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,	§	
Petitioners/Plaintiffs	§	
v.	§	C.A. No. M-05-331
MARC MOORE, DISTRICT DIRECTOR FOR INTERIOR ENFORCEMENT, DEPARTMENT OF HOMELAND SECURITY, et al.,	§	
Respondents/Defendants.	§	

DEFENDANT FAIRMONT'S MOTION FOR SUMMARY JUDGMENT

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DEFENDANT FAIRMONT'S MOTION FOR SUMMARY JUDGMENT

Defendant, Fairmont Specialty Insurance Company, f/k/a Ranger Insurance Company ("Fairmont"), files this Motion for Summary Judgment, and in support shows the following:

I. Introduction

A. Fairmont is entitled to a dismissal of all class action claims.

Under Federal Rule of Civil Procedure 23, the Court certified two plaintiff classes in this case: (1) the Indemnitor Notice Class; and (2) the Bonded Immigrant Class.[1] The two classes assert contract claims against Fairmont

[1] *See generally* Order Granting In Part and Denying In Part Plaintiffs' Motion to Certify Surety Bond Classes ("Certification Order"), *Zamora-Garcia et al. v. Moore, et al.*, No. M-05-331, Dkt. 139 (S.D. Tex. Apr. 25, 2007).

Specialty Insurance Company (f/k/a Ranger Insurance Company), Stonington Insurance Company (f/k/a Noble Insurance Company), and Aaron Federal Bonding Agency (sometimes known as U.S. Immigration Bonds and Services), an assumed name for Don Vannerson, deceased ("Aaron Bonding").[2]

The Indemnitor Notice Class is represented by Plaintiff Irma Sandoval. Ms. Sandoval represents a class of plaintiffs who served or are serving as Indemnitors on immigration-surety bonds posted by Ranger Insurance Company ("Ranger") or Nobel Insurance Company ("Nobel") to secure the release of bonded immigrants detained by the Immigration and Naturalization Services ("INS"), the predecessor agency to the Department of Homeland Security ("DHS").[3] Ms. Sandoval and the Indemnitor Notice Class seek to recover damages under Federal Rule of Civil Procedure 23(b)(3) for a single breach of contract claim resulting from Defendants alleged failure to notify the Indemnitors and Bonded Immigrants of scheduled appearances before the DHS.[4]

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[2] Aaron Federal Bonding Agency and U.S. Immigration Bonds and Services were assumed names for Don Vannerson. Mr. Vannerson died on March 1, 2004, almost two years after the predecessor action was filed. *See* Suggestion of Death, *Zamora-Garcia, et al. v. Tromski, et al.*, No. M-02-144, Dkt. 87 (S.D. Tex. Mar. 30, 2004). No efforts were made to substitute a personal representative of Mr. Vannerson's estate until Plaintiffs filed their Motion to Add Co-Executors Rodney Vannerson and Eleni Papadakis as Party Defendants on March 9, 2006. *See Zamora-Garcia et al. v. Moore, et al.*, No. M-05-331, Dkt. 39 (S.D. Tex. Mar. 9, 2006). Shortly thereafter, and prior to appearing in this lawsuit, Rodney Vannerson and Eleni Papadakis resigned as the Co-Executors of the Vannerson Estate. The first appearance in this lawsuit by an estate representative was filed by Michael Padilla, as Independent Administrator, on May 22, 2006. *See* Defendant's, Michael Padilla as Independent Administrator of the Estate of Don Vannerson, Original Answer, *Zamora-Garcia et al. v. Moore, et al.*, No. M-05-331, Dkt. 73 (S.D. Tex. May 22, 2006).

[3] *See* Certification Order at 39, *Zamora-Garcia et al. v. Moore, et al.*, No. M-05-331, Dkt. 139 (S.D. Tex. Apr. 25, 2007).

[4] *See id.* at 16-18.

The Bonded Immigrant Class is represented by Plaintiff Petra Carranza de Salinas. Ms. Salinas represents a class of plaintiffs who are bonded immigrants that have been released from INS/DHS custody pursuant to immigration-surety bonds posted by Ranger or Nobel, and where the bond is still outstanding. Ms. Salinas and the Bonded Immigrant Class seek an injunction under Federal Rule of Civil Procedure 23(b)(2) requiring Defendants, directly or through their agents, to make good faith efforts to provide actual, timely, and reasonable notice to Indemnitors and Bonded Immigrants of the Bonded Immigrants' scheduled appearances before the DHS.[5]

Defendant Fairmont seeks a dismissal of all class claims against it because the class representatives, Ms. Sandoval and Ms. Salinas, never had any contracts, transactions, or other dealings with Fairmont, and suffered no injury from Fairmont. As a result, Ms. Sandoval and Ms. Salinas do not have standing to assert causes of action against Fairmont, and this Court lacks jurisdictional power to hear and decide the class claims under Article III, Section 2, Clause 1 of the U.S. Constitution, which restricts judicial power to "cases" and "controversies."

B. Fairmont is entitled to a dismissal of all individual claims.

In addition to the class action claims, Plaintiffs Alberta Rubio, Miguel Rubio, Juana Zamora, and Aracely Zamora assert various individual claims against Fairmont and the other Defendants in this case. Specifically, Alberta Rubio asserts two separate breach of contract claims, Miguel Rubio asserts a

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[5] *See id.* at 34-39.

claim for false imprisonment, and Juana and Aracely Zamora assert a claim for intentional infliction of emotional distress.

Similar to the class action claims, Fairmont seeks a dismissal of all claims asserted by Alberta and Miguel Rubio because the Rubios never had any contracts, transactions, or dealings with Fairmont, and suffered no injury from Fairmont. Therefore, the Rubios do not have standing to assert causes of action against Fairmont, and this Court lacks jurisdictional power to hear and decide the Rubios' claims under Article III, Section 2, Clause 1 of the U.S. Constitution.

Fairmont seeks a dismissal of Juana and Aracely Zamora's claims for intentional infliction of emotional distress because they are barred under Texas law by the two-year statute of limitations. *See* TEX. CIV. PRAC & REM. CODE § 16.003(a) ("[A] person must bring suit for . . . personal injury . . . not later than two years after the day the cause of action accrues.").

II. Summary Judgment Standard of Review

Summary judgment is proper in a case where there is no genuine issue of material fact. FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*. 477 U.S. 317, 322 (1986). A defendant who seeks summary judgment on a plaintiff's cause of action must demonstrate the absence of a genuine issue of material fact by either (1) submitting summary judgment evidence that negates the existence of a material element of plaintiff's claim or (2) showing there is no evidence to support an essential element of plaintiff's claim. *J. Giels Band Employee Benefit Plan v. Smith Barney Shearson, Inc.*, 76 F.3d 1245, 1251 (1st Cir. 1996); *see Celotex Corp.*, 477 U.S. at 322-23. In this case, Irma Sandoval, Petra Carranza de

Salinas, Alberta Rubio, and Miguel Rubio cannot establish the existence of a contractual relationship with Fairmont, or that they suffered any injury from Fairmont. Aracely Zamora and Juana Zamora cannot establish that they filed their tort claim against Fairmont within the two-year statute of limitations. For these reasons, all claims in this lawsuit against Fairmont must be dismissed as a matter of law.

