

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

KNOWLEDGE ECOLOGY
INTERNATIONAL,

Plaintiff,

v.

NATIONAL INSTITUTES OF HEALTH, *et
al.*,

Defendants.

Case No. 8:18-cv-01130-PJM

**DEFENDANTS' REPLY TO PLAINTIFF'S MEMORANDUM IN
OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

Defendants, National Institutes of Health, National Cancer Institute, Francis S. Collins, and David Lambertson (together, the "Defendants"), by and through their counsel, Robert K. Hur, United States Attorney for the District of Maryland, and Alan C. Lazerow, Assistant United States Attorney for that district, respectfully submit this Reply to *Plaintiff's Memorandum in Opposition to Defendants' Motion to Dismiss*, see ECF No. 9 (the "Opposition").

I. INTRODUCTION

In the Defendants' *Motion to Dismiss*, see ECF No. 5 (the "Motion"), Defendants explained that Knowledge Ecology International ("KEI" or the "Plaintiff") lacks standing to sue, given that the facts as alleged in the *Complaint for Declaratory, Injunctive, and Other Relief*, see ECF No. 1 (the "Complaint") do not support Plaintiff's organizational or associational standing.

Although Rule 15(a)(1)(B) of the Federal Rules of Civil Procedure (the "Rules") permits a party to amend its pleading once as a matter of course within "21 days after service of a motion under Rule 12(b)," the docket reflects that Plaintiff filed no amended complaint. Instead, Plaintiff seeks to survive dismissal by asserting new facts in the *Opposition* and the *Declaration of James*

Packard Love, see ECF No. 9-1 (the “Love Declaration”). But it is well settled that a plaintiff cannot amend its complaint by asserting new facts in an opposition brief, and thus the Court should rule that the facts, *as alleged in the Complaint*, are facially insufficient to grant Plaintiff standing to sue.

But perhaps more to the point, even had Plaintiff amended its complaint with the allegations it now seeks to insert by the Opposition and the Love Declaration, the Complaint would still be subject to dismissal for lack of standing. As explained below, (i) the type of harm Plaintiff asserts resulting from Defendants’ alleged conduct is not a legally-cognizable harm sufficient to grant it organizational standing; and (ii) because Plaintiff cannot identify its constituency or that any such constituency control’s KEI’s functions, elects or serves on KEI’s leadership, or finances KEI’s activities, Plaintiff lacks associational standing.

For these reasons, and as explained below and in the Motion, the Court should dismiss the Complaint with prejudice.

II. ARGUMENT

A. PLAINTIFF LACKS ORGANIZATIONAL STANDING

i. *The Complaint Is Silent As to What Harm Plaintiff Has or Will Suffer from the Proposed License*

In the Motion, Defendants mount a facial challenge to Plaintiff’s standing, “asserting that the allegations pleaded in the complaint are insufficient to establish standing” See *Franklin v. Jackson*, No. 8:14-cv-00497, 2015 WL 1186599, at *8 (D. Md. Mar. 3, 2015); see Motion at p. 6. “When analyzing a facial challenge, the court determines whether the allegations in the Complaint, taken as true, are sufficient to establish standing under the plausibility standard of Rule 12(b)(6)

and *Iqbal/Twombly*.” *Allah-Mensah v. Law Office of Patrick M. Connelly, P.C.*, No. 8:16-cv-01053, 2016 WL 6803775, at *2 (D. Md. Nov. 17, 2016).

In the Motion, Defendants argued that Plaintiff lacked organizational standing, because the Complaint is silent about what actual or concrete injuries KEI will suffer because of Defendants’ alleged conduct. *See* Motion at pp. 8-9. In the Opposition, Plaintiff asserts, citing and relying on the Love Declaration, that “Plaintiff’s organizational standing is established by the substantial diversion of its limited resources . . . , to the detriment of KEI’s mission.” Opposition at p. 14. And Plaintiff alleges that “KEI has spent over 100 hours of time on the underlying issues and related research and drafting for this litigation,” and that “[t]hat time and eventual expenditure could have been used toward KEI’s mission” *Id.* at pp. 15-16. But such allegations are absent from the Complaint, and “it is axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss.”¹ *Jassie v. Mariner*, No. 8:15-cv-01682, 2016 WL 67257, at *7 (D. Md. Jan. 6, 2016) (internal quotation marks omitted); *see Haddad v. M & T Bank*, No. 8:13-cv-03542, 2014 WL 1870850, at *3 (D. Md. May 6, 2014) (“Plaintiffs cannot fix the deficiencies of the Complaint in a brief in opposition to a motion to dismiss.”); *see also Supreme Auto Transport, Inc. v. JBP Logistics, LLC*, No. 1:16-cv-1733, 2016 WL 9735766, at *3 (D. Colo. Dec. 16, 2016) (holding that because plaintiff “chose not to” amend its complaint when faced with a Rule 12(b) motion, “the Complaint must be considered as it was filed”). Although the Complaint alleges harm to *patients, taxpayers, and consumers* generally, it contains no allegations as to what

