

- (a) those who served or are serving as Indemnitors on a surety bond posted by a Bonding Defendant to secure the release of a Bonded Immigrant detained by the Federal Defendants,³ and
- (b) who have fully paid their up-front, non-reimbursable fees to the Bonding Defendant pursuant to the terms of the bonding contracts, and
- (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/DHS⁴ had scheduled an appearance for deportation for the Bonded Immigrant, and where the Bonding Defendant did not provide notice of the requested appearance for deportation to either the Indemnitor or the Bonded Immigrant.

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

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

- (a) those who have been released from custody of the Federal Defendants pursuant to surety bonds posted by the Bonding Defendants, and
- (b) where the bond is outstanding.

(Doc. 139). De Salinas and the Bonded Immigrant Class (collectively, "Bonded Immigrant Plaintiffs") assert a cause of action for "equitable relief preventing breach of

³ "Federal Defendants" are Marc Moore, District Director for Interior Enforcement, Department of Homeland Security; and Michael Chertoff, Secretary, Department of Homeland Security. (Docs. 114, 150).

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

contract” against Bonding Defendants. (Docs. 114, 139). Bonded Immigrant Plaintiffs seek an injunction requiring Bonding Defendants, directly or through their agents, to make good faith efforts to provide actual, timely, and reasonable notice to Bonded Immigrant Plaintiffs and to the indemnitors on their bonds of any and all demands for performance made on those bonds by Federal Defendants. *Id.* Bonded Immigrant Plaintiffs also seek corresponding declaratory relief. *Id.*

Upon being granted leave to do so, Fairmont and Stonington amended their Answer to assert counterclaims for indemnity, recoupment, setoff, and attorneys’ fees against Plaintiff Sandoval. (Docs. 166, 174).⁵ More specifically, Sureties claim that Sandoval entered into two agreements that obligate her to indemnify Sureties for losses resulting from her father’s breach of his surety bond. (Doc. 174). Sureties therefore assert a counterclaim for the affirmative relief of indemnity from Sandoval for these losses as well as reasonable attorneys’ fees incurred while enforcing the indemnity provisions of the agreements. *Id.* Sureties also assert the defensive counterclaims of recoupment and/or set-off against Sandoval. *Id.*

II. Analysis

A. Motions for Summary Judgment

1. Standard of Review

A district court will grant summary judgment when there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). A fact is material if it might affect the outcome of the lawsuit under the governing law, and a fact is genuinely in dispute only if a reasonable jury could return a

⁵ The Court reserved ruling on whether to allow Sureties to assert these counterclaims against the individual members of the Indemnitor Notice Class. (Doc. 166).

verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A party moving for summary judgment has “the initial responsibility of informing the district court of the basis for its motion and identifying those portions of ‘the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any’ which it believes demonstrate the absence of a genuine issue of material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The burden then shifts to the non-movant to produce evidence or designate specific facts showing the existence of a genuine issue for trial. *Allen v. Rapides Parish Sch. Bd.*, 204 F.3d 619, 621 (5th Cir. 2000). At the summary judgment stage, the court “may not make credibility determinations or weigh the evidence” and must resolve doubts and reasonable inferences regarding the facts in favor of the non-moving party. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000); *Anderson*, 477 U.S. at 249; *Dean v. City of Shreveport*, 438 F.3d 448, 454 (5th Cir. 2006).

2. Plaintiff Sandoval’s Motion for Partial Summary Judgment

Plaintiff Sandoval, on her own behalf and on behalf of the Indemnitor Notice Class, moves for partial summary judgment on the issue of Sureties’ liability for their alleged breach of contract. (Doc. 179); *see* FED. R. CIV. P. 56(d)(2). In order to prevail on the motion, Sandoval must demonstrate that no genuine issues of material fact exist regarding the following elements of Indemnitor Plaintiffs’ breach of contract claims: (1) the existence of a valid contract between the parties; (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 Techs., 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). Upon review of Sandoval's motion and the parties' briefing and evidence (Docs. 179, 181, 199, 201, 205, 213, 273), the Court finds that genuine issues of material fact exist with respect to (1) whether a valid contract exists between Indemnitor Plaintiffs and Sureties through the application of ratification or agency principles; (2) whether Indemnitor Plaintiffs performed their obligations under the Terms and Conditions agreement; and (3) what type of notice was required under the Terms and Conditions Agreement and whether Sureties breached the notice provision in the agreement by uniformly failing to give the required notice, thereby causing damage to Indemnitor Plaintiffs.⁶ For these reasons, the Court must deny Sandoval's Motion for Partial Summary Judgment.

3. Plaintiff/Counter-Defendant Sandoval's Motion for Summary Judgment

Plaintiff/Counter-Defendant Sandoval moves for summary judgment on Sureties' counterclaims against her. (Doc. 180). Upon review of Sandoval's motion and the parties' briefing and evidence (Docs. 180, 181, 198, 207), the Court finds that genuine issues of material fact exist regarding whether Sureties can be held responsible for any breach of the notice provision of the Terms and Conditions agreement, and therefore whether Sandoval is excused from her obligations under the indemnity agreements. For these reasons, the Court must deny Sandoval's Motion for Summary Judgment.

⁶ If the responsible parties uniformly failed to provide the required notice to either Indemnitor Plaintiffs or the bonded immigrants, then Indemnitor Plaintiffs may recover what they paid to receive a service, *i.e.* notice, that was not provided. (Doc. 139). However, genuine issues of material fact exist regarding whether any Bonding Defendant provided the required notice.