III. Summary Judgment Evidence.

In support of its motion, Defendant Fairmont includes evidence in the attached appendix, which is incorporated by reference in this motion.[6] The motion for summary judgment is based on the following evidence:

Exhibit 1	Judgment of Conviction of Manuel Sandoval
Exhibit 2	Manuel Sandoval's bond file
Exhibit 3	Agreement executed by the United States of America on behalf of the Department of Homeland Security and Stonington Insurance Company dated June 30, 2005
Exhibit 4	Agent Underwriting Agreement between Ranger Insurance Company and Don Vannerson d/b/a Aaron Federal Bonding Agency dated June 29, 1999
Exhibit 5	Petra Carranza de Salinas's bond file
Exhibit 6	Miguel Rubio's bond file

IV. Because Class Representative, Irma Sandoval, never had any relationship with Fairmont—contractual or otherwise—this Court lacks jurisdictional power to hear and decide Ms. Sandoval's individual and class claims against Fairmont.

A. Plaintiffs' allegations and factual background.

[6] *See also* Affidavit of Susan Logsdon in Support of Fairmont's Motion Summary Judgment filed with this motion.

According to Plaintiffs' Complaint, Irma Sandoval is the daughter of Manuel Sandoval.[7] Mr. Sandoval is a native and citizen of Mexico who entered the United States in July 1998, and has resided here continuously since that date.[8] In November 1996, Mr. Sandoval pleaded guilty to possession of cocaine, and was placed on probation.[9] In November 1997, Mr. Sandoval was detained by the Immigration and Naturalization Services ("INS"), now known as the Department of Homeland Security ("DHS").[10]

Plaintiffs contend that Irma Sandoval "contracted with Aaron Bonding, as agent for Noble and/or Ranger, for it to post a Surety Bond securing Mr. Sandoval's release," from INS/DHS detention.[11] The contract at issue is entitled "Terms and Conditions Under Immigration Bond,"[12] and the named parties to that contract are Aaron Federal Bonding and Irma Sandoval.[13] Plaintiffs contend that the Terms and Condition contract was a *uniform* contract used in the transactions between Aaron Bonding and members of the Indemnitor Notice Class.[14]

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[7] *See* Plaintiffs' Sixth Amended Petition for Writ of Habeas Corpus and Class Action Complaint ("Plaintiffs' Sixth Amended Complaint") at ¶¶ 67, *Zamora-Garcia, et al. v. Moore, et al.*, No. M-05-331, Dkt. No. 114 (S.D. Tex. Oct. 27, 2006).

[8] *See id.* at ¶¶ 65-67.

[9] *See id.* at ¶ 66; *see also* Ex. 1, Judgment of Conviction of Manuel Sandoval.

[10] *See id.* at ¶ 67. In their complaint, Plaintiffs' collectively refer to the INS and DHS as the "Federal Defendants." *See also id.* at ¶ 15.

[11] *See id.* at ¶ 67.

[12] Ex. 2, Manuel Sandoval bond file at BF-238.

[13] *See id.*

[14] *See* Plaintiffs' Sixth Amended Complaint at ¶5, *Zamora-Garcia, et al. v. Moore, et al.*, No. M-05-331, D kt. No. 114, (S.D. Tex. Oct. 27, 2006) ("Despite entering uniform

Plaintiffs further contend that Aaron Bonding is the agent of "Nobel and/or Ranger," and therefore, Nobel and/or Ranger are liable for Aaron Bonding's conduct.[15]

Irma Sandoval and the Indemnitor Notice Class's breach of contract claim consists of the "Bonding Defendants'"[16] alleged routine failure to abide by the following provision in the Terms and Condition contract:

> [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.[17]

However, as demonstrated below, the class representative for the Indemnitor Notice Class, Ms. Sandoval, never entered into any transactions with Fairmont, and suffered no injury from Fairmont. As a result, Ms. Sandoval cannot assert a cause of action against Fairmont, and this Court lacks jurisdictional power to hear and decide Ms. Sandoval's claims under Article III, Section 2, Clause 1 of the U.S. Constitution.

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contracts requiring them to provide the critical notice to both the Bonded Immigrant and Indemnitor, the Bonding Defendants never provide advance notice of DHS-scheduled appearances to both the Bonded Immigrant and the Indemnitor.").

[15] *See id.* at ¶¶ 112-122. In their Complaint, Plaintiffs collectively refer to Fairmont Specialty Insurance Company (f/k/a Ranger Insurance Company), Stonington Insurance Company (f/k/a Noble Insurance Company), and Aaron Federal Bonding as the "Bonding Defendants," imputing the conduct of Aaron Federal Bonding to Fairmont and Stonington. *See id.* at ¶ 1. *But see* Certification Order at n. 5, *Zamora-Garcia, et al. v. Moore, et al.*, No. M-05-331, Dkt. 139 (S.D. Tex. Apr. 25, 2007) ("[T]he Court notes that whether Insurer Defendants Fairmont and Stonington are liable for Aaron Bonding's conduct is an issue yet to be resolved.").

[16] *See supra* note 15.

[17] *See* Certification Order at 16-17; *Zamora-Garcia, et al. v. Moore, et al.*, No. M-05-331, Dkt. 139 (S.D. Tex. Apr. 25, 2007), *see also* Plaintiffs' Sixth Amended Complaint at ¶5, *Zamora-Garcia, et al. v. Moore, et al.*, No. M-05-331, Dkt. No. 114, (S.D. Tex. Oct. 27, 2006); and Ex. 2, Manuel Sandoval bond file at BF-238.

B. There is no privity of contract between Ms. Sandoval and Fairmont.

Irma Sandoval and the Indemnitor Notice Class assert a single cause of action for breach of contract against Fairmont.[18] As recognized by this Court:

> 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 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).[19]

In this case, Ms. Sandoval cannot prove her breach of contract claim against Fairmont because she has no contractual relationship with Fairmont—or any other dealings with Fairmont. There is no evidence that privity of contract exists between Irma Sandoval and Fairmont. The documents in Manuel Sandoval's bond file show that Irma Sandoval's dealings were entirely with Nobel (Stonington Insurance Company's predecessor-in-interest). The following transactions are evidenced in Mr. Sandoval's bond file and other documents produced in this case:

- Irma Sandoval executed an undated contract entitled Terms and Conditions Under Immigration Bond on an Aaron Federal Bonding Agency form.[20] This is the contract with the notice provision at issue in this case.[21]

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[18] *See* Plaintiffs' Sixth Amended Complaint at ¶¶ 112-122, *Zamora-Garcia, et al. v. Moore, et al.*, No. M-05-331, Dkt. No. 114 (S.D. Tex. Oct. 27, 2006).