¹ Because the facts it adds in the Opposition and the Love Declaration do not support Plaintiff’s standing, any motion for leave to amend would be futile.

harm *KEI* will suffer because of the Proposed License.² For this reason, the Complaint cannot withstand a facial standing challenge, and the Court should dismiss it, under Rule 12(b)(1).

ii. ***Plaintiff's New Allegations Regarding Diversion of its Assets Do Not Support Organizational Standing***

As discussed above, in the Opposition, Plaintiff seeks to cure the Complaint's deficiencies by asserting:

- "Plaintiff's organizational standing is established by the substantial diversion of its limited resources toward redressing Defendants' actions, to the detriment of KEI's mission." Opposition at p. 14.
- "KEI has diverted a substantial amount of its resources toward redressing the issues asserted in the Complaint, to the detriment of KEI's mission as stated in the organization's Articles of Incorporation" *Id.* at p. 15.
- "KEI is a small but effective nonprofit organization, with a staff of seven persons. One of the seven is counsel, whose primary role is outside of litigation on a variety of time-intensive domestic and international policy and legal and regulatory issues on topics hewing to the issues described in the KEI Articles of Incorporation. KEI has spent over 100 hours of time on the underlying issues and related research and drafting for this litigation, beginning with the original comments submitted to Defendants up through this memorandum, and – but for the personal experiences of outside counsel that resulted in his willingness to accept this case without immediate remuneration – already would have incurred tens of thousands of additional dollars in expenses that would take away from its ability to fulfill its mission. That time and eventual expenditure could have been used toward KEI's mission of meaningfully educating the public and other constituencies, and of contributing to policy discourse and debate, on the issues described in the Articles of Incorporation." *Id.* at pp. 15-16 (internal citations omitted).
- "KEI has devoted well over 100 hours of its time on this case, from the initial comments through the current state of litigation, causing it to divert its limited resources to the detriment of the organization's mission, and away from various other mission-specific efforts towards which KEI might be directing its energy. Counsel, in particular, has been forced to dedicate a significant amount of his time to this litigation that has prevented him from assisting on his other KEI activities." Love Declaration ¶ 57.

² Capitalized terms not otherwise defined are given the meanings ascribed to them in the Motion.

Forgetting that Plaintiff's attempt to amend the Complaint by the Opposition is procedurally improper, such allegations still would be insufficient to confer Plaintiff standing.

Plaintiff appears to concede that, as it is represented by its in-house counsel and unpaid outside counsel, it has not had to divert any *financial* resources because of the Proposed License. Instead, Plaintiff now alleges simply that it has had to devote "over 100 hours of time" on this matter, and "[t]hat time ... could have been used towards KEI's mission" Opposition at pp. 15, 16. Plaintiff identifies no specific project or initiative from which it had to divert resources to pursue this matter.

These additional facts fall well short of those with which this Court dealt in *Equal Rights Center v. Equity Residential*, 798 F. Supp. 2d 707 (D. Md. 2011) ("ERC"), on which Plaintiff chiefly relies. In *ERC*, a non-profit organization sued a developer of multi-family housing, alleging the developer designed and constructed properties that violated the Fair Housing Act and Americans with Disabilities Act. *See id.* at 711-12. After studying the inaccessibility of multifamily housing for people with disabilities for eight years, the Equal Rights Center began investigating Equity Residential, and undertook activities such as "conducting research about Equity properties, developing a testing methodology, choosing properties to test, finding testers, creating 'tester profiles,' drafting memoranda and reports, and arranging travel plans." *Id.* at 713. As for a diversion of its resources, the Equal Rights Center "devoted \$57,464.81 of staff time and \$12,566.22 of expenses to its investigation of Equity," and the Equal Rights Center was "forced to divert resources away from other programs." *Id.* at 714. Specifically:

For example, the investigation of Equity caused the ERC to diminish, eliminate, or otherwise offer less than it would have absent the Equity investigation of the following services: victim intake and counseling, seminars on discrimination against people with HIV/AIDS, an advertising campaign for the D.C. Metro Area Transit System to increase awareness of civil rights, various "Know Your Rights"

seminars scheduled to occur in 2005 through 2007, education and outreach activities, compliance testing for a contract scheduled to have begun in June 2005, developing training materials required under third-party contracts, revising a real estate company's fair housing policy manual that was also scheduled to begin in June 2005, and revising internship training materials. The Equity investigation diverted the time of various ERC staff members, including executive director Rabbi Kahn. The time Rabbi Kahn devoted to the Equity investigation was diverted from management and development activities, organization and implementation of a civil rights alliance, advancing an education and outreach campaign to religious institutions, expanding the ERC's programs on fair employment and public accommodations, organizing a nationwide collaboration to strengthen compliance with laws prohibiting housing choice voucher discrimination, conducting an advocacy and information campaign to promote housing choice voucher protection in the state of Maryland, and collaborating with other immigrant rights groups.

Id. at 715. Because of its investigation and later suit, "ERC was unable to produce five issues of its quarterly newsletter" *Id.* And, as a result of its investigation and findings, "[t]he ERC also worked to increase awareness among persons with disabilities of their rights concerning accessible housing," including

developing a presentation about accessible design and construction; training representatives of disability advocacy and membership organizations on rights to accessible housing; beginning to redesign the ERC website to include information on accessible design and construction; giving magazine and radio interviews on accessible design and construction issues; educating its members about accessible design and construction issues through its newsletter; meeting with "scores" of civil rights organizations to begin efforts to create a DC-Area Civil Rights Alliance in part to address inaccessible housing; and working with local governments, including a meeting with officials of Montgomery County, Maryland, to enlist their aid in promoting and requiring FHA and ADA compliance.

Id. at 715-16.

In holding that the Equal Rights Center had organizational standing to sue, this Court explained that it "suffered an injury when, pursuant to its mission ... , it expended resources to investigate and counteract Equity's alleged discriminatory practices," through its "pre-testing investigation, testing, and a post-testing floor-plan review." *Id.* at 721. The Equal Rights Center "expended resources counteracting Equity's alleged FHA violations," by generally "work[ing] to

increase awareness among persons with disabilities of their rights under the FHA.” *Id.* at 721-22. The Court emphasized that, “[b]y expending those resources to identify and counteract Equity’s alleged violations of the FHA, the ERC’s ability to advance its mission ... was perceptibly impaired,” as “[t]he time the ERC spent ... interfered with its existing programs, including work on victim intake and counseling, seminars, public service advertising campaigns, compliance testing, and training materials ...” *Id.* at 722. Importantly, the Equal Rights Center “identified specific projects that it had to curtail in order to investigate and counteract Equity’s alleged discriminatory practices, and it identified activities that it could and would have pursued if it had not dedicated resources to its investigation of Equity.” *Id.* at 724. It also showed that it was forced “to fund other programs at levels lower than it would have but for the drain on [the] organization’s resources resulting from [the] defendant’s alleged discriminatory practices.” *Id.*

The facts here are a far cry from those in *ERC*. Although Plaintiff generally asserts a “substantial diversion of its limited resources toward redressing Defendants’ actions,” Opposition at p. 14, Plaintiff offers no specific facts in support of its blanket assertion, other than trying to quantify the time it has spent on this matter. Unlike in *ERC*, Plaintiff cannot point to any specific programs with which its work in this matter interfered. Unlike in *ERC*, Plaintiff identifies no specific projects it had to curtail. *See* Love Declaration ¶ 57 (stating that its time has “caus[ed] it to divert its limited resources ... away from various other mission-specific efforts toward which KEI *might be* directing its energy”) (emphasis added). Unlike in *ERC*, Plaintiff alleges no diversion of any financial resources. Unlike in *ERC*, Plaintiff does not allege that it was forced to fund other of its programs at levels lower than it otherwise would have. And unlike in *ERC*, Plaintiff’s work on this matter did not constitute “a major shift in [its] activities,” *ERC*, 798 F. Supp. 2d at 716, given its work here – commenting on an exclusive patent license – is a routine

part of KEI's functions. See Love Declaration ¶ 38 ("Since 2015, KEI has filed comments with the NIH on more than 30 proposed exclusive patent licenses.").³

