly obligates the indemnitor to deposit collateral worth 50% to 60% of the total bond amount with Bonding Defendants. (Doc. 112). Plaintiffs contend that this Promissory Note also requires Bonding Defendants to return the collateral posted to the indemnitor in the event that Federal Defendants cancel the bond. *Id.* According to Plaintiffs, Bonding Defendants "never" contact the indemnitors to advise them that they are entitled to return of the collateral, but instead wrongfully retain the collateral posted. *Id.*

Notably, Plaintiffs admit in their Motion for Class Certification that Mr. Rubio's bond file does not contain the Promissory Note. (Doc. 112).[9] However, they attempt to show that Ms.

9 Plaintiffs take the position that although the Promissory Note is not contained in the file, the deposition testimony of Aaron Bonding employees Laura Cuayahuitl and Abigail Lopez "made it clear" that each indemnitor signs this note, and thus it must have been signed by Ms. Rubio. (Doc. 112 (citing Doc. 93, Exs. CC 1 at pp. 34-36, CC 2 at p. 71)). However, Bonding Defendants point out that Ms. Rubio entered into the bond contract in 1996–that is, several years before Ms. Lopez and Ms. Cuayahuitl began their employment with Aaron Bonding in 1999 and 2001, respectively. (Doc. 121 (citing Doc. 121, Exs. 2 at BF-273, BF-274, BF-275, BF-277, 3 at pp. 8-10, 4 at pp. 9-10)). Plaintiffs have failed to point to any specific evidence that Ms. Rubio herself signed a Promissory Note.

Rubio is a proper class representative by pointing to other evidence contained in and outside the file. (Doc. 124). According to Plaintiffs, Mr. Rubio's bond file indicates that Ms. Rubio paid a total of $4,000 for a $3,000 bond, and hand-written notes in the file indicate that Bonding Defendants owe her $2,500 in collateral–that is, Ms. Rubio's $4,000 payment less her $1,500 up-front, non-reimbursable fee. (Docs. 112, 124 (citing Doc. 93, Ex. CC 6 at BF-279, BF-289, BF-304)). In further support of their claim that Ms. Rubio paid collateral, Plaintiffs submit the declaration of Tina Stone, a paralegal for Plaintiffs' counsel. (Doc. 124 (citing Doc. 124, Ex. CC 40)). Ms. Stone states that Plaintiffs' counsel provided her with an electronic copy of an Excel spreadsheet labeled "Collateral Notes" that "appears to set forth notes regarding payments of collateral and attempts by Aaron Bonding to collect collateral." (Doc. 124, Ex. CC 40). Attached to Ms. Stone's affidavit is what she calls a "screen capture" from her computer screen of a section of the spreadsheet with an entry for the alien number of Miguel Rubio. *Id.* (citing Doc. 93, Ex. CC-6). This entry, apparently dated January 20, 2004, states as follows: "PAID IN FULL BY MARCO...YEIMI." (Doc. 124, Ex. CC 40). Ms. Stone points out that the depositions of Aaron Bonding employees Laura Cuayahuitl and Eliud Salinas indicate that Marco Soto was the manager or supervisor of Aaron Bonding's collections department. *Id.* (citing Doc. 93, Exs. CC 1 at p. 13, CC 29 at p. 22). Plaintiffs further support their contention that Ms. Rubio paid collateral, and that she is entitled to its return, by citing to what they refer to as "judicial admissions" contained in an adversary proceeding filed in the probate action for the Estate of Don Vannerson, Deceased. (Doc. 124 (citing Doc. 93, Ex. CC 11; Doc. 124, Ex. CC 41)). Aaron Bonding, through its court-appointed receiver, stated in a response filed in this action that "[t]he terms of the agreement with the indemnitor were that money received would 'be deposited into a collateral fund to be return upon [cancellation of the bond].'" (Doc. 93, Ex. CC 11,

Receiver's Response, at p. 2). In addition, Ranger Insurance Company stated in a response filed in the action that "indemnitors should recover the collateral that Aaron should have held in a collateral account upon cancellation of the immigration bonds at issue." (Doc. 93, Ex. CC 11, Ranger's Response, at pp. 1-2). Plaintiffs also point out that the co-executors of the Vannerson Estate stated in their "Response to Ranger's Motion for Partial Summary Judgment" as follows:

> As to [collateral held on unbreached bonds], Aaron owns the money (like a security deposit at an apartment) subject to contractual obligations to return it to the paying party if the bond requirements are met.... Aaron owns the money, but has contracts requiring the money to be returned if certain conditions are met. Failure to return the money, like failure to return any security deposit, does nothing more than create a cause of action for breach of contract.

