



1 Dear Mr. Kenneth Lewis:

2 The court in the above-captioned case has ordered the Social Security  
3 Administration to pay attorney fees in the amount of \$13,586.00 under the Equal  
4 Access to Justice Act.... We are making payment to you in accordance with the  
5 court's order filed in the above-captioned case on March 4, 2009. Payment will  
6 follow shortly by check....

7 (Doc. # 32-2, Ex. B). Plaintiff contends that Defendant has failed to make the required  
8 payment:

9 Pursuant to this Court's Order of March 3, 2009 granting Plaintiff's Motion for  
10 Attorneys Fees, Plaintiff is entitled to have attorney fees paid to her attorney,  
11 Mary Mitchell. Defendant owes Plaintiff a non-discretionary duty to have made  
12 payment in accordance with this Court's Order of March 3, 2009. Defendant  
13 has, without justification, failed to make such payment.

14 (Doc. # 32 at 9). Plaintiff requests that the Court do the following:

- 15 1. Assume jurisdiction in this matter;
- 16 2. Issue an Order directed to the Defendant to pay the attorney fees to Plaintiff's  
17 attorney within 72 hours;
- 18 3. Issue an Order to Show Cause compelling Social Security Regional Chief  
19 Counsel, Lucille G. Meis, and Assistant Regional Counsel/Special Assistant  
20 U.S. Attorney Roya Massoumi to appear and show cause why the Commissioner  
21 should not be found in contempt for their failure to effectuate payment of  
22 attorney fees to Plaintiff's attorney, Mary Mitchell, pursuant to the Court's  
23 Order;
- 24 4. Grant Plaintiff ... costs and additional attorney fees in this matter;
- 25 5. Grant Plaintiff ... such other and further relief as the Court deems just and  
26 proper.

27 (Doc. # 32 at 9-10).

28 On October 2, 2009, Defendant Michael J. Astrue, Commissioner of the Social Security  
Administration ("SSA"), filed an opposition to the Petition.<sup>1</sup> (Doc. # 33). Defendant contends:

Pursuant to the Court's March 3, 2009 Order, SSA certified payment of EAJA  
fees in the amount of \$13,586.00 to Plaintiff, who was the 'prevailing party' in  
this action, and transmitted that information to the Treasury Department for  
payment. After the matter is transferred to the Treasury Department, it must  
proceed pursuant to its own governing statutes and regulations; SSA has no  
further involvement. Therefore, SSA satisfied its obligation in accordance with  
the Court Order. There are no grounds for the mandamus relief sought or for an  
Order to Show Cause.

(Doc. # 33 at 2). Defendant states that it "will not address any actions taken by the Treasury

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<sup>1</sup> The opposition was not timely filed pursuant to the local rules. The Court finds that Defendant has demonstrated good cause for failing to timely file the opposition brief, *see* Doc. # 42 at 2, and the Court will consider the opposition as if it was timely filed. *See* Fed. R. Civ. P. 6(b) ("When an act ... must be done within a specified time, the court may, for good cause, extend the time....").

1 Department specific to Plaintiff's award, as they are beyond the scope of this response, and out  
2 of concern for Plaintiff's privacy rights." (Doc. # 33 at 4). However, Defendant states that "in  
3 the abstract," after payment is effectuated to the Treasury Department, "such payments become  
4 subject to Treasury Department governing statutes and regulations, including the offset  
5 provisions of the Debt Collection Act (for collection of nontax debts), and the Internal  
6 Revenue Code (for collection of tax debts)." (Doc. # 33 at 3-4). Defendant includes an  
7 affidavit from an SSA employee, which states:

8       On June 16, 2009, the EAJA payment for Plaintiff Kenneth Lewis, in the amount  
9       of \$13,586.00, was electronically transmitted to the Treasury Department....  
10       SSA records do not, and would not, independently reflect whether the Treasury  
11       Department actually issued payment to Mr. Lewis, or whether payment was  
12       withheld or offset by the Treasury Department.

11 (Waters Decl. ¶¶ 9-10, Doc. # 33-1).

12       On October 17, 2009, Plaintiff filed a reply in support of the Petition. (Doc. # 37).

13 Plaintiff contends:

14       The unfortunate yet simple typographical error in which the final sentence of the  
15       Court's [March 3, 2009] Order read '....in attorney in fees.' instead of '...to  
16       attorney in fees.' does not detract from the intention of the order of the  
17       Court--i.e. that attorney fees be paid directly to Plaintiff's attorney as requested  
18       in Plaintiff's Motion for EAJA fees.

