UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	**ED CV 12-1646 FMO (SPx)**	Date	**March 7, 2014**
Title	**Extradition Transport of America, LLC v. Houston Casualty Co., Inc., et al.**		

Present: The Honorable	Fernando M. Olguin, United States District Judge	
Vanessa Figueroa	None	None
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorney Present for Plaintiff(s):	Attorney Present for Defendant(s):
None Present	None Present

Proceedings: (In Chambers) Order Re: Pending Motion

Having reviewed and considered all the briefing filed with respect to the Motion for Summary Judgment filed by Defendant Houston Casualty Company, Inc., ("Motion") the court concludes that oral argument is not necessary and orders as follows. See Fed. R. Civ. P. 78; Willis v. Pac. Mar. Ass'n, 244 F.3d 675, 684 n. 2 (9th Cir. 2001).

INTRODUCTION

This case arises out of the escape of prisoner Joseph Matthew Megna ("Megna") while being transported from Florida to the state of Washington by Extradition Transport of America, LLC ("ETA") on October 4, 2011. A manhunt ensued, and Megna was captured the next day.

On or about June 12, 2012, the United States (the "government") filed a complaint against ETA in the United States District Court for the District of North Dakota (No. 3:12-cv-00046-KKK) (the "underlying action"). The United States made claim to recover damages, including costs it incurred to capture and return Megna. In addition, the government sought penalties pursuant to the Interstate Transportation of Dangerous Criminals Act of 2000, 42 U.S.C. § 13726 et seq., and related regulations, see 28 C.F.R. Pt. 97, "Standards for Private Entities Providing Prisoner of Detainee Services" (collectively "Jeanna's Act").

Houston Casualty Company ("HCC") insured ETA at the time of Megna's escape. ETA tendered the defense of the underlying action to HCC. HCC agreed to defend ETA in the underlying action under a reservation of rights. In an October 20, 2011, reservation of rights letter, HCC reserved its rights to deny the government's claim based on statements made by ETA in which it arguably appeared to volunteer that its insurer would cover costs associated with Megna's escape. HCC also reserved its rights to deny any portion of the government's claim that relate to penalties sought under Jeanna's Act, since the insurance policy's definition of "Damages" does not include penalties.

On August 28, 2012, ETA ("plaintiff") filed a complaint ("Complaint") against HCC et. al. for declaratory relief seeking independent counsel ("Cumis counsel") for ETA. On March 4, 2013,

defendant HCC filed the instant Motion, seeking to establish that a conflict sufficient to trigger a right to independent counsel for ETA does not exist here. The Motion was accompanied by: (1) Statement of Undisputed Facts and Genuine Issues in Support of Motion for Summary Judgment; (2) Declaration Part 1 - Declaration of Erica J. Bachmann and Declaration Part 2 - Declaration of Erica J. Bachmann (collectively "Bachmann Decl."); and (3) Request for Judicial Notice ("RJN").[1] ETA filed its Memorandum of Points and Authorities in Opposition to Defendant's Motion for Summary Judgment ("Opposition") on April 3, 2013. The Opposition was accompanied by: (1) Declaration of David Jafari ("Jafari Decl."); (2) Statement of Genuine Disputes; and (3) Proposed Order. On April 22, 2013, defendant HCC filed its Reply in Support of Motion for Summary Judgment ("Reply"), which was accompanied by: (1) Reply to Statement of Genuine Disputes and (2) Proposed Order.[2]

SUMMARY OF FACTS

Except as noted below, the following facts are undisputed:

ETA purchased from HCC a Criminal Justice Systems Operations Insurance Policy (No. H5-11-50501) (the "Policy"). (See Complaint at ¶ 3). The Policy was in effect from April 24, 2011 to April 24, 2012. (See Bachmann Decl. at ¶ 2 & Exh. A; SUF No. 1).

On or about October 4, 2011, ETA was in the process of transporting Megna when Megna escaped. (See Complaint at ¶ 8). Megna was captured the next day. (See id.).

On October 10, 2011, Barnes County North Dakota Sheriff's Department (the "Sheriff') submitted a claim via e-mail to HCC (the "Claim"), seeking expenses associated with the capture and return of Megna. (See Bachmann Decl. at ¶¶ 3 & 4; SUF No. 2).