Instead, this case more factually on point with this Court's *Shield Our Constitutional Rights & Justice* line of cases. See *Shield Our Constitutional Rights & Justice v. Hicks*, No. 8:09-cv-00940, 2009 WL 3747199 (D. Md. Nov. 4, 2009); *Shield Our Constitutional Rights & Justice v. Wilcher*, No. 8:09-cv-00151, 2009 WL 3517559 (D. Md. Oct. 26, 2009); *Shield Our Constitutional Rights & Justice v. Tippett*, No. 8:09-cv-00152, 2009 WL 2961428 (D. Md. Sept. 11, 2009). Each of the *Shield* cases involved a non-profit organization that sued, together with certain individual plaintiffs, various defendants relating to damage to the new home of one of the plaintiffs. In deciding whether the non-profit organization had organizational standing, the Court explained:

Plaintiffs allege that Shield is an organization that "help[s] and support[s] victims of others' unlawful actions." Plaintiffs further allege that Shield "through its staff, their times [sic], efforts, and costs, seeks to help victims seeking rights protected by Constitutions and Statutes." Although unclear, Plaintiffs appear to allege that Shield suffered injury as a result of having to divert its resources from other programs in order to assist Ms. Huang. However, Plaintiffs fail to allege any specific facts to substantiate this bald allegation.

³ In this regard, this case is also distinguishable from the Supreme Court's decision in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), on which Plaintiff also relies. In *Coleman*, an organization, Housing Opportunities Made Equal ("HOME") sued the owner of an apartment complex and an employee for violating the FHA. HOME's "activities included the operation of a housing counseling service, and the investigation and referral of complaints concerning housing discrimination." *Id.* at 368. In holding that HOME had organizational standing, the Supreme Court emphasized that defendants' "practices have perceptibly impaired HOME's ability to provide counseling and referral services for low-and moderate-income homeseekers, [and thus] there can be no question that the organization has suffered injury in fact." *Id.* at 378. Thus, *Coleman* was a case in which defendants' actions diverted resources away from HOME's core functions. Here, however, given Plaintiff's admission that it routinely comments on NIH's proposed grants of exclusive patent licenses, it cannot be said that Defendants' asserted conduct diverted KEI's resources away from its core functions.

See Tippett, 2009 WL 2961428, at *4 (internal citations omitted). In holding that the non-profit lacked organizational standing, the Court distinguished the facts before it with those in *Equal Rights Center v. Equity Residential*, 483 F. Supp. 2d 482 (D. Md. 2007) – another case involving the Equal Rights Center. The Court explained that the “complaint is devoid of any facts similar to those in *Equity Residential*,” and that “Plaintiffs’ unsupported, vague assertions are insufficient to establish organizational standing.” *Id.* at *5.

Here, as in the *Shield* cases, Plaintiff offers only “unsupported, vague assertions” of the diversion of its resources. Participating in an administrative process and filing a lawsuit requires time and resources. But it is not the law that every person or organization that chooses to participate in such an administrative process and file a lawsuit afterward has standing to sue in federal court. *See, e.g., Equal Rights Ctr. v. Post Props., Inc.*, 63 F.3d 1136, 1140 (D.C. Cir. 2011) (“[T]he diversion of resources to litigation or investigation in anticipation of litigation does not constitute an injury in fact sufficient to support standing.”) And this is especially true when that plaintiff, as is the case here, alleges only a vague diversion of its resources away from some unspecified “mission-specific efforts toward which [it] *might* be directing its energy.” *See* Love Declaration ¶ 57 (emphasis added). For these reasons and those Defendants presented in the Motion, Plaintiff lacks organizational standing, and the Court should thus dismiss the Complaint, under Rule 12(b)(1).