17 (Doc. # 37 at 5). Plaintiff contends that the application for EAJA fees requested that the  
18 "EAJA attorney fees ... be paid directly to Plaintiff's attorney and the Court subsequently  
19 granted Plaintiff's request without alteration." (Doc. # 37 at 3). Plaintiff further contends that  
20 Plaintiff executed a fee assignment clause directing the award of EAJA fees to be paid directly  
21 to Plaintiff's attorney. Plaintiff contends:

22       Defendant transmitted documentation to the Department of the Treasury for  
23       payment of the EAJA payment to Plaintiff Kenneth Lewis without consideration  
24       of Plaintiff's fee assignment clause.... [A] valid fee assignment clause may  
25       protect an EAJA payment from offset if the debt arose after the effective date of  
26       the assignment in the case of a proper assignment of rights to the EAJA  
27       payment. In the present case there is a proper assignment of Plaintiff's rights to  
28       the EAJA payment. The assignment may protect the EAJA payment from offset  
29       if Plaintiff's debt arose after the date of the assignment. The analysis of the date  
30       of the assignment and the date of the Plaintiff's debt must be performed by the  
31       Department of the Treasury. This analysis did not occur as the only information  
32       that was transmitted to the Department of the Treasury by Defendant was that  
33       the EAJA payment was to be made to Plaintiff Kenneth Lewis.... Defendant  
34       may not evade responsibility for effectuating payment according to the Court's  
35       Order by submitting incomplete and incorrect information to the Department of

1 the Treasury.  
2 (Doc. # 37 at 11-12).

3 On October 21, 2009, Defendant filed a sur-reply brief in opposition to the Petition.  
4 (Doc. # 42). Defendant contends:

5 There is no statutory authority for the Commissioner to set aside any offset made  
6 by the Treasury or levy by another Federal agency, which are independent  
7 federal government agencies. If Plaintiff has an issue with any levy against his  
8 payment, then his recourse was to follow any instructions provided to him by  
9 Treasury and contact the appropriate Federal agency. The fact that Plaintiff's  
10 funds may have been intercepted by another Federal agency is a matter for  
11 Plaintiff to raise with Treasury and/or that agency. SSA cannot be held  
12 responsible for Plaintiff's outstanding debts.

13 (Doc. # 42 at 3).

14 On December 10, 2009, Plaintiff filed the Motion for Filing of Sur-Reply, with an  
15 attached sur-reply brief.<sup>2</sup> (Doc. # 43). Plaintiff objects that Defendant's sur-reply raised new  
16 issues not previously raised by Defendant. Plaintiff's counsel requests an additional \$2,720  
17 for time spent reviewing Defendant's sur-reply brief and preparing Plaintiff's sur-reply brief.

## 18 **II. Discussion**

19 The EAJA provides:

20 [A] court shall award to a *prevailing party* other than the United States fees and  
21 other expenses ... *incurred by that party* in any civil action..., including  
22 proceedings for judicial review of agency action, brought by or against the  
23 United States in any court having jurisdiction of that action, unless the court  
24 finds that the position of the United States was substantially justified or that  
25 special circumstances make an award unjust.

26 28 U.S.C. § 2412(d)(1)(A) (emphasis added). There is a split among the circuits on the issue  
27 of whether EAJA fees in social security cases are payable to the party or to the party's  
28 attorney. Four circuits have held that EAJA fees in social security cases are payable to the  
29 party, not the attorney. *See Bryant v. Comm'r of Soc. Sec.*, 578 F.3d 443, 446-49 (6th Cir.  
30 2009); *Stephens v. Astrue*, 565 F.3d 131, 135-39 (4th Cir. 2009); *Reeves v. Astrue*, 526 F.3d  
31 732, 738 (11th Cir. 2008) (“[O]ur analysis begins and ends with the unambiguous text of the  
32 statute: The EAJA means what it says, attorney’s fees are awarded to the prevailing party, not

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33 <sup>2</sup> The Motion for Filing of Sur-Reply is granted. (Doc. # 43). When deciding the  
34 Petition, the Court considers the arguments raised in Plaintiff's sur-reply brief.

