

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
McALLEN DIVISION**

ARACELY ZAMORA-GARCIA, et al.,)
in their own name and right, and on)
behalf of all others similarly situated,)
Petitioners/Plaintiffs,)

v.)

MARC MOORE, DISTRICT)
DIRECTOR FOR INTERIOR)
ENFORCEMENT, DEPARTMENT OF)
HOMELAND SECURITY, et al.,)
Respondents/Defendants.)

C.A. No. M-05-331
JURY DEMAND

**PLAINTIFF/COUNTER-DEFENDANT IRMA SANDOVAL'S
MOTION FOR SUMMARY JUDGMENT AGAINST
STONINGTON AND FAIRMONT'S COUNTERCLAIMS**

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NOW COMES Plaintiff and counter-defendant Irma Sandoval Ibarra Valencia to move this honorable Court, pursuant to Federal Rule of Civil Procedure 56(b) and (c), for judgment against Fairmont Specialty Insurance Company and Stonington Insurance Company's counterclaims and claims of recoupment and setoff, and corresponding claims for attorney's fees (collectively, the "Counterclaims"), and for such other relief as this Court finds just and equitable.

INTRODUCTION

There are a variety of legal reasons, set forth herein, why this Court must enter judgment against Fairmont Specialty Insurance Company and Stonington Insurance Company's (the "Sureties") Counterclaims against plaintiff/counter-defendant Irma Sandoval. However, before addressing those reasons, it is worthwhile to consider the Sureties' Counterclaims in broader context. The undisputed evidence is that Ms. Sandoval has already paid the Bonding Defendants¹ \$1650—\$900 in fees and \$750 in collateral.² The penal amount of the bond Ms. Sandoval paid to have posted was \$1500.³ Thus, Ms. Sandoval has already paid \$150 *more* than the full amount of the bond. Now the Sureties seek even more from Ms. Sandoval. They have not specified how much they want to recover from Ms. Sandoval, but they note that the government billed them on Mr.

¹ Fairmont Specialty Insurance Company ("Fairmont") was formerly known as Ranger Insurance Company ("Ranger"). Stonington Insurance Company ("Stonington") was formerly known as Nobel Insurance Company ("Nobel"). Aaron Federal Bonding Agency was a d/b/a for Don Vannerson. Don Vannerson's immigration bonding business was briefly run by his son, Rodney Vannerson, after his death. Michael Padilla is the Independent Administrator of the Estate of Don Vannerson. Aaron Federal Bonding Agency, Don Vannerson, Rodney Vannerson, and Michael Padilla are collectively referred to herein as "Aaron Bonding." Aaron Bonding and the Sureties are collectively referred to herein as the "Bonding Defendants."

² See Sandoval Bond File at BF-0000251 (receipt for fees), BF-0000252-65 (receipts for collateral), BF-0000244 (sheet summarizing fees paid) (Ex. 1); Irma Sandoval Dep. at 29:2-30:8, 41:23-42:23 (Ex. 35). Unless otherwise noted, all exhibits are attached to the February 27, 2008, Declaration of J. Benjamin King, submitted herewith.

³ See Sandoval Bond File at BF-0000244, BF-0000224-25 (Immigration bond for Manuel Sandoval).

Sandoval's breached bond for \$1500 plus late fees.⁴ Ms. Sandoval having paid \$750 in collateral already, presumably the Sureties want at least an additional \$750 for a *total of \$2400 on a \$1500 bond*—plus attorney's fees. That is just outrageous.

However, Ms. Sandoval has no obligation to pay the Sureties a dime for two independent reasons. *First*, the Sureties failed to give notice of Mr. Sandoval's surrender date to either Ms. Sandoval or Mr. Sandoval, thereby materially increasing the risk that the indemnity obligation would be triggered. For this reason alone, Ms. Sandoval is relieved of the indemnity obligation. *See infra* Section I. *Second*, Nobel contractually agreed to provide Ms. Sandoval and Mr. Sandoval with notice of any surrender date. Nobel failed to provide notice of Mr. Sandoval's surrender date to either Ms. Sandoval or Mr. Sandoval, and its prior material breach excuses Ms. Sandoval's performance under the indemnity agreements. *See infra* Section II.

Finally, even if the Court does not grant Plaintiff judgment against the Sureties' Counterclaims, the equitable remedies of setoff and recoupment are not available to the Sureties because of their inequitable conduct. *See infra* Section III.