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[1] HCC asks the court to take judicial notice of the complaint filed by the United States in the underling action. (See RJN Exh. 1). Under the Federal Rules of Evidence, "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). "A court shall take judicial notice if requested by a party and supplied with the necessary information." Fed. R. Evid. 201(d). "[A] court may take judicial notice of matters of public record, including duly recorded documents, and court records available to the public through the Pacer system via the internet." Peviani v. Hostess Brands, Inc., 750 F. Supp. 2d 1111, 1116 (C.D. Cal. 2010) (internal quotations marks and citations omitted). Therefore, the court grants HCC's request for judicial notice and takes judicial notice of the complaint filed in the underlying action.

[2] The court will reference Document No. 26 for the parties' most complete statement of undisputed facts and genuine disputes ("SUF").

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In a letter dated October 20, 2011, HCC agreed to defend ETA subject to a reservation of rights. (See Bachmann Decl. at ¶ 5 & Exh. C; SUF No. 3). The October 20, 2011, letter identified the following coverage issues: (1) there is no coverage for any voluntarily assumed promise of payments by ETA and (2) there is no coverage for penalties sought by the government. (See Bachmann Decl. at ¶ 5 & Exh. C; SUF Nos. 3 & 4). HCC notified ETA that "[n]ews reports indicate a conference call between the sheriff's departments in Barnes and Cass counties, the state highway patrol and [ETA] was held on October 7, 2011 in which [ETA] agreed that its insurance should cover the expenses incurred during the search." (Bachmann Decl. at ¶ 5 & Exh. C; SUF No. 14). This statement is the basis for HCC's assertion of the "no voluntary payment" clause in the policy. (See Bachmann Decl., Exh. C; SUF No. 14).

On March 15, 2012, the United States issued a demand letter to ETA, in an attempt to settle the Claim. (See Bachmann Decl. at ¶ 6 & Exh. D; Jafari Decl., Exh. 1 at 1-6; SUF No. 5).[3] This letter was shared with HCC. (See Bachmann Decl. at ¶ 6 & Exh. D; Jafari Decl., Exh. 1 at 1-6; SUF No. 5). The settlement demand included costs that were allegedly incurred during the search and detention of Megna in addition to penalties for the alleged violation of the Jeanna's Act.[4] (See Bachmann Decl. at ¶ 6 & Exh. D; Jafari Decl., Exh. 1 at 1-6; SUF No. 5). The March 15, 2012, demand letter to ETA states that "[b]ased on the information currently available, the United States contends ETA has committed a minimum of three violations of Jeanna's Act, which, in whole or in part, resulted in Megna's escape in North Dakota." (See Jafari Decl., Exh. 1 at 4). The letter further states that "[i]t is anticipated that further investigation of the facts and circumstances surrounding the transport, the escape, the status of the other prisoners and the operations of ETA would result in the discovery of other violations of Jeanna's Act, resulting in additional liability for ETA with respect to civil penalties." (Id. at 4 & 5). The letter also states that

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[3] Page citations to Jafari Declaration are to the individual exhibit or document.

[4] The applicable regulations under the Jeanna's Act provide, in relevant part, that:

> Any person who is found in violation of the regulations in this part will:
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> (a) Be liable to the United States for a civil penalty in an amount not to exceed $10,000 for each violation;
> (b) Be liable to the United States for the costs of prosecution; and
> (c) Make restitution to any entity of the United States, of a State, or of an inferior political subdivision of a State, that expends funds for the purpose of apprehending any violent prisoner who escapes from a prisoner transport company as the result, in whole or in part, of a violation of the regulations in this part promulgated pursuant to the Act.

28 C.F.R. § 97.30. The parties dispute whether the penalties attach automatically under the Jeanna's Act. (See Motion at 7; Opposition at 3).

the government was willing to settle the matter on the following terms:

> (1) Payment of restitution and other losses by ETA directly to designated parties, or as otherwise directed by this Office, the claimed amount being $97,790.562;
> (2) An additional payment of $20,000.00, constituting Civil Monetary Penalties;
> (3) Execution of, and compliance with, the enclosed Settlement Agreement; and
> (4) Execution of the enclosed Consent to Judgment, to be filed with the Court in conjunction with the enclosed Complaint.