B. Motion to Decertify

1. Standard of Review

Bonding Defendants move to decertify the Surety Bond Classes, claiming that developments in Fifth Circuit law and evidentiary developments in the case since the issuance of the Court's class certification order require reexamination of that order. (Doc. 249). Federal Rule of Civil Procedure 23(c)(1)(C) provides that "[a]n order that grants or denies class certification may be altered or amended before final judgment." Pursuant to this rule, the district court "remains free to modify [a class certification order] in the light of subsequent developments in the litigation." *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982). The Fifth Circuit has more specifically directed that

[u]nder Rule 23 the district court is charged with the duty of monitoring its class decisions in light of the evidentiary development of the case. The district judge must define, redefine, subclass, and decertify as appropriate in response to the progression of the case from assertion to facts.

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

2. Legal Developments

Bonding Defendants first attempt to argue that two recent Fifth Circuit decisions require the Court to again evaluate its decision to certify the Surety Bond Classes. (Doc. 249). According to Defendants, the decisions in *Oscar Private Equity Invs. v. Allegiance Telecom, Inc.*, 487 F.3d 261 (5th Cir. 2007) and *Luskin v. Intervoiced-Brite, Inc.*, 261 Fed.Appx. 697 (5th Cir. 2008), both issued after the Court's certification order, clarified that a party seeking certification must establish all requirements for class certification by a preponderance of the evidence even if those requirements bear on the merits of the case. *Id.* *Oscar* and *Luskin*, both securities fraud cases, held that a court may not rely upon the "fraud-on-the market" theory to presume that each class member has satisfied the reliance

element of his claim for the purpose of determining whether common issues predominate. *Oscar*, 487 F.3d at 264; *accord Luskin*, 261 Fed.Appx. at 700-01. Rather, the court must determine that this “loss causation” element of each class member’s substantive claim has been shown by a preponderance of the evidence in order to find that the “predominance” requirement of Federal Rule of Civil Procedure 23(b)(3) has been met. *See id.* Defendants maintain that these cases stand for the proposition that a district court must hold a party seeking certification to its burden regardless of whether the carrying of that burden implicates the merits of the case. (Doc. 249). However, the Court already recognized in its certification order that Plaintiffs bear the burden of establishing all of the applicable Rule 23 requirements. (Doc. 139 at p. 3). Defendants do not argue that the Court excepted Plaintiffs from this burden to avoid reaching the merits of the case. (Doc. 249).

3. Evidentiary Developments

The remainder of Bonding Defendants’ motion to decertify consists of arguments related to the establishment of the “predominance” requirement—that is, the requirement under Rule 23 that “questions of law or fact common to class members predominate over any questions affecting only individual members.” FED. R. CIV. P. 23(b)(3). Defendants claim that evidentiary developments in the case now mandate decertification of the Surety Bond Classes for failure to meet this requirement. (Doc. 249).

“The predominance inquiry requires a court to consider ‘how a trial on the merits would be conducted if a class were certified.’” *E.g., Gene & Gene LLC v. BioPay LLC*, 541 F.3d 318, 326 (5th Cir. 2008)(quoting *Bell Atl. Corp. v. AT&T Corp.*, 339 F.3d 294, 302 (5th Cir. 2003)). “This, in turn, ‘entails identifying the substantive issues that will

control the outcome, assessing which issues predominate, and then determining whether the issues are common to the class, a process that ultimately prevents the class from degenerating into a series of individual trials.” *Id.* Although similar to the “commonality” requirement of Rule 23(a)(2), the predominance requirement is “far more demanding” because it “tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.” *Id.* (quoting *Anchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623-24 (1997)).

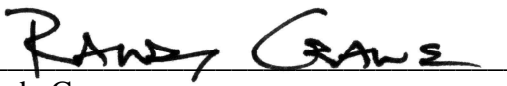
Given the above, a determination of whether the predominance requirement has been met requires an examination of the underlying cause of action. Again, the breach of contract cause of action asserted by each Surety Bond Class consists of the following elements: (1) the existence of a valid contract between the parties; (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.⁷ Upon review of Defendants’ motion and the parties’ briefing and evidence (Docs. 249, 269), the Court finds that many of the individual issues raised by Defendants appear to be irrelevant to the establishment of the elements of Plaintiffs’ causes of action. Moreover, to the extent that the issues raised by Defendants are relevant, they do not render trial on a class-wide basis unworkable at this time. However, the Court may alter or amend its certification decision at any time before judgment. Therefore, should the evidence at trial demonstrate that individual issues relevant to Plaintiffs’ causes of action predominate, the Court may reevaluate its certification decision at that time. *See In re Mounce*, 390 B.R. 233, 256 (Bankr. W.D.Tex. 2008)(citing FED. R. CIV. P. 23(c)(1)(C)).

⁷ For purposes of clarification, the Court notes that the Bonded Immigrant Class seeks equitable relief to prevent the breach and damages elements of this cause of action.

III. Conclusion

For the foregoing reasons, it is hereby **ORDERED** that Plaintiff Sandoval's Motions for Summary Judgment (Docs. 179, 180) and Bonding Defendants' Motion to Decertify (Doc. 249) are hereby **DENIED**.

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



Randy Crane
United States District Judge