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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

FREDY ZARAGOZA,  
  
Plaintiff,  
  
v.  
  
NANCY A. BERRYHILL, Acting  
Commissioner of the Social Security  
Administration,  
  
Defendant.

Case No. 16-cv-00628-BAS-WVG

**ORDER ON MOTIONS FOR  
ATTORNEY FEES UNDER  
EAJA AND REQUEST FOR  
ENTRY OF JUDGMENT**

**[ECF Nos. 19, 21]**

Presently before the Court is the parties’ joint motion for entry of judgment and two motions requesting an award to Plaintiff of attorney fees pursuant to the Equal Access to Justice Act, 28 U.S.C. §2412(d)(1)(A). (ECF Nos. 19, 21.)

**I. BACKGROUND**

In this case, Plaintiff Fredy Zaragoza sought judicial review of a final decision by the Acting Commissioner of Social Security (“Commissioner”) denying his application for supplemental security income benefits under Title XVI of the Social Security Act, 42 U.S.C. §§ 401–433 (2012). (ECF No. 1.) On July 12, 2017, this Court issued an opinion granting in part Plaintiff’s motion for summary judgment and denying the Defendants’ cross-motion for summary judgment. (ECF No. 18.) The Court remanded the case to the Commissioner for further proceedings pursuant to

1 sentence four of 42 U.S.C. §405(g). (*Id.*)

2 On August 8, 2017, the parties filed a joint motion for attorney fees and  
3 expenses under the Equal Access to Justice Act (“EAJA”), 28 U.S.C. §2412(d)(1)(A),  
4 requesting that the Court award to Plaintiff of \$4,000.00 in attorney fees and  
5 expenses. (ECF No. 19.) A second joint motion followed on August 17, 2017,  
6 requesting an entry of the remand order on a separate document under Rule 58 and  
7 reiterating the original request for an award to Plaintiff of \$4,000.00 in attorney fees  
8 and expenses pursuant to the EAJA. (ECF No. 21.)

## 9 II. DISCUSSION

10 Although the parties previously moved to request an award to Plaintiff of  
11 attorney fees pursuant to the EAJA (ECF No. 19), the parties contend that the earlier  
12 motion was premature. They claim that the time for filing their joint motion to award  
13 Plaintiff attorney fees and expenses pursuant to the EAJA was never triggered  
14 because this Court’s remand order was not entered on the docket in a separate  
15 document pursuant to Rule 58. (ECF No. 21 at 1); *see also* Fed. R. Civ. P. 58.  
16 Without the entry of the remand order on a separate document *nunc pro tunc* to July  
17 12, 2017, the parties argue that the time for Plaintiff to move for an award of attorney  
18 fees would not start until February 7, 2018. (ECF No. 21 at 5.)

19 Under the EAJA, a court may award a “prevailing party” expenses and fees  
20 incurred in certain civil actions against the United States. *See* 28 U.S.C. §2412(d).  
21 The party must submit to the Court an application for fees and expenses within thirty  
22 days of final judgment. *See* 28 U.S.C. §2412(d)(1)(B). A final judgment means a  
23 judgment that is not appealable, and includes an order of settlement. *See* 28 U.S.C.  
24 §2412(d)(2)(G). For the purposes of the EAJA, a district court judgment does not  
25 become final until the time for filing an appeal with the Court of Appeals has expired.  
26 *Id.*; *Shalala v. Schaefer*, 509 U.S. 292, 301–302 (1993).

27 Federal Rule of Appellate Procedure 4 in turn provides that in a civil case to  
28 which a federal officer is a party, the time for appeal does not end until 60 days after

1 “entry of judgment,” and that a judgment is considered entered for purposes of the  
2 Rule only if it has been “entered in compliance with Rule 58 of the Federal Rules of  
3 Civil Procedure.” *See Shalala*, 509 U.S. at 302; *see also* Fed. R. App. P. 4(a)(1), (7).  
4 Under Rule 58, where a judgment must be set out in a separate document but is not,  
5 the judgment is not entered until it has both (1) been entered in the civil docket under  
6 Rule 79(a) and (2) the earlier of two events has occurred, *i.e.*, it is set out in a separate  
7 document or 150 days have run from its entry in the civil docket. Fed. R. Civ. P.  
8 58(c). As the parties recognize, there is no question that this Court’s remand order is  
9 final judgment required to be set out in a separate document under Rule 58. *See*  
10 *Shalala v. Schaefer*, 509 U.S. at 303 (“Since the District Court’s April 4 remand order  
11 was a final judgment, a ‘separate document’ of judgment should have been entered.”).  
12 This requirement has not yet been satisfied. Where a remand order is not set out in a  
13 separate document, the 30-day period for applying for EAJA attorney fees never  
14 begins to run. *Yang v. Shalala*, 22 F.3d 213 (9th Cir. 1994).