(Doc. 124, CC 41 at p. 3 n.7).

According to Plaintiffs, these "admissions" reveal that "all indemnitors on immigration bonds are entitled to a return of collateral upon the cancellation of the bond"; as such, Ms. Rubio and all indemnitors on surety bonds are so entitled. (Doc. 124).

As Bonding Defendants note, the primary difficulty with Plaintiffs' evidence is that it is derived from documents other than the Promissory Note that Plaintiffs claim is contained in each bond file, and which allegedly obligates Bonding Defendants to return collateral posted by the indemnitor upon the cancellation of the immigrant's bond. (Docs. 121, 125). In other words, if the Promissory Note is the document from which Plaintiffs hope to identify each class member and his or her damages, and upon which the breach of contract claim of the Indemnitor Collateral Class is based, that Ms. Rubio's payment of collateral and entitlement to its return cannot be established by reference to this document makes her an improper class representative. Moreover, Bonding Defendants submit evidence to show that Ms. Rubio never paid $2,500 in collateral. (Docs. 121, 125). First, Bonding Defendants point to a handwritten note on the cover of Mr. Rubio's bond file that states: "Collateral Payments–0." (Doc. 121 (citing Doc. 121, Ex. 2 at BF-266)). In addition, Bonding Defendants cite to an "information sheet" in the file that has blanks

to insert the bond amount, bond fee, and collateral. (Doc. 121 (citing Doc. 121, Ex. 2 at BF-268)). Although $3,000 is listed in the blank next to "bond amount" and $2,500 in the blank for "bond fee," the blank for "collateral" contains no amount. (Doc. 121, Ex. 2 at BF-268). Bonding Defendants also reference a "Promissory Note" contained in the file which, unlike the Promissory Note upon which Plaintiffs' Indemnitor Notice Class claim is based, does not require any collateral deposits but rather provides that the note is due and payable in full upon the *breach* of Mr. Rubio's bond. (Doc. 121 (citing Doc. 121, Ex. 2 at BF-273)). Bonding Defendants claim that because Mr. Rubio's bond was cancelled rather than breached, this note, in the amount of $3,000, never became due. (Doc. 121). Furthermore, Bonding Defendants point to a document in Mr. Rubio's file entitled "Receipt for Collateral Deposited" which states as follows:

> Received of Alberta Rubio...[a]s security for the execution of this Immigration Bond written in the sum of $3,000.00 on behalf of the Principal the following described collateral: -0-.

Id. (citing Doc. 121, Ex. 2 at BF-287).

With respect to the evidence offered by Plaintiffs in support of their contention that Ms. Rubio paid collateral, Bonding Defendants point out that the word "collateral" does not appear on the receipts for Ms. Rubio's payments of $2,500 and $1,500. (Doc. 125 (citing Doc. 121, Ex. 2 at BF-304)). In addition, Bonding Defendants note that the alien, or "A" number, on each receipt is different, perhaps indicating the possibility of two bonds for Mr. Rubio. (Doc. 125 (citing Doc. 121, Ex. 2 at BF-304; Doc. 125, Ex. 15 at p. 96)). According to Bonding Defendants, the handwritten note in Mr. Rubio's file which indicates a "need to refund" $2,500 to Ms. Rubio does not state that this amount is collateral, and the fact that it apparently was written in September 1996, more than nine years prior to the cancellation of Mr. Rubio's bond in April 2005, would indicate that it is not. (Doc. 125 (citing Doc. 121, Ex. 2 at BF-279)). Bonding Defendants suggest that one possible explanation for the need to refund this amount to