1 to the prevailing party’s attorney.”), *cert. denied*, --- U.S. ----, 129 S. Ct. 724 (2008); *Manning*  
2 *v. Astrue*, 510 F.3d 1246, 1252-55 (10th Cir. 2007), *cert. denied*, --- U.S. ----, 129 S. Ct. 486  
3 (2008). One circuit has held that the EAJA fee award was payable to the attorney, not to the  
4 party. *See Ratliff v. Astrue*, 540 F.3d 800, 802 (8th Cir. 2008). In *Ratliff*, the Eighth Circuit  
5 stated that it felt it was constrained by prior precedent, stating that had it considered the issue  
6 in the first instance the Circuit “may well [have] agree[d] with our sister circuits and be  
7 persuaded by a literal interpretation of the EAJA, providing that ‘a court may award reasonable  
8 fees and expenses of attorneys ... to the prevailing party.’” *Id.* (citation omitted). On  
9 September 30, 2009, the Supreme Court granted certiorari in *Ratliff*. *See Astrue v. Ratliff*, ---  
10 U.S. ----, 130 S. Ct. 48 (2009). Although the Ninth Circuit has not issued a published opinion  
11 on the issue, in an unpublished opinion, the Ninth Circuit stated: “The request that the fees be  
12 directly awarded to counsel is denied. *See, e.g., Reeves v. Astrue*, 526 F.3d 732 (11th  
13 Cir.2008).” *Lozano v. Astrue*, No. 06-15935, 2008 WL 5875572, at \*1 (9th Cir., July 18,  
14 2008).

15 This Court concludes that EAJA fee awards are payable “to [the] prevailing party,” 28  
16 U.S.C. § 2412(d)(1)(A), and not to the prevailing party’s attorney. “[B]ecause the EAJA  
17 awards are payable to plaintiffs rather than to plaintiffs’ counsel, those awards are subject to  
18 administrative offset.” *Bryant*, 578 F.3d at 449; *see also Stephens*, 565 F.3d at 137 (same);  
19 *Reeves*, 526 F.3d at 737-38 (same); *Manning*, 510 F.3d at 1255-56 (same). “[T]he EAJA  
20 award belongs to the plaintiff and not his counsel. Since all federal payments are subject to  
21 administrative offset unless explicitly excluded or prohibited by federal statute, and EAJA  
22 awards are not explicitly excluded or prohibited by federal statute, EAJA awards are subject  
23 to administrative offset.” *McCarty v. Astrue*, 505 F. Supp. 2d 624, 632 (N.D. Cal. 2007).

24 In the March 3, 2009 Order, the Court intended—consistent with the language of the  
25 EAJA—to award *Plaintiff* \$13,586.00 in fees, and not *Plaintiff’s attorney*. As the Court stated  
26 in the Order: “The Court awards *Plaintiff* the requested fees of \$13,586.00.” (Doc. # 31 at 5  
27 (emphasis added)). The Court amends the March 3, 2009 Order as follows: on page 5, line 23,  
28 the sentence, “The Court awards \$13,586.00 in attorney in fees,” is hereby amended to read,

1 “The Court awards Plaintiff \$13,586.00 in attorney fees.”


2 Plaintiff has submitted evidence that Plaintiff executed a fee assignment clause directing  
3 the award of EAJA fees to be paid directly to Plaintiff’s attorney. Plaintiff contends that  
4 Defendant had a duty to inform the Treasury Department of the existence of the fee assignment  
5 clause. Plaintiff cites no authority for this proposition.

6 Even if Defendant owed Plaintiff such a duty, Plaintiff has failed to demonstrate that  
7 he was prejudiced by Defendant’s alleged failure to satisfy this duty. The federal offset  
8 regulations provide that “[i]f a person ... assigns the right to receive a Federal payment to a  
9 third party (the ‘assignee’), the assigned payment will be subject to offset to ... collect  
10 delinquent debts owed by the assignor unless ... the debtor [(i.e. the assignor)] has properly  
11 assigned the right to such payments and the debt arose *after* the effective date of the  
12 assignment.” 31 C.F.R. § 285.5(e)(6) (emphasis added). “In other words, if a plaintiff and  
13 attorney were to enter into a contract to assign statutory attorneys’ fees to the attorney, and the  
14 plaintiff requested and received such fees, that fee payment would not be subject to  
15 administrative offset to satisfy the debts of the plaintiff if those debts arose after the  
16 assignment became effective. Even if plaintiff and [plaintiff’s attorney] had contracted to  
17 assign plaintiff’s right to the EAJA fees to [plaintiff’s attorney], then, defendant could still  
18 offset payment to plaintiff based on plaintiff’s prior federal debts.” *Whitmore v. Astrue*, No.  
19 06-5062, 2008 WL 276387, at \*5 (N.D. Cal., Jan. 31, 2008). In this case, Plaintiff has not set  
20 forth any facts which would show that Defendant’s alleged failure to inform the Treasury  
21 Department of the existence of the fee assignment clause prejudiced Plaintiff.

22 **III. Conclusion**

23 IT IS HEREBY ORDERED that the Motion for Filing of Sur-Reply (Doc. # 43) is  
24 **GRANTED**, and the Petition for Writ of Mandamus and for an Order to Show Cause Re:  
25 Contempt (Doc. # 32) is **DENIED**.

26 DATED: December 17, 2009

27   
28 **WILLIAM Q. HAYES**  
United States District Judge