[19] *See* Certification Order at 16; *Zamora-Garcia, et al. v. Moore, et al.*, No. M-05-331, Dkt. 139 (S.D. Tex. Apr. 25, 2007).

[20] Ex. 2, Manuel Sandoval bond file at BF-238.

[21] *See id.* at BF-238 at ¶ 4.

- On November 14, 1997, Irma Sandoval executed an indemnity agreement in favor of Nobel, and in consideration of Nobel posting a bond with the INS to obtain Manuel Sandoval's release from federal detention.[22]

- On November 18, 1997, Nobel Insurance Company issued a Power of Attorney, Power No. N15-0122773, appointing Don Vannerson as its Attorney-in-Fact to execute an immigration bond on behalf of Nobel Insurance for Manuel Sandoval, and to deliver the bond to the INS.[23]

- On November 18, 1997, Nobel Insurance Company issued an immigration bond guaranteeing the delivery of Miguel Rubio to the INS upon demand. Don Vannerson signed the bond on behalf of Nobel Insurance Company. Mr. Vannerson's Power of Attorney No. N15-0122773 is referenced in the upper right-hand corner of the bond. [24]

- On June 4, 2002, the INS issued Noble a Notice to Obligor to deliver Mr. Sandoval for deportation on July 5, 2002.[25]

- On July 17, 2002, the INS issued Noble a notice that the immigration bond for Manuel Sandoval had been breached because Noble failed to deliver Mr. Sandoval for deportation on July 5, 2002.[26]

- On September 20, 2002, the INS sent Nobel an invoice for $1,500 for payment on the breached bond.[27]

- On June 30, 2005, Stonington, as successor-in-interest to Nobel, entered into a settlement agreement the Department of Homeland Security ("DHS") to settle Stonington's alleged

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[22] *See* Ex. 2, Manuel Sandoval bond file at BF-241.

[23] *See* Ex. 2, Manuel Sandoval bond file at BF-232.

[24] *See* Ex. 2, Manuel Sandoval bond file at BF-224.

[25] *See id.* at BF-0217.

[26] *See id.* at BF-211.

[27] *See id.* at BF-206.

indebtedness to the DHS for breached immigration bonds posted by Nobel.[28]

- The bond Nobel posted on behalf of Manuel Sandoval was part Stonington's settlement with the DHS.[29]

These documents establish that Aaron Bonding and Nobel had a contractual relationship with Irma Sandoval, but they provide no evidence of the existence of a contract between Irma Sandoval and Fairmont or Ranger. Indeed, neither Fairmont, nor Ranger, are mentioned anywhere among the bond file documents for Manuel Sandoval.[30]

"In a breach of contract action, the plaintiff has the burden to prove that the defendant has obligated himself under the contract . . . . Maintenance of an action for breach of contract requires privity between the damaged party and the party sought to be held liable." *Cannon v. ICO Tubular Serv., Inc.*, 905 S.W.2d 380, 392-393 (Tex. App.—Houston [1st Dist.] 1995, no writ), *abrogated on other grounds by Lane Bank Equipment Co. v. Smith Southern Equipment, Inc.*, 10 S.W.3d 308, 312 (Tex. 2000); *see also Texas Interstate Contracting Corp. v. City of Dallas*, 135 S.W.3d 605, 607 (Tex. 2004) ("Privity of contract, as a necessary predicate to suit on a contract, has a long and settled history in this State.");

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[28] *See* Ex. 3, Agreement executed by the United States of America on behalf of the Department of Homeland Security and Stonington Insurance Company at BF 3519-3552.

[29] *See id.* at BF-3522.

[30] *See generally* Ex. 2, Manuel Sandoval bond file. Furthermore, when Nobel posted the immigration bond for Manuel Sandoval on November 18, 1997, Ranger did not have any relationship with Don Vannerson. Ranger and Don Vannnerson d/b/a Aaron Federal Bonding Agency entered into an Agency Underwriting Agreement on June 29, 1999. *See* Ex. 4, Agency Underwriting Agreement.

McIntosh v. Wiley, 2006 WL 3691109, at *2 (S.D. Tex. Dec. 11, 2006) (Plaintiff's breach of contract claim was dismissed against one of the defendants because the defendant was not a party to the contract, and thus there was no privity of contract as required under Texas law). Because there is no privity of contract between Fairmont and Irma Sandoval, Ms. Sandoval's individual contract claims against Fairmont must be dismissed as a matter of law.

C. This Court lacks jurisdictional power to hear and decide Irma Sandoval's breach of contract claims against Fairmont.

Under federal law, if a plaintiff cannot demonstrate injury by the defendant, the plaintiff lacks standing to request adjudication of the issue, and the federal court lacks jurisdictional power to hear and decide the case.

> It is a fundamental principle of law that a plaintiff must demonstrate injury to himself by the parties whom he sues before that plaintiff can successfully state a cause of action. This principle is found in Article III, Section 2, Clause 1 of the Constitution which restricts judicial power to "cases" and "controversies."

Weiner v. Bank of King of Prussia, 358 F. Supp. 684, 690 (E.D. Penn. 1973).[31] In *Weiner,* the plaintiff sued 20 banks for violations of the federal Truth-in-Lending act, among other things. *Id.* at 687. But, the complaint acknowledged that the plaintiff was a customer and borrower of only one of the 20 banks, and that he had no transactions or loans from the other 19 banks. *Id.* The plaintiff claimed he was suing on behalf of a class of customers and borrowers in "this District." *Id.*

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[31] *Citing Flast v. Cohen*, 392 U.S. 83, 94-101(1968); *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 149-154 (1951); *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239 (1937); *Muskrat v. United States*, 219 U.S. 346, 356-363 (1911); *Osborn v. Bank of United States*, 9 Wheat. 738, 819, 6 L.Ed. 204 (1824).

The 19 defendant banks that had no transactions with the plaintiff filed a motion to dismiss the complaint on the grounds that the plaintiff lacked standing to maintain his action. *Id.* Recognizing that "standing is a jurisdictional issue which concerns the power of the federal courts to hear and decide cases," *id.* at 697, the district court agreed that the plaintiff had no standing to sue the 19 banks, and dismissed them from the action. *Id.* at 705. Since Irma Sandoval had no transactions with Fairmont, she does not have standing to sue Fairmont, and this Court lacks jurisdictional power to hear and decide her breach of contract case against Fairmont.

D. Rule 23 of the Federal Rules of Civil Procedure does not affect class representative Irma Sandoval's lack of standing.