Ms. Rubio is that Ms. Rubio may have been inadvertently charged twice on her initial bond. (Doc. 125). According to Bonding Defendants, the bond amount was originally set at $5,000 in September 1996 but was later reduced to $3,000 by the time the bond posted with INS in October 1996. *Id.* (citing Doc. 121, Ex. 2 at BF-270, BF-271, BF-295, BF-304). Whereas one document in the bond file indicates that the "bond fee" is $2,500, another states that the "total charges" are $1,500. (Doc. 125 (citing Doc. 121, Ex. 2 at BF-268, BF-303)). Therefore, Bonding Defendants submit that Ms. Rubio may have paid an initial bond fee of $2,500 in September 1996 on what the parties thought would be a $5,000 bond and then, when the bond was reduced to $3,000, another bond fee of half that amount in October 1996. (Doc. 125 (citing Doc. 121, Ex. 2 at BF-304)). Bonding Defendants also contend that Ms. Stone's declaration is not sufficient proof that Ms. Rubio paid $2,500 in collateral, as Ms. Stone was never an employee of Aaron Bonding and has no knowledge of Aaron Bonding's procedures for entering information in the electronic bond files. (Doc. 125). Further, Bonding Defendants claim that no explanation has been provided of who "Yeimi" is, or why the entry cited by Plaintiffs is dated January 20, 2004. *Id.* As further evidence, Bonding Defendants submit another "screen capture" allegedly taken from the same electronic bond files referenced by Ms. Stone and which lists Alberta Rubio under the "Surety Name" column and an amount of "$0.00" under the "Collateral" column in the row of data pertaining to Mr. Rubio. (Doc. 125, Ex. 16).

Upon reviewing the evidence submitted, the Court finds that Plaintiffs have failed to establish that Ms. Rubio ever made a collateral deposit, much less a deposit reflected by the Promissory Note referenced in Plaintiffs' Motion for Class Certification, or that she is entitled to the return of any collateral on the grounds alleged by the Indemnitor Notice Class. Therefore, Plaintiffs cannot establish that Ms. Rubio's breach of contract claim, or the facts upon which it is

based, are common to the proposed class, nor can they show that her claim is typical of the claims of the proposed class members. Furthermore, Plaintiffs cannot establish that Ms. Rubio is an adequate class representative, both because of the potential conflict between her interests and those of the proposed class, as well the concerns discussed in the Court's analysis of whether Ms. Rubio is an adequate representative of the Indemnitor Notice Class.[10] As such, Plaintiffs have failed to fulfill the requirements of Rule 23(a).[11] Therefore, the Court **ORDERS** that Plaintiffs' Motion for Class Certification is **DENIED** with respect the Indemnitor Collateral Class.

D. Bonded Immigrant Class

Finally, Plaintiff Petra Carranza de Salinas seeks to represent the "Bonded Immigrant Class," described 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.

(Doc. 112).

Ms. Salinas requests, individually and on behalf of the class she seeks to represent, an injunction requiring Bonding Defendants, directly or through their agents, to make good faith efforts to provide actual, timely, and reasonable notice to bonded immigrants and indemnitors of any and all demands for performance made on those bonds by Federal Defendants. (Doc. 114 at ¶ 131). Ms. Salinas, individually and on behalf of the class, also seeks corresponding declaratory relief. (Doc. 114 at ¶ 133).

10 In its discussion, the Court noted the lack of Ms. Rubio's knowledge regarding the bond company against whom she sought recovery and that Ms. Rubio did not know she had signed a contract with the bond company, what the contract may have promised, or whether the bond company may have broken any contractual promise. The same concerns apply here.

11 The Court has no need, therefore, to consider whether certification of the Indemnitor Collateral Class satisfies Rule 23(b)(3).