STATEMENT OF FACTS

1. Nobel contracted with Ms. Sandoval for the posting of a surety bond securing the release of her father, Manuel Sandoval, from INS detention, using the following documents:
 - A Nobel Receipt for Collateral Deposited.⁵
 - A Nobel Application for U.S. Immigration Bond.⁶
 - A Nobel U.S. Immigration Bond Indemnity Agreement (the "Nobel Indemnity

⁴ *See* Sureties' First Amended Answer and Counterclaim at 17-18 (Dkt. # 174).

⁵ *See* Sandoval Bond File at BF-0000232.

⁶ *See id.* at BF-0000232.

Agreement”).⁷

- A Promissory Note, obligating Ms. Sandoval to make monthly collateral payments to Aaron Bonding, along with a Spanish version of the Promissory Note.⁸
 - A Promissory Note obligating Ms. Sandoval to pay the full amount of the bond upon its breach.⁹
 - A U.S. Immigration Bonds & Services Indemnity Agreement, obligating Ms. Sandoval to indemnify Nobel in the event of a breach of the immigration bond (the “Additional Indemnity Agreement”).¹⁰
 - A Nobel Consent to Rate Application.¹¹
 - A Terms and Conditions Under Immigration Bond (the “Terms and Conditions agreement”).¹² This document contained the following provision (the “Notice Provision”): “PRINCIPAL and INDEMNITOR will be notified by AGENCY of all appearances requested by the U.S. IMMIGRATION AND NATURALIZATION SERVICE of which AGENCY receives notice.”
2. The Sureties have brought counterclaims in this litigation against Ms. Sandoval based on the Nobel Indemnity Agreement and the U.S. Immigration Bonds & Services Indemnity Agreement.¹³
 3. On June 6, 2002, Aaron Bonding received an I-340 for the surrender of Mr. Sandoval for deportation on July 5, 2002.¹⁴
 4. The Bonding Defendants historically did not provide notice of their receipt of an I-340 for deportation to, at least, the alien.¹⁵ Neither Nobel nor Aaron Bonding provided notice of Mr. Sandoval’s appearance date for deportation to either Mr. or

⁷ See *id.* at BF-0000241.

⁸ See *id.* at BF-0000236 (English), BF-00002336 (Spanish).

⁹ See *id.* at BF-0000239.

¹⁰ See *id.* at BF-0000240.

¹¹ See *id.* at BF-0000237.

¹² See *id.* at BF-0000238.

¹³ See Sureties’ First Amended Answer at ¶ 113 (Dkt. # 174).

¹⁴ See *id.*

¹⁵ See Order Granting in Part and Denying in Part Plaintiffs’ Motion to Certify Surety Bond Classes (Apr. 25, 2007) (“Surety Bond Class Order”) at 20 (Dkt. # 139); Petition for Leave to File an Interlocutory Appeal Under Fed. R. Civ. P. 23(f) at 1 (“The bonding ‘agency’ concedes it followed a policy of withholding notice of deportation from the alien.”) (Ex. 28).

Ms. Sandoval.¹⁶

5. If Mr. Sandoval had received notice of his July 5, 2002, surrender date, he would have timely filed a petition in federal district court to prevent a breach of his bond.¹⁷ If Ms. Sandoval had received notice of her father's July 5, 2002, surrender date, she would have made sure he timely appeared, and his bond would not have been breached.¹⁸

ARGUMENT

Pursuant to Federal Rule of Civil Procedure 56(c), a district court should render judgment for the moving party "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Here, the undisputed facts in this case demonstrate that Ms. Sandoval is entitled to summary judgment on the Sureties' Counterclaims.

I. BECAUSE NOBEL MATERIALLY INCREASED THE RISK THAT THE INDEMNITY OBLIGATION WOULD BE TRIGGERED, MS. SANDOVAL'S INDEMNITY OBLIGATION IS DISCHARGED.