In *Weiner*, the district court also held that the plaintiff could not cure his standing defect by claiming to sue for violations of the Truth-in-Lending Act on behalf of those who may have been so injured. 358 F. Supp. at 694. "A plaintiff may not use the procedural device of a class action to boot strap himself into standing he lacks under the express terms of the substantive law." *Id.* As stated by another court, "a predicate to [a plaintiff's] right to represent a class is his eligibility to sue in his own right. What he may not achieve himself, he may not accomplish as a representative of a class." *Kauffman v. Dreyfus Fund, Inc.*, 434 F.2d 727, 734 (3rd Cir. 1970), (Shareholder of four mutual funds which allegedly sustained damage by reason of violations of antitrust and securities laws did not have standing to serve as class representative under Federal Rule 23 on behalf of similarly situated shareholders of other mutual funds.) cert. denied, 401 U.S. 974 (1971); *see also La Mar v. H & B Novelty Loan Co.*, 489 F.2d 461, 466 (9th

Cir. 1973) (actions against pawnbroker for violation of Truth-in-Lending Act and against air carrier for overcharging for tickets were not appropriate for class action as to pawnbrokers and air carriers who engaged in similar conduct, but at whose hands plaintiffs suffered no injury and have no cause of action).

Because Ms. Sandoval suffered no injury, and has no cause of action against Fairmont, Ms. Sandoval has no standing to represent absentee class members who served as indemnitors on bonds posted by Fairmont. The United States Supreme Court has "repeatedly held, a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members." *East Texas Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977) (citing cases).

> In other words, the representative must show that his individual claim rises to the level of a "case" or "controversy." As the Supreme Court recently stated: "[I]f none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class." *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974).[32]

Leonard v. Merrill Lynch, Pierce, Fenner & Smith, 64 F.R.D. 432, 435 (S.D.N.Y. 1974).[33] *Leonard*, is another case in which class action claims were dismissed

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[32] Texas law follows the federal law on this issue. *See M.D. Anderson Cancer Center v. Novak*, 52 S.W.3d 704, 711 (Tex. 2002) (Relying on federal case law, the Texas Supreme Court held "that a named plaintiff's lack of individual standing at the time suit is filed deprives the court of subject matter jurisdiction over the plaintiff's individual claims and claims on behalf of a class.").

[33] *See also Rivera v. Wyeth-Ayerst Laboratories*, 283 F.3d 315, 318 (Tex. 2002) ("The irreducible constitutional minimum of standing contains three elements: The plaintiff must have suffered an injury in fact, there must be a causal connection between the injury and the conduct complained of, and it must be likely that the injury will be redressed by a favorable decision.") (internal quotations omitted).

because the representative plaintiffs had no cause of action against the defendants in their own right. The district court held plaintiffs who did not purchase unregistered securities from defendants, and who had no dealings with defendants, did not have standing to maintain an action against defendants under a provision of the Securities Act creating civil liability in favor of an aggrieved purchaser with respect to the sale of unregistered securities. *Id.* at 434-435. Thus, the named plaintiffs could not serve as class representatives of purchasers of unregistered securities, some of whom might have purchased securities from defendants. *Id.* In the same way, class representative Irma Sandoval lacks standing to sue Fairmont for breach of contract in her own right, and on behalf of absentee class members who served as indemnitors on bonds posted by Fairmont. Therefore, the Indemnitor Notice Class claims against Fairmont must be dismissed as a matter of law.

V. Class Representative, Petra Carranza de Salinas, never contracted with Fairmont, and therefore, this Court lacks jurisdictional power to hear and decide Ms. Salinas's individual and class claims against Fairmont

A. Plaintiffs' allegations and factual background.

In addition to certifying the Indemnitor Notice Class, the Court certified the Bonded Immigrant Class, which is a class of bonded immigrants who have been released from custody of the INS/DHS pursuant to immigration-surety bonds posted by Nobel or Ranger, and where the bond is still outstanding.[34] Petra

[34] *See* Certification Order at 34-40; *Zamora-Garcia, et al. v. Moore, et al.*, No. M-05-331, Dkt. 139 (S.D. Tex. Apr. 25, 2007).

Carranza de Salinas is the sole representative for the Bonded Immigrant Class.[35]

Plaintiffs allege that Ms. Salinas is a native and citizen of Mexico, who became a lawful permanent resident in this country on or about August 29, 1985.[36] Ms. Salinas was detained by the INS on or about August 18, 1997, and removal proceedings were commenced shortly thereafter.[37] In 1997, her friend, Juan De La Rosa, contracted with Aaron Bonding to post an immigration-surety bond with the INS on Ms. Salinas' behalf.[38] To Ms. Salinas' knowledge, the DHS has not yet issued a demand on Ms. Salinas' bond.[39] 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 of the immigration bonds by the INS/DHS.[40]

B. There is no privity of contract between Ms. Salinas and Fairmont.

Like Irma Sandoval, Ms. Salinas never had a contract, engaged in any transactions, or had any other dealings with Fairmont, or its predecessor Ranger. As the bonded immigrant (rather the indemnitor, like Ms. Sandoval), Ms. Salinas

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[35] *See id.* at 39-40.

[36] *See* Plaintiffs' Sixth Amended Complaint at ¶ 79, *Zamora-Garcia, et al. v. Moore, et al.*, No. M-05-331, Dkt. No. 114 (S.D. Tex. Oct. 27, 2006).

[37] *See id.*

[38] *See id.*

[39] *See id.* at ¶ 81.

[40] *See id.* at ¶ 131.

did not enter into any contract with any of the defendants in this case. To the extent, Ms. Salinas had dealings with any of the defendants, those dealings were with Aaron Bonding and Nobel, not Fairmont or Ranger. The following transactions are evidenced in Ms. Salinas' bond file:

- On September 25, 1997, Juan De La Rosa signed the U.S. Immigration Bonds and Services' (a/k/a Aaron Bonding) Terms and Conditions Under Immigration Bond contract as part of his application to obtain an immigration bond in the amount of $3,000 for Petra Carranza de Salinas' release from INS detention.[41]

- On September 25, 1997, Mr. De La Rosa executed an indemnity agreement in favor of Nobel, and in consideration of Nobel posting a bond with the INS to obtain Ms. Salinas' release from federal detention.[42]

- On September 25, 1997, Mr. De La Rosa signed a Promissory Note in the amount of $3,000 payable to U.S. Immigration Bonds and Services in the event Ms. Salinas' bond is breached.[43]

- On September 25, 1997, Nobel Insurance Company issued a Power of Attorney, No. N15-0101215, appointing Don Vannerson as its Attorney-in-Fact to execute an immigration bond on behalf of Nobel Insurance for Ms. Salinas, and to deliver the bond to the INS.[44]

- On September 25, 1997, Nobel Insurance Company issued an immigration bond guaranteeing the delivery of Ms. Salinas to the INS upon demand. Don Vannerson signed the bond on behalf of Nobel Insurance Company. Mr. Vannerson's Power of Attorney No. N15-0101215 is referenced in the upper right-hand corner of the bond.[45]

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[41] *See* Ex. 5, Petra Carranza de Salinas Bond file at BF-320.

