

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

ASSOCIATION OF AMERICAN UNIVERSITIES, ET AL.,)	
)	
)	
Plaintiffs,)	
)	Case No. 1:25-cv-10346
v.)	
)	
DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,)	
)	
)	
Defendants.)	
)	

**REPLY IN SUPPORT OF DEFENDANTS’ MOTION FOR LEAVE TO CONDUCT
LIMITED DISCOVERY**

Plaintiff’s new declaration establishes that AAU cannot recover EAJA fees because it is not the real party in interest for fee-recovery purposes and, if the Court does not deny recovery on that basis, that more information is needed. First, the declaration demonstrates that only a subset of AAU members paid the attorneys’ fees. Second those members funded the litigation through special additional payments, not general dues, meaning any EAJA recovery would inure to the members rather than partially restore AAU to its pre-litigation financial position. Because the members are the real parties in interest, AAU’s EAJA eligibility is immaterial here and the Court should assess EAJA eligibility based on the eligibility of AAU’s members. Because AAU has provided no evidence of its members’ eligibility and those members are almost certainly ineligible for EAJA fees anyway, the Court should deny AAU’s claim without additional discovery.

But, to the extent the Court believes that additional information is necessary, AAU’s new declaration avers only that AAU has no legally binding agreements with its members and other

plaintiffs about the provision of additional funds. Defendants, however, appropriately sought specific disclosure of “the arrangement(s) or terms under which funds were provided.” AAU has not answered that question. If the Court does not deny AAU’s request for attorneys’ fees based on the newly disclosed information, then AAU must provide additional details about the terms of the funding arrangements between AAU and other entities.

Finally, because of AAU’s refusal to provide additional information about the funding of this litigation until Defendants moved for discovery, and the still incomplete information provided, the Court should order the declarant to sit for a deposition and should reserve the possibility of additional discovery based on any new disclosures that the declarant also omitted from the second declaration.

Defendants have kept and continue to keep their discovery requests narrow and seek only what is necessary to reveal the relevant facts.

ARGUMENT

In general, “[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case . . .” Fed. R. Civ. P. 26(b)(1). And where, as here, the government challenges EAJA eligibility, “the court generally requires the plaintiff to provide supporting materials.” *Norager v. United States*, No. 22-135, 2024 WL 3717448, at *3 (Fed. Cl. Aug. 8, 2024). AAU’s opposition to discovery, Doc No. 115, appears to dispute the relevance of Defendants’ two interrogatories but case law and commonsense counsel otherwise.

I. The Court Should Rule Against AAU’s EAJA Motion Based on Information Provided in the New Declaration

AAU’s supplemental declaration provides sufficient information for the Court to deny AAU’s EAJA motion. First, it shows that AAU’s U.S.-based members, not AAU itself, are the

real parties in interest in this case. Second, it reveals that AAU was not responsible for 27% of the fees that it claims because two other plaintiffs have agreed to pay those fees.

A. AAU’s U.S.-based members are the real parties in interest.

As explained in Defendants’ motion for discovery, Doc No. 112 at 2, EAJA eligibility must be assessed against the “real parties in interest” to the EAJA fee motion. A “real party in interest” is one who (1) paid the fees and (2) stands to financially benefit from the award of EAJA fees. These are the two factors analyzed in *National Ass’n of Mfrs. v. Department of Labor*, 159 F.3d 597 (D.C. Cir. 1998) (“*NAM*”). First, the D.C. Circuit recognized that the real party in interest doctrine “may properly extend to an ineligible non-party (such as an association member) who *pays the fees* of a party (such as an association).” *Id.* at 603 (emphasis added). Second, *NAM* considered whether the association’s ineligible members would ultimately “be the beneficiaries of an award of fees to the association.” *Id.* at 604. Here, AAU’s declaration makes clear that the real parties in interest are AAU’s U.S.-based members.