1. FED. R. CIV. P. 23(a)

a. Numerosity

Plaintiffs attempt to show that the Bonded Immigrant Class is sufficiently numerous by pointing to a document filed in the probate action for the Estate of Don Vannerson, Deceased which indicates that Aaron Bonding had 1,450 bonds outstanding in July 2004. (Doc. 112 (citing Doc. 93, Ex CC 20)). As indicated in the Court's discussion of the Indemnitor Notice Class, Plaintiffs have also submitted evidence of the existence of nearly 8,000 bond files for surety bonds issued by Aaron Bonding for Insurer Defendants after May 7, 1998. (Doc. 93, Ex. CC 16). Bonding Defendants have not disputed the numerosity of the Bonded Immigrant Class, and the Court is satisfied that Plaintiffs have shown that the number of immigrants whose surety bonds are outstanding are too numerous to join. (Docs. 121, 125). As such, the Court finds that Plaintiffs have fulfilled the numerosity requirement.

b. Commonality

Plaintiffs submit that the following questions of law or fact are common to the proposed Bonded Immigrant Class: (1) whether the bonded immigrants are third party beneficiaries of the bonding contracts; (2) whether, absent equitable relief, Bonding Defendants will likely continue to fail to provide the contractually required notice; and (3) whether the Court can order future injunctive relief for Bonding Defendants' future anticipated breach of contract. (Doc. 112).

Bonding Defendants do not offer any argument to dispute commonality. (Docs. 121, 125). In addition, the Court notes that determining the propriety of an injunction requiring Bonding Defendants to provide the requested notice of all demands on surety bonds clearly would require the resolution of at least one issue of law or fact common to all immigrants with bonds outstanding. As such, the Court finds that Plaintiffs have satisfied the commonality requirement.

c. Typicality

According to Plaintiffs, Ms. Salinas's claim for prospective relief is typical of that of other bonded immigrants released on surety bonds who face the risk that Bonding Defendants will fail to forward notice of a DHS-requested appearance. (Doc. 112). Plaintiffs submit evidence that Ms. Salinas is currently released from DHS detention pursuant to a surety bond posted by Bonding Defendants. (Doc. 93, Ex. CC 7 at BF-334-338). Furthermore, as discussed *supra*, Plaintiffs have provided some evidence that Bonding Defendants do not uniformly notify indemnitors or bonded immigrants of DHS-requested appearances, and in fact Bonding Defendants admit that they do not provide notice of requested appearances for deportation to bonded immigrants. The Court therefore finds that Ms. Salinas's claim is typical of that of the proposed Bonded Immigrant Class.

d. Adequacy

Plaintiffs submit the deposition testimony and sworn declarations of Ms. Salinas in support of their contention that she is an adequate representative of the Bonded Immigrant Class. (Doc. 112). According to Plaintiffs, this evidence shows that Ms. Salinas has personal knowledge of the facts of her case and that she has an understanding of the claims of the class she seeks to represent, the relief sought by the class, and the significance of acting as a class representative. *Id.* The Court notes that Plaintiffs have submitted evidence showing that Ms. Salinas knows that Juan De La Rosa contracted with Aaron Bonding to post a $3,000 surety bond on her behalf. (Doc. 99, Exs. CC 26 at pp. 15, 18-19, CC 27). Ms. Salinas has further demonstrated that she knows that she would forfeit the amount of the bond if she fails to appear for deportation, and that she believes that Aaron Bonding has the responsibility to provide her with notice of her need to appear. (Doc. 99, Exs. CC 26 at pp. 62-63, 79-80, CC 27). In addition, Ms. Salinas has

indicated that she has kept in contact with her attorneys throughout the case and understands her responsibility to remain in contact. (Doc. 99, Ex. CC 26 at p. 81; Doc. 112, Exs. CC 36, CC 36A). Finally, she attested in her declaration that she understands that she is a representative of a class of people like her who have similar claims and that she has a responsibility to protect their interests. (Doc. 112, Exs. CC 36, CC 36A).

Bonding Defendants contest Ms. Salinas's adequacy as a class representative on the sole ground that she is not an indemnitor, and thus she cannot request relief in the form of an injunction requiring notice to both bonded immigrants and indemnitors. (Doc. 121). However, whether the bonded immigrant Plaintiffs have standing to complain of lack of notice to the indemnitor is an issue common to the class that may be resolved on a class-wide basis; it is not a ground for defeating the adequacy requirement. Given the evidence submitted by Plaintiffs, the Court is satisfied that Ms. Salinas is an adequate class representative; as such, Plaintiffs have fulfilled all of the requirements of Rule 23(a).