[42] *See id.* at BF-315.

[43] *See id.* at BF-318.

[44] *See id.* at BF-342.

[45] *See id.* at BF-334.

Like Ms. Sandoval, there is no evidence that Ms. Salinas ever had any dealings with Fairmont. Ms. Salinas' request for injunctive relief, individually and on behalf of the Bonded Immigrant class, presumes that Fairmont has an existing contractual duty to provide notice to Ms. Salinas and Mr. De La Rosa of any and all demands for performance made on her immigration bond by the INS/DHS. Ms. Salinas seeks equitable relief to prevent an anticipatory breach by Fairmont.[46] However, as demonstrated above, there is no contractual relationship between Ms. Salinas and Fairmont. As such, there is no privity of contract between Ms. Salinas and Fairmont, which is a prerequisite to a suit on a contract under Texas law. *See Texas Interstate Contracting Corp. v. City of Dallas*, 135 S.W.3d 605, 607 (Tex. 2004) ("Privity of contract, as a necessary predicate to suit on a contract, has a long and settled history in this State."). Moreover, since Fairmont owes no contractual duties to Ms. Salinas, there is no basis for her request for injunctive relief based upon an anticipatory breach of a contractual duty. As a result, this Court lacks jurisdictional power to hear and decide Ms. Salinas' claim for injunctive relief against Fairmont under Article III, Section 2, Clause 1 of the U.S. Constitution, which restricts judicial power to "cases" and "controversies." *See O'Shea*, 414 U.S. at 494 ("[I]f none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of

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[46] *See* Plaintiffs' Sixth Amended Complaint at ¶¶ 129-133, *Zamora-Garcia, et al. v. Moore, et al.*, No. M-05-331, Dkt. No. 114 (S.D. Tex. Oct. 27, 2006).

himself or any other member of the class."). For these reasons, Ms. Salinas' claims for injunctive relief against Fairmont, individually and on behalf of the Bonded Immigrant Class, must be dismissed as a matter of law.

VI. Miguel Rubio and Alberta Rubio also had no dealings with Fairmont, and have no standing to maintain a cause of action against Fairmont

A. Plaintiffs' allegations and factual background

In this case, Alberta Rubio asserts two breach of contract claims against Fairmont;[47] and her son, Miguel Rubio, asserts a false imprisonment against Fairmont for allegedly surrendering him to the DHS on April 12, 2005.[48] Miguel Rubio's false imprisonment claim against Fairmont is premised upon his status as a third-party beneficiary of an alleged contractual relationship between Fairmont and Alberta Rubio.[49] However, no contract exists between Fairmont and Alberta Rubio, and there is no evidence that Fairmont had any involvement with the detention and surrender of Miguel Rubio to federal immigration authorities. As such, Alberta and Miguel Rubio's claims against Fairmont should be dismissed.

According to Plaintiffs' complaint, immigration authorities detained Miguel Rubio in connection with deportation proceedings in 1996.[50] His mother, Alberta

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[47] *See id.* at ¶¶ 112-128.

[48] *See id.* at ¶¶ 156-161.

[49] *See id.* at ¶ 161 ("Plaintiff Miguel Rubio also seeks recovery for the damages caused him by the Bonding Defendants' surrender of him to the INS/DHS in violation of his contractual rights as a third-party beneficiary of the contract between Alberta Rubio and the Bonding Defendants.").

[50] *See id.* at ¶73.

Rubio, contracted with Aaron Bonding for the posting of an immigration-surety bond, and served as the indemnitor on the bond contract.[51] On October 31, 1996, Noble Insurance Company posted a bond with the INS for Mr. Rubio.[52] Ms. Rubio's first breach of contract claim is identical to the contract claim asserted by Irma Sandoval and the absentee Indemnitor Notice Class members—Fairmont breached its alleged duty to "provide notice of all appearances requested by the DHS."[53] In her second breach of contract claim, Ms. Rubio contends that Fairmont failed to return collateral to her after the government cancelled Miguel Rubio's bond.[54]

B. Because there is no contractual relationship between Fairmont and Alberta Rubio, Fairmont does not owe a duty to provide Alberta Rubio and Miguel Rubio with notice of scheduled appearances before the INS/DHS.

Similar to Ms. Sandoval's circumstances, Ms. Rubio cannot assert breach of contract claims against Fairmont, because Miguel Rubio's bond file shows that Nobel, not Fairmont or its predecessor, Ranger, posted the immigration bond for Mr. Rubio. Therefore, there is no privity of contract between Fairmont and Alberta Rubio. *See Cannon v. ICO Tubular Serv., Inc.*, 905 S.W.2d at 392-393. Mr. Rubio's bond file shows the following transactions:

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[51] *See id.*

[52] *See infra* note 59.

[53] *See* Plaintiffs' Sixth Amended Complaint at ¶ 115, *Zamora-Garcia, et al. v. Moore, et al.*, No. M-05-331, Dkt. No. 114, (S.D. Tex. Oct. 27, 2006); *see generally id.* at ¶¶ 112-122 (breach of contract claim asserted by Irma Sandoval, Alberta Rubio and the Indemnitor Notice Class).

[54] *See id.* at ¶¶ 124-128.

- An undated Bond Preparation Worksheet is prepared for Miguel Rubio identifying the obligor on the bond as Noble Insurance Company.[55]

- On September 30, 1996, Ms. Rubio signed U.S. Immigration Bonds and Services' (a/k/a Aaron Bonding) Terms and Conditions Under Immigration Bond contract as part of her application to obtain an immigration bond in the amount of $3,000 for Miguel Rubio's release from INS detention.[56]

- On September 30, 1996, Alberta Rubio signed a Promissory Note in the amount of $3,000 payable to U.S. Immigration Bonds and Services in the event Miguel Rubio's bond is breached.[57]

- On October 31, 1996, Nobel Insurance Company issued a Power of Attorney, Power No. N15-0036642, appointing Don Vannerson as its Attorney-in-Fact to execute an immigration bond on behalf of Nobel Insurance Company for Miguel Rubio, and to deliver the bond to the INS.[58]

- On October 31, 1996, Nobel Insurance Company issued an immigration bond guaranteeing the delivery of Miguel Rubio to the INS upon demand. Don Vannerson signed the bond on behalf of Nobel Insurance Company. Mr. Vannerson's Power of Attorney No. N15-0036642 is referenced in the upper right-hand corner of the bond. [59]

- On March 1, 2005, the INS sent Nobel Insurance Company, in care of Don Vannerson, a Notice to Obligor to Deliver Miguel Rubio for an interview.[60]

- On April 12, 2005, Miguel Rubio was surrendered into INS

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[55] *See* Ex. 6, Miguel Rubio Bond file at BF-269.

[56] *See id.* at BF-274. U.S. Immigration Services, like Aaron Federal Bonding, is an assumed name for Don Vannerson.

[57] *See id.* at BF-273.

[58] *See id.* at BF-287.