B. PLAINTIFF LACKS ASSOCIATIONAL STANDING

i. Plaintiff Fails the Functional Equivalency Test

In the Motion, Defendants asserted that Plaintiff lacks associational standing, given that it is a non-member organization and it fails the “functional equivalency” test, under which a non-member organization may have standing “if the organization (1) serves a specialized segment of

the community; (2) represents individuals that have all the indicia of membership, including (i) electing the entity's leadership, (ii) serving in the entity, and (iii) financing the entity's activities, and (3) its fortunes are tied closely to those of its constituency." *Heap v. Carter*, 112 F. Supp. 3d 402, 418 (E.D. Va. 2015); *see* Motion at p. 10. Although Plaintiff broadly asserts, in the Opposition, that it "meets the functional equivalency test to establish associational standing" because "patients, taxpayers, and consumers control KEI's leadership, and finance KEI's activities," Opposition at pp. 3, 5, Plaintiff's arguments in support of its broad arguments reveal that Plaintiff fails that test.⁴

To begin with, Plaintiff still cannot identify the constituency it purports to "represent" beyond abstractly referring to them as "consumers, patients and taxpayers." *See* Opposition at pp. 3, 5, 10. Consumers of what? Patients of whom? How many consumers, patients, and taxpayers does it represent? Plaintiff's inability to answer these questions, in either the Complaint or the Opposition, is telling. The Court need not go on to answer the questions of whether KEI's constituency "elect[s] the entity's leadership," "serv[es] in the entity," and "finance[es] the entity

⁴ Many facts Plaintiff alleges to support its argument as for associational standing are absent from the Complaint. As Plaintiff argues above as for organizational standing, Plaintiff cannot amend the Complaint through the Opposition. *See supra* Part II.A.i.

activities,” *see Heap*, 112 F. Supp. 3d at 418, if Plaintiff cannot establish what the constituency is in the first place.^{5, 6}

But even if Plaintiff could identify the constituency it “represents,” its arguments in the Opposition show that the constituency does not “elect[] the entity’s leadership,” “serv[e] in the entity,” and “finance[e] the entity activities.” *See id.*

First, Plaintiff, by arguing for a watered-down version of the functional equivalency test which de-emphasizes whether an organization’s constituency elects its leadership, *see infra* at pp. 13-14, concedes that KEI’s constituency does not elect its leadership. All that Defendants and the Court can glean from the Opposition and the Love Declaration is that a five-member board of directors “manages the affairs of KEI,” Love Declaration ¶ 4, but Plaintiff does not allege that its

⁵ Plaintiff’s only attempt to identify those it “represents” is its reference to a 2400-subscriber email list. *See* Complaint ¶ 5; Opposition at p. 9. Although Plaintiff now states, in the Opposition, that the list “consists of patients and consumers, as well as governmental and intergovernmental officials, journalists, advocates and activists and other members of civil society,” Opposition at p. 9, courts have denied associational standing to organizations claiming its constituency consists of mailing-list subscribers. *See Wash. Legal Found. v. Leavitt*, 477 F. Supp. 2d, 202, 210 (D.D.C. 2007) (rejecting the contention that a person is a “member” if he “request[ed] to be placed on one or more of [the organization]’s mailing lists”); *see also Gettman v. DEA*, 290 F.3d 430, 435 (D.C. Cir. 2002) (rejecting a magazine’s contention that its readers and subscribers were “members,” and denying associational standing because such readers and subscribers did not select the magazine’s leadership, guide its activities, or finance its activities).

⁶ Plaintiff’s newfound allegation that “[t]he high price of cancer medicines directly affects KEI’s staff” does not move the needle. *See* Opposition at p. 8. Of the alleged affected individuals, only one – Mr. Love’s brother – has been diagnosed with a cancer whose treatment may be implicated by the Proposed License in some way. *See id.*; Love Declaration ¶ 32. But Plaintiff does not allege that Mr. Love’s brother is one of its constituents, or that he elects KEI’s leadership, serves in the entity, or finances its affairs. Additionally, the link between the Proposed License and any injury to Mr. Love’s brother is too attenuated to constitute a sufficient injury-in-fact for standing purposes in his own right. *See, e.g., Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 414 n.5 (2013) (denying plaintiffs standing where an “attenuated chain of inferences” was necessary to reach the harm of which plaintiffs complained).

constituency (whether that consists of the 2400-subscriber email list or some other constituency) elects these directors.⁷ The same is true for KEI's two-member board of advisors. And it is the board, and not KEI's constituency, that "elects the Executive Director and other officers." *See* Love Declaration ¶ 5.