(Id. at 5). Finally, the letter specifies that "[i]f settlement is not reached on the terms and conditions proposed, it is the intent of the United States to file suit, conduct discovery and enforce Jeanna's Act to the fullest extent of the law." (Id. at 6).

HCC sent ETA an e-mail, dated April 11, 2012, to inquire about ETA's position regarding the fines. (See Bachmann Decl. at ¶ 7 & Exh. E; SUF No. 6). The next day, April 12, 2012, HCC sent a follow-up email, urging ETA to retain independent counsel because the "claim involves potential uncovered exposure." (See Bachmann Decl. at ¶ 7 & Exh. F; SUF No. 6).

On April 30, 2012, HCC sent ETA another letter, "supplement[ing]" HCC's October 20, 2011, letter and April 11, 2012, email, relating to the Claim. (See Bachmann Decl. at ¶¶ 8, 9 & Exh. G; SUF No. 7). This correspondence repeated HCC's reservations of rights. (See Bachmann Decl. at ¶¶ 8, 9 & Exh. G; SUF No. 7). HCC once again urged ETA to retain independent counsel to evaluate exposure presented by the penalties not covered under the Policy. (See Bachmann Decl. at ¶¶ 8, 9 & Exh. G; SUF No. 7).

The Claim did not settle, and the government filed a lawsuit against ETA on June 11, 2012. (See RJN, Exh. 1 at 11; SUF No. 8). The government sought costs that were incurred during the search and detention of prisoner Megna as well as penalties for alleged violations of the Jeanna's Act. (See RJN, Exh. 1; SUF No. 8). The government's complaint states that "[p]ursuant to 28 C.F.R. § 97.30, as a result of Defendant's violation of 28 C.F.R. § [97.16, 97.17, and 97.20], Defendant is liable to the United States for a civil penalty in an amount not to exceed $10,000 for each violation." (See RJN, Exh. 1 at ¶¶ 36 (28 C.F.R. § 97.16), 41 (28 C.F.R. § 97.17), & 46 (28 C.F.R. § 97.20)).

ETA retained David Jafari ("Jafari") to represent it in the underlying action. (See Jafari Decl. at ¶ 2; SUF No. 11). In said capacity, Jafari acts as the liaison between ETA and HCC's panel counsel, Chris Nyhus ("Nyhus"), who controls the underlying action. (See Jafari Decl. at ¶ 2; SUF No. 11).

On June 25, 2012, HCC sent another letter to ETA, stating that it would retain counsel to

defend ETA against the civil lawsuit filed by the government, under a reservation of rights. (See Bachmann Decl. at ¶ 10 & Exh. H; SUF No. 9). Again, HCC reiterated the coverage issues raised by the Claim. (See Bachmann Decl. at ¶¶ 10-11 & Exh. H; SUF No. 9). HCC urged ETA to retain independent counsel to assist it in resolving the uncovered exposure, now that a lawsuit had been filed against ETA. (See Bachmann Decl. at ¶¶ 10-11 & Exh. H; SUF No. 9).

On July 9, 2012, HCC sent another letter to ETA. (See Bachmann Decl. at ¶ 12 & Exh. I; SUF No. 10). This letter supplemented HCC's prior reservation of rights letters. (See Bachmann Decl. at ¶ 12 & Exh. I; SUF No. 10). HCC notified ETA that it retained defense counsel to defend ETA in the underlying action. (See Bachmann Decl. at ¶ 12 & Exh. 10; SUF No. 10). HCC reiterated its prior coverage issues. (See Bachmann Decl. at ¶ 12 & Exh. 10; SUF No. 10). HCC once again urged ETA to retain independent counsel to assist with resolving uncovered exposure. (See Bachmann Decl., Exh. 10).

ETA's panel counsel, Nyhus, has been in settlement discussions with the government throughout the entire case. (See Jafari Decl. at ¶ 3; SUF No. 12). The parties dispute whether the settlement amount can be allocated between penalties and damages. (See Jafari Decl., Exh. 2; Opposition at 5; Reply at 2, 6, & 7; SUF Nos. 12 & 13). The parties also dispute whether the main stumbling block for settling the underlying case has become how much of the settlement should be allocated to penalties. (See Jafari Decl., Exh. 2; Opposition at 5; Reply at 2, 6, & 7; SUF Nos 12 & 13).