[59] *See id.* at BF-296.

[60] *See id.* at BF-300.

custody.[61]

- On April 12, 2005, the INS sent Nobel Insurance Company notice that the conditions of immigration bond for Miguel Rubio had been fulfilled, that the bond was cancelled, and Nobel was no longer liable under the bond.[62]

Transactions between Ms. Rubio and Nobel cannot create contractual obligations between Ms. Rubio and Fairmont. It is "a black-letter, axiomatic rule that a contract between other parties cannot create an obligation or duty on a non-contracting party, which non-contracting party was a stranger to the basic underlying . . . contract." *City of Beaumont v. Excavators & Constructors, Inc.*, 870 S.W.2d 123, 129 (Tex. App.—Beaumont 1993, writ denied) (Telephone company which was not party to contract between excavator and city had no duty arising out of ordinary contract to avoid causing delay or inefficiency in contractor's performance). Since Nobel posted the immigration bond for Mr. Rubio with the INS, Ms. Rubio cannot plausibly claim that Fairmont had a contractual duty to provide Ms. Rubio with "notice of all appearances requested by the DHS."[63] In addition, since Fairmont was not the surety on Mr. Rubio's bond, Ms. Rubio cannot plausibly contend that Fairmont would ever receive notices from the DHS regarding Mr. Rubio's appearances before the DHS. Consequently, Fairmont did not have any contractual duty to provide either Alberta Rubio or Miguel Rubio with notices of schedule appearances before the

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[61] *See id.* at BF-285 (see handwritten note at the bottom of the Notice to Obligor indicating that Mr. Rubio was surrendered to the INS on April 12, 2005).

[62] *See id.* at BF-289.

[63] *See* Plaintiffs' Sixth Amended Complaint at ¶ 115, *Zamora-Garcia, et al. v. Moore, et al.*, No. M-05-331, Dkt. No. 114, (S.D. Tex. Oct. 27, 2006).

DHS, and Ms. Rubio's breach of contract claim against Fairmont for failure to provide such notice must be dismissed as a matter of law. *See id.*

C. Fairmont never had an obligation to return collateral to Ms. Rubio.

Similarly, Fairmont does not have any contractual agreement with Ms. Rubio regarding alleged collateral payments for security on Mr. Rubio's immigration bond. On her second breach of contract claim, Ms. Rubio contends:

> The uniform surety contracts . . . obligate the Bonding Defendants to return collateral paid under the terms of the contracts to the Indemnitors upon the cancellation of the bond at issue. The Bonding Defendants have failed to return the posted collateral to Alberta Rubio and the members of Indemnitor Collateral Class.[64]

This claim against Fairmont fails as a matter of law because there is no evidence that Ms. Rubio ever paid any collateral that needs to be returned, and there is no evidence that she had any agreement whatsoever regarding collateral with Fairmont. In Plaintiffs' complaint, Alberta Rubio sought to be the class representative for the so-called "Indemnitor Collateral Class," representing all indemnitors who were allegedly owed a collateral refund by the sureties, but never received the refund.[65] In its certification order, this Court thoroughly analyzed the relevant evidence, and ultimately denied certification of the Indemnitor Collateral Class.[66] The Court concluded that Ms. Rubio could not maintain such a claim in her own right, much less on behalf of the proposed Indemnitor Collateral Class:

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[64] *Id.* at ¶¶ 126-127.

[65] *Id.* at ¶ 106.

[66] *See* Certification Order at 29-34, *Zamora-Garcia, et al. v. Moore, et al.*, No. M-05-331, Dkt. 139 (S.D. Tex. Apr. 25, 2007).

> Upon reviewing the evidence submitted, the Court finds that Plaintiffs have failed 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 [Collateral] 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 . . . Therefore, the Court ORDERS that Plaintiffs' Motion for Class Certification is DENIED with respect to the Indemnitor Collateral Class.[67]

No additional evidence has been produced in this case that would alter the above stated findings. Furthermore, there is no evidence that Ms. Rubio had any agreement with Fairmont regarding collateral. Indeed, such an agreement would serve no purpose since Fairmont did not post the bond for Miguel Rubio's release. Consequently, Alberta Rubio's breach of contract claims against Fairmont should be dismissed as a matter of law. *See City of Beaumont*, 870 S.W.2d at 129.

D. There is no evidence that Fairmont willfully detained Miguel Rubio or had any involvement with his detention and surrender to the federal immigration authorities.

Miguel Rubio contends that the INS sent "the bonding company" notice of a demand requiring the bonding company to deliver Mr. Rubio to the INS.[68] The complaint further contends that the "bond company did not inform either Miguel Rubio or his Indemnitor, Alberta Rubio," of the notice.[69] According to Mr. Rubio,

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[67] *See id.* at 33-34.

[68] *See* Plaintiffs' Sixth Amended Complaint at ¶ 158, *Zamora-Garcia, et al. v. Moore, et al.*, No. M-05-331, Dkt. No. 114, (S.D. Tex. Oct. 27, 2006).

[69] *See id.*

an unnamed agent of Aaron Bonding apprehended Mr. Rubio, in the middle of the night, in his home on April 11, 2005, and surrendered him to the INS/DHS on April 12, 2005.[70] Mr. Rubio seeks recovery for false imprisonment because "the Bonding Defendants apprehended Mr. Rubio with no contractual or legal authority for doing so."[71] In order to prove a claim for false imprisonment against Fairmont, Mr. Rubio must show: (1) Fairmont willfully detained Mr. Rubio; (2) the detention was without Mr. Rubio's consent; and (3) the detention was without legal authority or justification. *Wal-Mart Stores v. Rodriguez*, 92 S.W.3d 502, 506 (Tex. 2002).

In this case, there is no evidence that Fairmont willfully detained Mr. Rubio. Mr. Rubio does not claim that Fairmont or its employees were directly involved with Mr. Rubio's detention and surrender to the INS. There is no evidence that Fairmont requested or directed Mr. Rubio's detention. *See Wal-Mart*, 92 S.W.3d at 507 ("Liability for false imprisonment extends beyond those who willfully participate in detaining the complaining party to those who request or direct the detention."). Fairmont's liability to Mr. Rubio is premised entirely upon Mr. Rubio's alleged contractual rights as a third-party beneficiary of the contract between Alberta Rubio and Fairmont, which does not exist in this case.[72] As explained earlier, Nobel, not Fairmont or its predecessor, Ranger, posted the

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[70] *See id.* at ¶ 159.

[71] *See id.* at ¶ 160.