On the first factor, the new declaration avers that a subset of AAU’s members made special litigation payments to finance this litigation. Doc No. 115-1 ¶ 9. It states that AAU “collected supplemental dues” from “[a]ll 69 US.-based members.” Doc No. 115-1 ¶ 9. However, AAU admits that its non-U.S.-based members paid nothing. *See* Doc No. 115-1 ¶ 9. This lack of payment is likely no mere coincidence. AAU challenged an NIH policy that capped indirect cost-rate reimbursement to “institutions of higher education.” (“IHEs”). Doc No. 1 at 22-23. But AAU’s foreign members are not IHEs. 2 C.F.R. § 200.1 (citing to 20 U.S.C. § 1001 and defining “institution of higher education” as “an educational institution in any *State*”) (emphasis added). So, this litigation benefitted only a subset of AAU members, and only that subset paid for the litigation. AAU’s supplemental declaration confirms that it did not finance the litigation from general dues paid by all its members. Rather, the declaration makes clear that AAU pooled

the litigation funds that flowed from IHEs with an interest in the litigation to the attorneys representing their interests.¹

On the second factor, AAU's U.S.-based members are the real parties in interest because they are likely to benefit from the award of EAJA fees. Because a subset of members funded this litigation through special payments, any EAJA recovery means that AAU will have funds that exceed its general membership dues. Even if AAU holds and spends any recovery, that windfall would return to its members by defraying the need for future dues. Funding the litigation through special payments is different in kind from using the association's general fund, for which an EAJA award would put the association in the same position that it would have been in had it not sued. Indeed, *NAM* specifically noted that “[w]hen an association uses general revenues derived from membership dues to finance litigation . . . it does not transform its members into real parties in interest.” *NAM*, 159 F.3d at 604. In sum, both factors considered by *NAM* weigh against an EAJA fee award here.

AAU responds by incorrectly asserting that *NAM* established that the real-party-in-interest analysis requires the United States to prove that the association itself is nothing more than a “front” or a “sham.” Doc No. 115 at 3. *NAM* predicated its analysis on *Unification Church v. INS*, 762 F.2d 1077 (D.C. Cir. 1985), which itself imposed no such requirement. Rather, *Unification Church* held only that the “doctrine of the real party in interest” was “appropriate to carry out the congressional intent” enshrined by EAJA. *Id.* at 1082. *NAM* does not purport to heighten this standard. Indeed, it emphasized that the proper inquiry is “who pays the fees” for the litigation. *NAM*, 159 F.3d at 603. As such, that AAU serves a legitimate purpose advancing

¹ To be clear, the Court need not find that AAU's funding structure is improper in any way to deny an EAJA fee award here. Rather, it need only find that the funding for this litigation precludes attorney fee recovery for AAU under EAJA.

its members' interests in areas besides litigation does not render the "real party in interest" doctrine inapplicable for purposes of this particular fee recovery.

B. AAU is not responsible for 27% of the fees because other plaintiffs have agreed to pay that amount.

Finally, the American Council on Education ("ACE") and Association of Public and Land-grant Universities ("APLU") have agreed to pay 27% of the litigation fees in this case. Doc No. 115-1 ¶ 11. Far from AAU being solely "responsible" for all fees in this matter, it has agreed to share the costs of this litigation with both ACE and APLU. But neither ACE nor APLU filed a timely EAJA-fee petition. EAJA requires that a party seeking attorneys' fees and costs file "within thirty days of final judgment in the action." 28 U.S.C. § 2412(d)(1)(B). The final judgment in this action was entered on March 16, 2026. Judgment, *AAU v. DOE*, No. 25-1727 (1st Cir. Mar. 16, 2026); Mandate, *AAU v. DOE*, No. 25-1727 (1st Cir. Mar. 16, 2026). Well over thirty days have passed since then.

II. If the Court Does Not Deny AAU's EAJA Motion Based on AAU's New Declaration, Additional Discovery is Needed.

However, if the Court determines that additional information is required to better see which entities are the real parties in interest for purposes of a potential EAJA fee award, then full answers to Defendants' interrogatories will provide crucial information to the Court on both factors of the *NAM* analysis.