2. FED. R. CIV. P. 23(b)(2)

According to Plaintiffs, Bonding Defendants' failure to provide notice of DHS-scheduled appearances to both bonded immigrants and indemnitors demonstrates that these Defendants have acted or refused to act on grounds generally applicable to the Bonded Immigrant Class, thereby making appropriate the injunctive and corresponding declaratory relief sought. (Doc. 112); *see* FED. R. CIV. P. 23(b)(2). However, Bonding Defendants contend that because the indemnitor Plaintiffs, through the certification of the Indemnitor Notice Class, seek money damages for Bonding Defendants' alleged failure to provide notice, this monetary relief predominates over any injunctive or declaratory relief requested by these Plaintiffs indirectly through the certification of the Bonded Immigrant Class. (Doc. 121). As Bonding Defendants

note, the Fifth Circuit has explained that Rule 23(b)(2) certification "'does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages.'" *Allison*, 151 F.3d at 411 (quoting FED. R. CIV. P. 23 advisory committee's note)(emphasis omitted). However, monetary relief does not predominate where it "'flow[s] directly from liability to the class as a whole on the claims forming the basis of the injunctive or declaratory relief.'" *In re Monumental Life Ins. Co.*, 365 F.3d at 416 (5th Cir. 2004)(quoting *Allison*, 151 F.3d at 415)(emphasis omitted). Here, the Indemnitor Notice Class seeks the return of the up-front, non-reimbursable fees paid to Bonding Defendants to enter into the surety contracts on the grounds that Bonding Defendants did not provide notice of DHS-requested appearances to the indemnitors and/or bonded immigrants as required by the contracts. Whether or not such notice is contractually mandated is also the determinative issue with respect to the Bonded Immigrant Class, which requests an injunction requiring that such notice be given. Clearly, the monetary relief requested by the Indemnitor Notice Class flows directly from an issue of liability affecting the Bonded Immigrant Class as a whole. As such, monetary damages do not predominate.

Bonding Defendants further contend that because their notice practices under the surety contracts have been "anything but uniform," they have not acted or refused to act on grounds generally applicable to the class. (Doc. 121). Here, where Plaintiffs' class claim is based on their contention that uniform notice *is* required, Bonding Defendants' argument is hardly persuasive. In addition, Bonding Defendants plainly admit that they do not provide bonded immigrants with notice of appearances for deportation. *Id.* As the Bonded Immigrant Class asserts that notice of deportation dates, as well as notice of other appearances, is contractually required and seeks injunctive relief requiring such notice to be given in all cases, the Court finds that Plaintiffs have shown that Bonding Defendants are acting or refusing to act in a manner

generally applicable to the class, thus making appropriate the relief sought.

Finally, Bonding Defendants contend that certification under Rule 23(b)(2) is inappropriate because the notice provision of the surety contract at issue cannot be enforced against Insurer Defendants Fairmont and Stonington. (Doc. 121). However, this issue is one whose resolution may be resolved on a class-wide basis. It is not, as Bonding Defendants contend, a basis for defeating class certification.

For the foregoing reasons, the Court finds that the Bonded Immigrant Class is appropriate for certificate under Rule 23(b)(2). Therefore, the Court **ORDERS** that Plaintiffs' Motion for Class Certification is **GRANTED** with respect to the Bonded Immigrant Class.

III. Conclusion

In sum, the Court **ORDERS** that Plaintiffs' Motion for Class Certification (Doc. 112) is **GRANTED** with respect to the following classes:

(1) The Indemnitor Notice Class, represented by Plaintiff Irma Sandoval and 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.

(2) The Bonded Immigrant Class, represented by Plaintiff Petra Carranza de Salinas and 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.

Further, the Court **ORDERS** that Plaintiffs' Motion for Class Certification (Doc. 112) is **DENIED** with respect to the Indemnitor Collateral Class.

Accordingly, the Court hereby appoints William T. Reid, IV, J. Benjamin King, Tucker Ronzetti, and Elisabeth S. Brodyaga as class counsel. FED. R. CIV. P. 23(g).

So ORDERED this April 25, 2007.

Randy Crane
U.S. District Court