[72] *See id.* at ¶ 161 ("Plaintiff Miguel Rubio also seeks recovery for the damages caused him by the Bonding Defendants' surrender of him to the INS/DHS in violation of his contractual rights as a third-party beneficiary of the contract between Alberta Rubio and the Bonding Defendants.").

immigration bond for Mr. Rubio.[73] Under these circumstances, the INS/DHS would have no reason or contractual right to issue a demand to Fairmont for the delivery of Miguel Rubio since Fairmont did not post Mr. Rubio's bond guaranteeing Mr. Rubio's delivery upon demand. There is no evidence that Fairmont had any contractual relationship with Alberta and Miguel Rubio. More importantly, there is no evidence that Fairmont had any involvement with Miguel Rubio's surrender to the federal immigration authorities. Consequently, Miguel Rubio cannot establish the elements of his false imprisonment claim against Fairmont, and it must be dismissed as a matter of law.

VII. Aracely Zamora and Juana Zamora claims against Fairmont for intentional infliction of emotional distress are barred by the two-year statute of limitations.

A. Plaintiffs' allegations and factual background.

According to Plaintiffs, Aracely Zamora is a Mexican national who has resided in the United States since 1982.[74] She and her mother, Juana Zamora, live in Mission, Texas.[75] In February of 2000, Aracely was detained by the federal authorities and placed under removal proceedings for helping two young girls enter the U.S. illegally.[76] To secure Aracely's release from detention, Juana

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[73] *See supra* notes 55-62 and accompanying text.

[74] *See* Plaintiffs' Sixth Amended Complaint at ¶ 82, *Zamora-Garcia, et al. v. Moore, et al.*, No. M-05-331, Dkt. No. 114 (S.D. Tex. Oct. 27, 2006).

[75] *See id.*

[76] *See id.*

Zamora contacted Juvencio Pena, Aracely's cousin.[77] Mr. Pena, on Juana Zamora's behalf, entered a contract with Aaron Bonding by which Aaron Bonding agreed to post an immigration-surety bond on Aracely Zamora's behalf.[78] Also, according to Plaintiffs, Aaron Bonding served as the agent of Ranger in contracting with Pena.[79]

On September 20, 2001, an immigration judge ordered Aracely's removal from the United States, and subsequently the DHS issued a demand on the bond to Aaron Bonding, requiring that Aaron Bonding present Aracely Zamora for an appearance before the DHS on December 12, 2001.[80] Plaintiffs allege that Aracely was not timely presented to the DHS, and the bond was declared breached by the DHS.[81]

Moreover, Plaintiffs contend that on April 15, 2002, Defendant Santiago Sol, as agent for Aaron Bonding, went to the home of Juana Zamora in Mission, Texas, looking for Aracely Zamora to turn her into the DHS.[82] According to Plaintiffs, Mr. Sol falsely asserted that he had a warrant for Aracely's removal, issued in December 2001, and that he was authorized to arrest her.[83] Plaintiffs further allege that Aracely was not home on April 15, 2002, so Mr. Sol returned to

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[77] *See id.* at ¶ 83.

[78] *See id.*

[79] *See id.*

[80] *See id* at ¶ 84.

[81] *See id.*

[82] *See id.* at ¶¶ 146-149.

[83] *See id.* at ¶ 148.

the Zamora home, and to the homes of relatives, over the next few days.[84] Even though there is no allegation that Mr. Sol ever in fact detained Aracely Zamora—or even met or spoke with her—Juana and Aracely Zamora claim Mr. Sol caused them great emotional distress.[85] As a result of Mr. Sol's and Aaron Bonding's alleged actions, Juana and Aracely Zamora assert a cause of action for intentional infliction of emotional distress.[86]

B. The Zamoras' tort claim against Fairmont is barred by the two-year statute of limitations.

To the extent that Aracely and Juana Zamora seek to hold Fairmont liable for Mr. Sol's and Aaron Bonding's alleged tortious conduct, their claim is barred by the two-year statute of limitations. *See* TEX. CIV. PRAC & REM. CODE § 16.003(a) ("[A] person must bring suit for . . . personal injury . . . not later than two years after the day the cause of action accrues."). "[T]he applicable limitations period for a claim of intentional infliction of emotional distress is two years from the accrual of the cause of action." *Bhalli v. Methodist Hosp.*, 896 S.W.2d 207, 211 (Tex. App.—Houston [1st Dist.] 1995, writ denied). According to Plaintiffs' complaint, the alleged actions by Aaron Bonding and Santiago Sol occurred in April 2002, which is when their claim for intentional infliction of emotional distress accrued. *See id.* at 212 (a cause of action for intentional infliction of emotional distress accrues when the tortious acts have ceased).[87]

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[84] *See id.* at ¶ 88.

[85] *See id.*

[86] *See id.* at ¶¶ 146-155.

[87] *See id.* at ¶¶ 82-89 and ¶¶ 146-155.

However, Fairmont was not added as a party to this lawsuit until September 30, 2005, when Plaintiffs filed their Third Amended Class Action Complaint.[88] Consequently, Plaintiffs' Aracely and Juana Zamoras' claim against Fairmont for intentional infliction of emotional distress is barred as a matter of law.

Plaintiffs cannot avoid the statute of limitations by claiming that their tort claim is timely under the "relation back" provision of Federal Rule of Civil Procedure 15(c)(3). Aracely Zamora originally filed the predecessor action, Case No. M-02-144, on April 16, 2002, against the federal government.[89] Aaron Federal Bonding Agency and Santiago Sol, were added as defendants in the First Amended Class Action Complaint, filed on May 7, 2002.[90] Juana Zamora was added as a plaintiff in the Second Amended Class Action Complaint, filed on July 28, 2003.[91] More than two years later, on September 30, 2005, Fairmont and Ranger were added as defendants to the Third Amended Class Action

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[88] *Compare* Plaintiffs' Third Amended Petition for Writ of Habeas Corpus and Class Action Complaint ("Plaintiffs' Third Amended Complaint"), *Zamora-Garcia, et al. v. Moore, et al.*, No. M-05-331, Dkt. 2 (S.D. Tex. Sept. 30, 2005) *with* Plaintiffs' Second Amended Petition for Writ of Habeas Corpus and Class Action Complaint ("Plaintiffs' Second Amended Complaint"), *Zamora-Garcia, et al. v. Tromski, et al.*, No. M-02-144, Dkt. 36 (S.D. Tex. July 31, 2003).

[89] *See* Plaintiffs' Petition for Writ of Habeas Corpus and Class Action Complaint, *Zamora-Garcia, et al. v. Tromski*, et al., No. M-02-144, Dkt. 1 (S.D. Tex. Apr. 16, 2002).

[90] *See* Plaintiffs' First Amended Petition for Writ of Habeas Corpus and Class Action Complaint, *Zamora-Garcia, et al. v. Tromski*, et al., No. M-02-144, Dkt. 2 (S.D. Tex. May 7, 2002).

[91] *See* Plaintiffs' Unopposed Motion to File Second Amended Petition for Writ of Habeas Corpus and Class Action Complaint, *Zamora-Garcia, et al. v. Tromski, et al.*, No. M-02-144, Dkt. 32 (S.D. Tex. July 28, 2003); and Plaintiffs' Second Amended Complaint, *Zamora-Garcia, et al. v. Tromski, et al.*, No. M-02-144, Dkt. 36 (S.D. Tex. July 31, 2003).