On January 30, 2013, Nyhus sent Jafari an e-mail stating that the United States Attorney "would contemplate a settlement of $10,000.00 for penalties." (See Jafari Decl., Exh. 2 at 2).

On July 23, 2012, ETA's counsel sent a letter to HCC asserting that HCC has a duty to assign independent counsel to ETA based on conflict of interest faced by HCC's panel counsel and demanding that HCC assign independent counsel to ETA. (See Jafari Decl. ¶ 8 & Exh. 3; SUF No. 15). HCC refused. (See Jafari Decl. ¶ 8).

STANDARD OF REVIEW

Rule 56(a) of the Federal Rules of Civil Procedure authorizes the granting of summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." The standard for granting a motion for summary judgment is essentially the same as for granting a directed verdict. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S.Ct. 2505, 2511 (1986). Judgment must be entered "if, under the governing law, there can be but one reasonable conclusion as to the verdict." Id.

Where the moving party bears the burden of proof on the claim at trial, "it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial." Houghton v. South, 965 F.2d 1532, 1536 (9th Cir. 1992) (quotations and citations omitted); see also Fontenot v. Upjohn Co., 780 F.2d 1190, 1194 (5th Cir. 1986) ("[I]f the

movant bears the burden of proof on an issue, either because he is the plaintiff or as a defendant he is asserting an affirmative defense, he must establish beyond peradventure all of the essential elements of the claim or defense to warrant judgment in his favor."); Anderson, 477 U.S. at 252, 106 S.Ct. at 2512 (parties bear the same substantive burden of proof as would apply at a trial on the merits). A party that bears the burden of proof has the burden of establishing a prima facie case on its motion for summary judgment. See UA Local 343 United Ass'n of Journeymen & Apprentices of Plumbing and Pipefitting Indus. of U.S. and Can., AFL-CIO v. Nor-Cal Plumbing, Inc., 48 F.3d 1465, 1471 (9th Cir. 1994).

If the moving party does not bear the burden of proof at trial, it has the initial burden of identifying relevant portions of the record that demonstrate the absence of a fact or facts necessary for one or more essential elements of each cause of action upon which the moving party seeks judgment. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553 (1986). A factual dispute is material only if it affects the outcome of the litigation and requires a trial to resolve the parties' differing versions of the truth. SEC v. Seaboard Corp., 677 F.2d 1301, 1305-06 (9th Cir. 1982). If the moving party has sustained its burden, the burden then shifts to the nonmovant to identify specific facts, drawn from materials in the file, that demonstrate that there is a dispute as to material facts on the elements that the moving party has contested. Celotex, 477 U.S. at 324, 106 S.Ct. at 2553. Summary judgment must be granted for the moving party if the nonmoving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322, 106 S.Ct. at 2552.

A party opposing a properly supported motion for summary judgment "must set forth specific facts showing that there is a genuine issue for trial."[5] Anderson, 477 U.S. at 256, 106 S.Ct. at 2514. A factual dispute is material only if it affects the outcome of the litigation and requires a trial to resolve the parties' differing versions of the truth. SEC v. Seaboard Corp., 677 F.2d 1301, 1306 (9th Cir. 1982). If the moving party fails to carry its initial burden of production, "the nonmoving party has no obligation to produce anything." Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc., 210 F.3d 1099, 1102-03 (9th Cir. 2000).

In determining whether a triable issue of material fact exists, the evidence must be considered in the light most favorable to the nonmoving party. Barlow v. Ground, 943 F.2d 1132, 1134 (9th Cir. 1991), cert. denied, 505 U.S. 1206 (1992). However, summary judgment cannot be avoided by relying solely on "conclusory allegations [in] an affidavit." Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 888, 110 S.Ct. 3177, 3188 (1990); see also Matsushita Elec. Indus. Co. v.

[5] "In determining any motion for summary judgment or partial summary judgment, the Court may assume that the material facts as claimed and adequately supported by the moving party are admitted to exist without controversy except to the extent that such material facts are (a) included in the 'Statement of Genuine Disputes' and (b) controverted by declaration or other written evidence filed in opposition to the motion." Local Rule 56-3.