On the first factor, AAU's new declaration states that there are no "legally enforceable agreements" with any other entities to pay the litigation fees. Doc No. 115-1 ¶ 10. But it does not disavow more allegedly "informal agreement[s]" to pay fees, similar to the other associations' purportedly informal agreements to pay fees. Whether these "informal" agreements are legally enforceable is a legal conclusion, unproven by the declarant's bare assertion. Additionally, AAU claims that it initially funded this litigation through its dues reserves, Doc No. 115-1 ¶ 9, but

does not explain how much it drew from its reserves or whether or how much an EAJA fee award and the U.S.-members' special litigation payments will replenish those reserves or be excess funding.

On the second factor, the terms of the agreements, plans, or other arrangements that provided the payments to fund the litigation will more precisely show who will benefit from an award of attorneys' fees under EAJA. Those details will establish whether any EAJA recovery will reduce follow-up payments from U.S.-based members, or will increase any litigation funding pool that is to be remitted to the funding members, or will be held by AAU to reduce the need for future dues payments. Arrangements addressing what to do with excess money for litigation, which an EAJA recovery would increase, will show who benefits from the EAJA recovery. Arrangements addressing what to do in the event AAU does not have enough money to cover litigation fees, which shortfall an EAJA recovery would offset, will show who benefits by avoiding the need to pay more.

Full responses to Defendants' interrogatories would also provide insight into AAU's agreement with ACE and APLU. AAU's threadbare assertion that this agreement is "informal" and is not "legally binding or otherwise enforceable," Doc No. 115-1 ¶ 11, is insufficient to moot Defendants' discovery motion. Contract law is rich with cases brought to enforce "informal" agreements. *E.g., Neuhoff v. Marvin Lumber and Cedar Co.*, 370 F.3d 197, 203 (1st Cir. 2004) (discussing promissory estoppel). And while the enforceability of AAU's agreements with ACE and APLU may not ultimately matter, Defendants' interrogatories will enable the Court to assess this previously undisclosed agreement. Responses should also clarify whether there is any interaction between the special litigation assessment AAU's members paid, and AAU's agreement with ACE and APLU, such as whether ACE and APLU will pay AAU less if AAU

first recovers EAJA fees. After ACE and APLU reimburse AAU, does AAU have arrangements with its litigation-funding members to return this contribution to those members, or will it hold the funds and offset against future dues payments? Defendants broadly ask for “the terms of the agreement[s], plan[s], or other arrangement[s]” for reimbursement and AAU simply has not provided that information.

III. A Deposition and Potentially Follow-up Discovery Is Warranted.

Finally, while HHS is mindful of the Supreme Court’s admonition that “a request for attorney’s fees should not result in a second major litigation,” *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dept. of Health and Hum. Res.*, 532 U.S. 598, 609 (2001), incomplete and inconsistent information in AAU’s supplemental declaration warrant a deposition to obtain clear and complete information for the Court’s adjudication of AAU’s EAJA motion. For example, AAU exclaims that there are no “otherwise enforceable agreements” with either AAU or APLU to finance this litigation. Doc No. 115-1 ¶ 11. But it does not make the same representation as to agreements with its own members. *See* Doc No. 115-1 ¶ 10. This unexplained incongruity in the phrasing the declarant uses in two successive paragraphs of the declaration could imply that AAU *does* have “otherwise enforceable agreements” with its members to pay the costs of this litigation. Further, AAU avers that it did not disclose that ACE and APLU agreed to reimburse AAU’s fees based on AAU’s legal determination that only AAU was “liable” for attorneys’ fees. *See* Doc No. 115-1 ¶ 11. AAU’s declarant’s legal conclusion, without supporting documentation or citation to controlling language or communications, is insufficient for this Court to adjudicate AAU’s right to EAJA fees. Defendants need the opportunity to determine whether AAU did not disclose other potentially relevant agreements or facts based on AAU’s own determination that the agreements or facts were irrelevant. A short, half-day deposition will permit discovery of

additional relevant facts put at issue by AAU's arrangements for legal fees to prosecute this litigation.

CONCLUSION

For these reasons, HHS respectfully requests that the Court grant its motion for limited discovery, Doc No. 112. HHS also respectfully requests that the Court consider ordering AAU's declarant to sit for a deposition.

Dated: June 22, 2026

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CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF).

Dated: June 22, 2026

/s/ Thomas W. Ports, Jr.

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