"[A]ny act on the part of an indemnitee which materially increases the risk, or prejudices the rights, of the indemnitor, will discharge the indemnitor under the contract of indemnity."¹⁹ Here, on June 4, 2002, the INS informed the Sureties, through Aaron

¹⁶ See Manuel Sandoval Declaration (Sept. 20, 2002) (Ex. 16 to the January 25, 2008 Declaration of Elisaveta Dolghih, Dkt. # 172); Manuel Sandoval-Herrera's First Amended Objections and Responses to Defendants' First Set of Interrogatories at Resp. 9 (no notice of his surrender date from Aaron Bonding), Resps. 10-11 (no notice from any source of his surrender date) (Ex. 36); Irma Sandoval Declaration (Sept. 20, 2002) (Ex. 14 to the January 25, 2008 Declaration of Elisaveta Dolghih, Dkt. # 172); Irma Sandoval Ibarra Valencia's First Amended Objections and Responses to Defendants' First Set of Interrogatories at Resp. 8 (Ex. 37) (no notice of Mr. Sandoval's surrender date from Aaron Bonding), Resps. 9-10 (no notice from any source of Mr. Sandoval's surrender date).

¹⁷ See Manuel Sandoval Decl. (Sept. 20, 2002) (Ex. 16 to the January 25, 2008 Declaration of Elisaveta Dolghih, Dkt. # 172).

¹⁸ See I. Sandoval Dep. at 45 ("Q: If you had known that he had to go, would you have made sure that he did go? A: Yes. Q: And if you asked your father to go, would he have gone? A: Yes.") (Ex. 35).

¹⁹ *Hiern v. St. Paul Indem. Co.*, 262 F.2d 526, 529-30 (5th Cir. 1959); see also *Am. Casualty Co. of Reading, Penn. v. Idaho First Nat'l Bank*, 328 F.2d 138, 142-43 (9th Cir. 1964) (same); *New Amsterdam Casualty Co. v. Lundquist*, 293 Minn. 274, 283-84, 198 N.W.2d 543, 549 (1972) (same).

Bonding, that the INS had scheduled a surrender date for Mr. Sandoval's deportation for July 5, 2002.²⁰ The evidence is undisputed that the Sureties—whether through Aaron Bonding or directly—did not provide either Ms. Sandoval or Mr. Sandoval with notice of this surrender date.²¹ This failure to provide notice is consistent with the Bonding Defendants' practice of not providing notice of deportation dates to, at least, the aliens released on their appearance bonds.²²

It is undisputed that the Sureties depended on Aaron Bonding for any and all interaction with the Indemnitors and the aliens, including Ms. Sandoval and Mr. Sandoval. The corporate representative for Nobel/Stonington testified as follows:

Q. Did Nobel have any direct interaction with any other person?

A. With whom?

Q. With indemnitors. So did Nobel rely on Mr. Vannerson to take care of any interaction with the indemnitors?

A. Yes.

Q. Did Nobel rely on Mr. Vannerson to take care of any interaction with the aliens as well?

A. Yes.²³

The same was true for Ranger/Fairmont:

Q. Okay. So, Ranger relied on Mr. Vannerson to take care of any interaction with the indemnitors that was necessary?

²⁰ See Statement of Fact 3, *supra*.

²¹ See Statement of Fact 4, *supra*.

²² See *id*.

²³ See Ramos Dep. at 55:6-14 (Ex. 7 to the January 25, 2008 Declaration of Elisaveta Dolghih (Dkt. # 170, under seal)).

A. That was the agreement.

Q. And did Ranger also rely on Mr. Vannerson to take care of any interaction with the aliens that was necessary?

A. That's a fair statement.²⁴

Nobel's failure—through Aaron Bonding or otherwise—to provide Mr. and Ms. Sandoval of Mr. Sandoval's surrender date “materially increase[d] the risk” that Ms. Sandoval's indemnity obligation would be triggered by a breach of the bond.²⁵ Nobel was provided with the critical information on which Ms. Sandoval's ability to protect herself against the breach of the bond depended—the date Mr. Sandoval was to appear for deportation. Yet Nobel failed to pass this information along to either Ms. Sandoval or her father. It thus increased the risk that the bond would be breached, and Ms. Sandoval's indemnity obligation is discharged.

The Sureties may claim that a question of fact exists as to whether Aaron Bonding sent a bounty hunter to apprehend Mr. Sandoval at the address they had for him shortly before Mr. Sandoval's surrender date. Whether or not this happened is irrelevant. Nobel—either directly or through its designated agent—knew of Mr. Sandoval's surrender date for *thirty days* before that date, and waiting until the day before or the day of Mr. Sandoval's surrender date to try to apprehend him (if in fact Aaron Bonding did so prior to the surrender date), rather than notifying Ms. Sandoval and Mr. Sandoval within a reasonable time after its own notice, “materially increase[d] the risk” that the bond would breach. Not only did failing to provide notice increase the risk of a bond breach, but also failing to do so within a reasonable time after receiving the I-340 was a failure to

²⁴ See Klimaszewski Dep. at 39:15-40:5 (Ex. 8 to the January 25, 2008 Declaration of Elisaveta Dolghih (Dkt. # 170, under seal)).