Zenith Radio Corp., 475 U.S. 574, 586, 106 S.Ct. 1348, 1356 (1986) (more than a "metaphysical doubt" is required to establish a genuine issue of material fact). "The mere existence of a scintilla of evidence in support of the plaintiff's position" is insufficient to survive summary judgment; "there must be evidence on which the [fact finder] could reasonably find for the plaintiff." Anderson, 477 U.S. at 252, 106 S.Ct. at 2512.[6]

With these standards in mind, the court now turns to the arguments raised by defendant in its Motion.

DISCUSSION

California Civil Code § 2860 provides, in relevant part, that "when an insurer reserves its rights on a given issue and the outcome of that coverage issue can be controlled by counsel first retained by the insurer for the defense of the claim, a conflict of interest may exist." Cal. Civ. Code § 2860(b) (emphasis added). Civil Code § 2860 does not purport to address all conflicts that may arise. See Gafcon, Inc. v. Ponsor & Associates, 98 Cal.App.4th 1388, 1421, review denied (2002). "The language of Civil Code section 2860 does not preclude judicial determination of conflict of interest and duty to provide independent counsel such as was accomplished in Cumis so long as that determination is consistent with the section." Id. (internal quotation marks and citation omitted).

Not every reservation of rights creates a conflict of interest requiring independent counsel. See Dynamic Concepts v. Truck Ins. Exch., 61 Cal.App.4th 999, 1006, review denied (1998).[7] "[W]here the reservation of rights is based on coverage disputes which have nothing to do with the issues being litigated in the underlying action, there is no conflict of interest requiring independent counsel." Gafcon, 98 Cal.App.4th at 1422 (internal quotation and citation omitted).

There are a number of circumstances that may create a conflict of interest requiring the insurer to provide independent counsel, including:

(1) where the insurer reserves its rights on a given issue and the outcome of

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[6] The court "may grant summary judgment motions touching upon contract interpretation when the agreement is unambiguous." S. Cal. Gas Co. v. City of Santa Ana, 336 F.3d 885, 889 (9th Cir. 2003). "Ambiguity is a question of law for the court." Id. (citation omitted).

[7] California courts have warned that "*Cumis* can be read to suggest that a conflict arises whenever the insurer asserts a reservation of its right to assert noncoverage, while still providing a defense to the liability action." See Gafcon, 98 Cal.App.4th at 1421-22 (internal quotation marks and citation omitted). However, "[t]his interpretation of *Cumis* would be erroneous." Id. (citation omitted).

> that coverage issue can be controlled by the insurer's retained counsel; . . . (4) where the insurer pursues settlement in excess of policy limits without the insured's consent and leaving the insured exposed to claims by third parties; and (5) any other situation where an attorney who represents the interests of both the insurer and the insured finds that his or her representation of the one is rendered less effective by reason of his [or her] representation of the other.

James 3 Corp. v. Truck Ins. Exchange, 91 Cal.App.4th 1093, 1101 & 1102 (2001) (emphasis in the original) (internal quotation marks and citations omitted). Moreover, for independent counsel to be required, the conflict of interest must be "significant, not merely theoretical, actual, not merely potential." Dynamic Concepts, 61 Cal.App.4th at 1007.

Here, the parties dispute whether HCC's reservation of rights gives rise to a conflict of interest sufficient to trigger a right to independent counsel for ETA. (See, e.g., Motion at 4, 9, & 10; Opposition at 2 & 6). Under the circumstances, the court is persuaded that the undisputed facts establish a conflict of interest sufficient to trigger a right to independent counsel for ETA.

First, HCC repeatedly urged ETA to retain independent counsel. (See Bachmann Decl. at ¶¶ 7-12 & Exhs. F, G, H, & I; SUF Nos. 6-9). HCC does not dispute these facts, nor does it address them in its argument against Cumis counsel. (See, generally, Motion at 9-14; Reply at 3-9). HCC's repeated recommendations to ETA to retain independent counsel is significant, for "[t]he governing principle underlying *Cumis* and *section 2860* is the attorney's ethical duty to the clients." James 3 Corp., 91 Cal.App.4th at 1102; see id. ("Thus, an attorney representing the interests of the insurer and the insured is subject to the rule a conflict of interest between jointly represented clients occurs whenever their common lawyer's representation of the one is rendered less effective by reason of his representation of the other.") (emphasis in the original) (internal quotation marks and citations omitted). Here, HCC's repeated recommendations to ETA to retain independent counsel demonstrate that HCC itself had concerns about effective representation of ETA as to uncovered exposure. See Golden Eagle Ins. Co. v. Foremost Ins. Co., 20 Cal.App.4th 1372, 1395 & 1396 (1993) (finding that the insurance counsel's representation of the insurance company's interest made his representation of the insureds "less effective," because it exposed the insureds to claims by third parties and "one set of clients--the insurers--was seeking to settle the case with the other clients' money"); see also James 3 Corp., 91 Cal.App.4th at 1107 ("The potential for conflict requires a careful analysis of the parties' respective interests to determine whether they can be reconciled (such as by a defense based on total nonliability) or whether an actual conflict of interest precludes insurer-appointed defense counsel from presenting a quality defense for the insured.") (citation omitted).