Complaint.[92]

> Federal Rule of Civil Procedure 15(c)(3) states:
>
> > c) Relation Back of Amendments. An amendment of a pleading relates back to the date of the original pleading when
> >
> > (3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

FED. R. CIV. P. 15(c)(3). Rule 15(c)'s "relates back" provision does not apply to Fairmont because an amended complaint adding a defendant does not relate back to the original complaint if Plaintiff has shown neither factual mistake nor legal mistake concerning the identity of the proper party. *See Soto v. Brooklyn Corr. Facility*, 80 F.3d 34, 36 (2nd Cir. 1996); *see also Jacobson v. Osborne*, 133 F.3d 315, 319-20 (5th Cir. 1998) (Rule 15(c)(3) "is meant to allow an amendment changing the name of a party to relate back to the original complaint only if the change is the result of an error, such as misnomer or misidentification."). In this case, Plaintiffs have not shown that they delayed adding Fairmont as a party to this litigation as a result of factual or legal mistake. Indeed, they offer no

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[92] *See* Plaintiffs' Third Amended Complaint, *Zamora-Garcia, et al. v. Tromski, et al.*, No. M-02-144, Dkt. 150 (S.D. Tex. Sept. 30, 2005). The Court severed the Third Amended Complaint from cause number M-02-144, and assigned it a new cause number, M-05-331. *See* Order of Severance, *Zamora-Garcia, et al. v. Tromski, et al.*, No. M-02-144, Dkt. 151 (S.D. Tex. Sept. 30, 2005); *see also* Plaintiffs' Third Amended Complaint, *Zamora-Garcia, et al. v. Moore, et al.*, No. M-05-331, Dkt. No. 2 (S.D. Tex. Sept. 30, 2005).

explanation for their delay in adding Fairmont.[93] Moreover, Plaintiffs have failed to show that within the period provided by Rule 4(m) for service of the summons and complaint,[94] Fairmont received such notice of the institution of the action that Fairmont will not be prejudiced in maintaining a defense on the merits, and that Fairmont knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.[95] *See* FED. R. CIV. P. 15(c)(3); *see also Bailey v. U.S.*, 289 F. Supp.2d 1197, 1207 (D. Haw. 2003) (amended complaint adding new defendants did not relate back to the date of the original complaint in wrongful death action where plaintiffs failed to show the requirements of Rule(c)(3) were met).

Moreover, Texas procedural law does not rescue the Zamoras' tort claim from the effect of limitations.[96] "Texas Civil Practice & Remedies Code section 16.068 (Vernon 1986) permits the amendment of pleadings after the statute of

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[93] *See* Plaintiffs' Motion to File Third Amended Petition for Writ of Habeas Corpus and Class Action Complaint, *Zamora-Garcia, et al. v. Tromski, et al.*, No. M-02-144, Dkt. 148 (S.D. Tex. Sept. 30, 2005). Plaintiffs' motion is little more than a pleading title, and it is not supported by any factual allegationsl or legal authority.

[94] Rule 4(m) allows 120 days for service of the summons and complaint unless an extension is obtained. See FED. R. CIV. P. 4(m).

[95] *See supra* at note 93.

[96] Under Federal Rule 15 (c)(1): "An amendment of a pleading relates back to the date of the original pleading when (1) relation back is permitted by the law that provides the statutes of limitations applicable to the date of the original pleading." FED. R. CIV. P. 15(c)(1). There is a split among the federal circuit courts as to whether state procedural rules or federal procedural rules govern the relation back principles set forth in Rule 15(c)(1). *See Oros v. Hull & Assocs.*, 217 F.R.D. 401, 404-05 (N.D.Ohio 2003) (discussing circuit split). In *McGregor v. Louisiana State Univ.*, 3 F.3d 850, 864-65 (5th Cir. 1993), the Fifth Circuit applied Louisiana procedural law in determining that the amended pleadings did not relate back to the original pleadings. As discussed above, neither the federal procedural rules, nor the Texas procedural rules, prevent limitations from barring the Zamoras' tort claim against Fairmont.

limitations has run to change 'the facts or grounds of liability or defense,' but this section does not authorize the addition of new defendants after the claims against them have been barred by limitation." *Cothrum Drilling Co. v. Partee*, 790 S.W.2d 796, 800 (Tex. App.—Eastland 1990, writ denied); *see also Koch Oil Co. v. Wilber*, 895 S.W.2d 854, 863 (Tex. App.—Beaumont 1995, writ denied) (amended pleadings do not prevent the running of the statute of limitations against parties who are added by amended pleadings); and *Leeds v. Cooley*, 702 S.W.2d 213, 215 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.) ("The statute of limitations is tolled at the time a party defendant is brought into the suit and not when the original pleading is filed."). Therefore, Plaintiffs' Aracely Zamora and Juana Zamora's claim for intentional infliction of emotional distress against Fairmont is barred by the applicable two-year statute limitation, and should be dismissed as a matter of law.

VIII. Conclusion

Irma Sandoval, Petra Carranza de Salinas, Alberta Rubio, and Miguel Rubio cannot establish the existence of a contractual relationship with Fairmont, or that they suffered any injury from Fairmont. As a result, these Plaintiffs do not have standing to assert causes of action against Fairmont, and this Court lacks jurisdictional power to hear and decide their claims under Article III, Section 2, Clause 1 of the U.S. Constitution, which restricts judicial power to "cases" and "controversies." Furthermore, without standing to sue Fairmont in their own right, Irma Sandoval and Petra Carranza de Salinas cannot sue Fairmont on behalf of the Indemnitor Notice Class and the Bonded Immigrant Class. Therefore, all

individual and class claims asserted by Ms. Sandoval, Ms. Salinas, and the Rubios against Fairmont must be dismissed as a matter of law.

Finally, Fairmont was added as a defendant to this lawsuit more than two years after Aracely and Juana Zamora's alleged cause of action for intentional infliction of emotional distress accrued. As such, Aracely and Juana Zamora's tort claim is barred by the statute of limitations. For these reasons, all claims in this lawsuit against Fairmont must be dismissed as a matter of law.

PRAYER FOR RELIEF

Defendant Fairmont Specialty Insurance Company, f/k/a Ranger Insurance Company ("Fairmont"), requests that the Court grant its motion, and enter a summary judgment in its favor, and dismiss all individual and class claims asserted against Fairmont with prejudice; and for such other and further relief, at law and in equity, as the Court deems just and appropriate.

Respectfully submitted,

Bradford W. Irelan by permission

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CERTIFICATE OF SERVICE

I hereby certify that on this the 6th day of September, 2007, a true and correct copy of the foregoing, *Defendant Fairmont's Motion for Summary Judgment*, was duly served in accordance with the Federal Rules of Civil Procedure on:

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