15 In this case, because the remand order was not set out in a separate document,  
16 the Court’s remand order would not be “entered” for the purposes of Rule 58 until  
17 December 9, 2017, 150 days from the date of the Court’s remand order, *or* until the  
18 Court has entered the judgment in a separate document. The parties argue that the  
19 Plaintiff would have to wait until February 7, 2018 – after 150 days have lapsed for  
20 the judgment to become effective under Rule 58 and 60 days after the time for the  
21 government to appeal has lapsed – before they can move for an award to Plaintiff of  
22 attorney fees and expenses under the EAJA. To escape this result, the parties request  
23 that the Court enter a “separate judgment, *nunc pro tunc*” with a date of July 12, 2017.  
24 The parties argue that doing so would make their second joint motion for an award to  
25 Plaintiff of attorney fees and expenses “timely.” They point to no authority in which  
26 a court has issued such a *nunc pro tunc* order for the purposes of retroactively  
27 triggering the EAJA’s timing requirements to award attorney fees and expenses.

28 It is true that when a judgment is not properly entered, a court may issue a *nunc*

1 *pro tunc* judgment retroactive to the date of the original order. *See In re Mgndichian*,  
2 312 F. Supp. 2d 1250, 1258 n.5 (C.D. Cal. 2003). However, “[t]he power to amend  
3 *nunc pro tunc* is a limited one, and may be used only where necessary to correct a  
4 clear mistake and prevent injustice. It does not imply the ability to alter the substance  
5 of that which actually transpired or to backdate events to serve some other purpose.”  
6 *Id.* (quoting *United States v. Sumner*, 226 F.3d 1005, 1009–10 (9th Cir. 2000)). Here,  
7 the entry of the *nunc pro tunc* judgment on the remand order is intended to backdate  
8 an event to serve some other purpose – to allow the Plaintiff to be awarded attorney  
9 fees and expenses under the EAJA now as opposed to within a few months – rather  
10 than to correct a mere clerical mistake.

11         The problem the Court has with the parties’ request is that each of the rules on  
12 which the parties’ motion relies is clear as to the proper sequence of events. The  
13 parties themselves recognize the clarity of the rules and prematurity of their initial  
14 joint motion for attorney fees, but nevertheless ask this Court to create an exception  
15 to how the EAJA, Federal Rule of Appellate Procedure 4, and Rule 58 interact  
16 through the issuance of *nunc pro tunc* judgment. Complying with these rules might  
17 seem like a mere formality, but it is not without meaning. By defining “final  
18 judgment” to mean “not appealable,” the EAJA itself contemplates that an award of  
19 attorney fees will not occur while a judgment remains appealable. The remand order  
20 in this case remains appealable. Thus, this parties’ request is one to alter the  
21 substance of what has actually happened. The Court declines to make such an  
22 alteration.

23         Although the parties contend that without the issuance of a *nunc pro tunc*  
24 judgment they would have to wait until February 7, 2018 before they could request  
25 that the Court award Plaintiff attorney fees and expenses under the EAJA, this is  
26 simply not the case. Under Rule 58, the Court has the authority to enter the remand  
27 order in a separate document upon the request of a party. Fed. R. Civ. P. 58(d). The  
28 Court will therefore construe the parties’ joint motion (ECF No. 21) as a request to

1 enter the remand order in a separate document and will grant that request. After 60  
2 days from the entry of the remand order in a separate document on the civil docket,  
3 the remand order will be no longer appealable and the parties may then move for an  
4 award to Plaintiff of attorney fees under the EAJA.

5 **III. CONCLUSION & ORDER**

6 In light of the foregoing, the Court **HEREBY ORDERS** the Clerk of the Court  
7 to enter a Clerk’s Judgment on the civil docket for the purposes of setting out the  
8 Court’s earlier remand order (ECF No. 18) as a separate document pursuant to Rule  
9 58. The Clerk’s Judgment shall be dated as of the date of this order.

10 The Court **DENIES WITHOUT PREJUDICE** the parties’ two motions for  
11 an award of attorney fees and expenses under the EAJA to Plaintiff as premature.  
12 (ECF No. 19, 21.) **The parties may move for an award to Plaintiff of attorney**  
13 **fees and expenses under the EAJA on December 25, 2017 or thereafter.** Failure  
14 to move for an award **by January 23, 2018** will prevent this Court from granting an  
15 award to Plaintiff of attorney fees and expenses under the EAJA.

16 **IT IS SO ORDERED.**

17 **DATED: October 24, 2017**

18   
19 **Hon. Cynthia Bashant**  
20 **United States District Judge**

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