Second, HCC's reservation of rights on the ground that statements made by ETA in which it appeared to volunteer that its insurer would cover costs associated with Megna's escape constitutes a violation of HCC's "no voluntary payment" clause in the Policy, (see Bachmann Decl. at ¶ 5 & Exh. C; SUF No. 14), raises a conflict of interest. Whether or not ETA's statements

constituted such an admission of liability or willingness to provide payment is necessarily a factual determination. See, e.g., Moving Picture Etc. Union v. Glasgow Theaters, Inc., 6 Cal.App.3d 395, 405 (1970) ("The question whether [defendant] intended to admit liability . . . was one of fact."). Any counsel appointed by HCC would have an incentive to control the outcome of this factual determination to result in a finding that ETA made such an admission. See Scottsdale Ins. Co. v. Hous. Grp., 1995 U.S. Dist. LEXIS 8791, *11 & *12 (N.D. Cal. 1995) (finding a substantial conflict of interest where the insurer had a direct incentive to have its counsel develop facts that would trigger lower coverage amount). Such an admission could then trigger the "no voluntary payment" clause and result in a denial of coverage for ETA.

Third, there is a conflict of interest with respect to allocation of the settlement amount between damages and penalties. HCC's appointed counsel could, as part of structuring a settlement, negotiate an allocation of the damages and penalties in such a way as to designate the larger portion of the settlement amount to penalties, which HCC could then refuse to pay under the Policy.

HCC asserts that the amount of penalties is determined by the court based upon the facts developed in the underlying litigation. (See, e.g., Reply at 8). However, HCC fails to cite to any authority to support its assertion. (See, generally, id. at 8 & 9). Moreover, HCC has not shown any basis that the court can and will decide the penalties as part of a settlement. (See, generally, id.). Attorneys routinely negotiate and structure settlements in a way that meets the needs of their respective clients. Cf. Caplan v. Fellheimer Eichen Braverman & Kaskey, 68 F.3d 828, 835 (3d Cir. 1995) ("Our federal courts have neither the authority nor the resources to review and approve the settlement of every case brought in the federal court system. There are only certain designated types of suits, for instance consent decrees, class actions, shareholder derivative suits, and compromises of bankruptcy claims where settlement of the suit requires court approval."). Here, the record shows that the United States is negotiating the amount owed for penalties under the Jeanna's Act. (See Jafari Decl., Exh. 1 at 5 ($20,000 for penalties) & 6 (enforce Jeanna's Act to fullest extent of the law if settlement not reached); id., Exh. 2 at 2 ($10,000.00 for penalties)).

In short, the court will deny HCC's Motion and grant summary judgment in favor of ETA on the issue of whether HCC has a duty to assign Cumis counsel to ETA in the underlying action. See Bethlehem Constr., Inc. v. Transp. Ins. Co., 2006 WL 2818363, *1 (E.D. Wash. 2006) (granting summary judgment sua sponte in favor of plaintiff on the issue of whether defendant was obligated to provide Cumis counsel).

CONCLUSION

This Order is not intended for publication. Nor is it intended to be included in or submitted to any online service such as Westlaw or Lexis.

Based on the foregoing, IT IS ORDERED THAT:

1. Defendant's Motion for Summary Judgment **(Document No. 19)** is **denied**.

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2. The court sua sponte grants summary judgment in favor of ETA on the issue of whether HCC has a duty to assign Cumis counsel to ETA in the underlying action.

3. Plaintiff's counsel shall, no later than **March 12, 2014**, lodge a proposed form of Judgment. Any objections to the proposed form shall be filed no later than **March 14, 2014**.

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Initials of Preparer vdr