²⁵ See footnote 19, *supra*, and accompanying text.

“act in good faith” that would discharge the indemnity obligation.²⁶ Nobel can provide no reason why it should just sit on this critical information, rather than passing it along to the Sandovals.

Finally, whether or not the failure to provide notice caused the breach of Mr. Sandoval’s bond is irrelevant because the failure to provide notice robbed Ms. Sandoval of the opportunity to prevent a breach of the bond.²⁷ However, even if proof of causation were required to discharge the indemnity obligation, the undisputed evidence here demonstrates that Mr. Sandoval’s bond was breached because of the lack of notice.²⁸ Both Mr. and Ms. Sandoval have confirmed this fact, and there is no contrary evidence whatsoever. Thus, to the extent causation is relevant, the failure to provide notice caused the breach of Mr. Sandoval’s bond.

As discussed below, Nobel, through its agent Aaron Bonding, contractually agreed to provide notice of Mr. Sandoval’s surrender date to Mr. and Ms. Sandoval, the breach of which agreement excused Ms. Sandoval’s payment of any indemnity. However, this Court need not even reach the issue of whether Aaron Bonding was Nobel’s agent or whether Nobel is bound by the Notice Provision in the Terms and Conditions agreement to resolve this motion for summary judgment. Apart from the

²⁶ *Gen. Ins. Co. of Am. v. Fleeger*, 389 F.2d 159, 160–61 (5th Cir. 1968).

²⁷ For example, in *Rochelle Bail Agency, Inc. v. Maryland Nat’l Ins. Co.*, 484 F.2d 877 (7th Cir. 1973), a bail bondsman obtained an indemnity agreement from an insurer (Maryland National Ins. Co.) by which the insurer agreed to indemnify the bondsman in the event of a breach of a criminal bond. *See id.* at 878. (Separately, the bond posted was backed by a surety, Cosmopolitan Mutual Ins. Co. *See id.*) The bondsman failed to exercise minimal supervision over the criminal released on bond. *See id.* By failing to exercise minimal supervision, the bondsman “materially increased [the insurer’s] risks under the indemnity agreement, thereby discharging [the insurer] from its obligations thereunder.” *Id.* In so ruling, the court did not find that the bondsman’s failure to supervise the criminal caused the breach of the bond. Rather, the failure to supervise merely increased the insurer’s risk under the indemnity agreement, thereby extinguishing the indemnity obligation. *See id.* at 878, 879.

²⁸ *See supra* Statement of Fact 5.

Notice Provision, Nobel materially increased the likelihood of a breach of the bond and dealt with Ms. Sandoval in bad faith, and for this reason alone, her indemnity obligation is discharged.

II. NOBEL'S FAILURE TO PROVIDE NOTICE OF MR. SANDOVAL'S SURRENDER DATE TO BOTH MR. SANDOVAL AND MS. SANDOVAL WAS A PRIOR MATERIAL BREACH OF CONTRACT THAT EXCUSED MS. SANDOVAL'S FURTHER PERFORMANCE.

Plaintiff demonstrated in her Motion for Partial Summary Judgment on her Claims and the Indemnitor Notice Class Claims Against Stonington and Fairmont that the Sureties are bound by the Notice Provision in the Terms and Conditions agreement and that Nobel breached the Notice Provision in failing to provide Mr. and Ms. Sandoval with notice of his surrender date for deportation.²⁹ Plaintiff incorporates that briefing here by reference.

Because of Nobel's prior material breach of the bonding contract between it and Ms. Sandoval, Ms. Sandoval is excused from her payment of any indemnity to Nobel. The breach of a material provision in a contract excuses or discharges the other party from further performance.³⁰ A material contract provision is one "that the parties reasonably regarded, at the time of contracting, as a vitally important ingredient in their bargain."³¹ Here, the Notice Provision is one of the central terms of the bonding contracts—it is the provision that protects the Indemnitor from having to pay out on the indemnification obligation. The Notice Provision was thus a "vitally important

²⁹ See Plaintiff Irma Sandoval's Motion for Partial Summary Judgment on her Claims and the Indemnitor Notice Class Claims Against Stonington and Fairmont (Feb. 27, 2008) at Sections II-V.

³⁰ See Surety Bond Class Opinion at p. 22 (noting that, under Texas law, "a party's material breach of contract . . . discharges or excuses the other party from further performance" and citing cases).

³¹ See *Neely v. Bankers Trust Co. of Tex.*, 757 F.2d 621, 628 (5th Cir. 1985); *Potcinske v. McDonald Prop. Invs., Ltd.*, -- S.W.3d --, 2007 WL 1717002, at *5 (Tex. App.-Houston June 15, 2007).

ingredient” in the bargain between Ms. Sandoval and Nobel, and the breach of that material provision relieved Ms. Sandoval of any obligation to indemnify Nobel.

III. NOBEL’S INEQUITABLE CONDUCT PRECLUDES IT FROM OBTAINING AN AWARD OF SETOFF OR RECOUPMENT.

Claims of setoff and recoupment are equitable remedies unavailable to a defendant who comes to court with “unclean hands.”³² Whether or not setoff and recoupment are available is a decision committed to the discretion of the trial court.³³

Because recoupment and setoff are equitable remedies, the Sureties’ own inequitable conduct, discussed at length above and in Plaintiff’s companion motion for partial summary judgment, bars them from benefiting from those remedies.

- Stonington (through its agent, Aaron Bonding) contracted with Ms. Sandoval to provide her and her father with notice of any surrender date for him, knowing that it would not provide that notice.
- Stonington willfully refused to provide notice of Mr. Sandoval’s surrender date to Ms. Sandoval and Mr. Sandoval. By so failing, Stonington put at risk Ms. Sandoval’s ability to prevent a breach of the bond and Mr. Sandoval’s immigration rights.³⁴
- Stonington charged Ms. Sandoval \$900 in fees and \$750 in collateral on a \$1500 bond. They now seek at least \$750 more on Ms. Sandoval’s indemnity obligations. Stonington has engaged in predatory overcharging of a poor person in a vulnerable situation.
- Through Aaron Bonding, Stonington charged Ms. Sandoval fees equal to 60% of the penal amount of Mr. Sandoval’s bond. However, under Texas law, Stonington could only charge 20% of the penal amount of the bond—

³² See *Davis v. U.S.*, No. CA 4-2430, 1977 WL 1172 at *5 (N.D. Tex. Apr. 12, 1977) (recoupment); *F.D.I.C. v. Texarkana Nat’l Bank*, 874 F.2d 264, 269 (5th Cir. 1989) (setoff an equitable right); *In re Cascade Roads, Inc.*, 34 F.3d 756, 762-64 (9th Cir. 1994) (denying setoff where claimant acted inequitably); *F.D.I.C. v. Bank of Am. Nat. Trust and Sav. Ass’n*, 701 F.2d 831, 836-37 (9th Cir. 1983) (same); *Citizens Indus. Bank of Austin v. Oppenheim*, 118 S.W.2d 820, 822 (Tex. Ct. Civ. App. 1938).

³³ *Shen v. Leo A. Daly Co.*, 222 F.3d 472, 478 (8th Cir. 2000); *Buder v. U.S.*, 436 F.3d 936, 938 (8th Cir. 2006).

³⁴ See Expert Report of Jodi Goodwin (detailing impact the failure of a bond company to provide notice of a surrender date for deportation on aliens released on surety bonds) (Ex. 38).

the rate approved by the Texas Department of Insurance.³⁵

- Fairmont has engaged in materially identical conduct with respect to the other indemnitors with which it contracted.

By participating in this misconduct directly or by employing an agent who did so, the Sureties have forfeited their right to any sort of equitable relief. Allowing the Sureties to defeat or reduce Ms. Sandoval's recovery through an equitable doctrine would be the height of inequity.

CONCLUSION

For all the reasons stated above, Plaintiff respectfully requests that this Court grant summary judgment against the Sureties' Counterclaims.

Date: Feb. 27, 2008.

Respectfully submitted,



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³⁵ See Plaintiff Irma Sandoval's Motion for Partial Summary Judgment on Her Claims and the Indemnitor Notice Class Claims Against Fairmont and Stonington (Feb. 27, 2008) at Section VI.

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CERTIFICATE OF SERVICE


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

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