Second, although Plaintiff spends pages of the Opposition and the Love Declaration touting the credentials and experience of Mr. Love and other directors/advisors, *see* Opposition at pp. 6-9; Love Declaration ¶¶ 4-36, they offer little from which the Court could conclude that its constituency meaningfully serves in KEI's goings-on. Plaintiff contends that its "IP-Health listserv" is a "means for others outside of KEI to inform KEI's work," Opposition at p. 9, and that it uses the listserv "to receive feedback, suggestions and other information." Love Declaration ¶ 58. But Plaintiff cannot explain the volume of "feedback, suggestions and other information" it receives or how or even whether such "information" guides KEI's work. *See Gettman v. DEA*, 290 F.3d 430, 435 (D.C. Cir. 2002) (rejecting a magazine's contention that its readers and subscribers were "members," and denying associational standing because such readers and subscribers did not select the magazine's leadership, guide its activities, or finance its activities). At bottom, Plaintiff admits: "In lieu of members, KEI has a Board of Directors, which manages the affairs of KEI ..., and a Board of Advisors that guide the direction of KEI's work." Opposition at p. 8. In Plaintiff's own words, it is KEI's hand-selected directors and advisors who serve and guide KEI – not its undefined constituency.

⁷ Although the Opposition and Love Declaration cite and quote from KEI's articles of organization and bylaws (which presumably provide the method of appointment for the board), Plaintiff does not attach such documents to the Opposition or the Love Declaration.

And *third*, Plaintiff does not explain if and how its constituency finances KEI's operations. The Love Declaration provides: "KEI receives funding from several U.S. based private foundations, and occasionally from intergovernmental organizations like UNITAID, as well as from other organizations and individuals." Love Declaration ¶ 59. But Plaintiff cannot explain who these "individuals" are, whether they are a part of its undefined constituency, and how much they contribute. *See Hunt v. Wash. State Apple Advertising Comm'n*, 432 U.S. 333, 344-45 (1977) (granting associational standing where the constituency "alone finance[s] its activities ... through assessments levied upon them").

ii. ***The Court Should Reject Plaintiff's Calls for a "Flexible" Analysis, and Plaintiff Fails the Functional Equivalency Test Even Under Such a "Flexible" Analysis***

Perhaps recognizing that it cannot meet the functional equivalency test to grant it standing, Plaintiff finally argues that "the functional equivalency test should not be rigidly applied." *See* Opposition at p. 10. In support of this argument, Plaintiff relies principally on a law journal article, Karl Coplan, *Is Voting Necessary? Organizational Standing and Non-Voting Members of Environmental Advocacy Organizations*, SE. ENVTL. L.J. 47 (2005) (the "Coplan Article"). Plaintiff's reliance on the Coplan Article – which courts have cited only twice in commercially-available opinions – is puzzling for at least two reasons.

First, the Coplan Article concludes that, "although voting rights are one means of promoting organizational responsiveness to the interested constituents, they are neither the only such means nor the most effective," and that "[v]oluntary association with an organization combined with substantial financing for the organization's activities, is, as a practical matter, at least as effective a means of enforcing board responsiveness as voting rights" Coplan Article, at 76. Stated differently, although the Coplan Article argues for a decreased emphasis on the

voting rights of an environmental organization's constituency, it still calls for satisfaction of the other two functional-equivalency factors: "serving in the entity" and "financing the entity's activities." *See Heap*, 112 F. Supp. 3d at 418. As explained above, KEI's constituency (whatever and whoever it is) does not control KEI's functions or finance KEI's activities, and thus Plaintiff would fail even the standard for which the Coplan Article advocates. And *second*, as its title suggests, the Coplan Article dealt with environmental organizations, and Plaintiff does not allege that it is an environmental organization.

Lastly, the cases on which Plaintiff relies in asserting that "the functional equivalency test requires some flexibility in analysis," *see* Opposition at p. 12, are all distinguishable. In *Citizens Coal Council v. Matt Canestrone Contracting, Inc.*, 40 F. Supp. 3d 632, 641 (W.D. Pa. 2014), the district court granted associational standing, emphasizing that "twenty-six individual members of CCC ... have voluntarily affiliated with CCC for the specific purpose of filing this lawsuit, and have provided financial support in the form of annual dues" Here, Plaintiff has not identified a single "constituent" who has affiliated with it to bring this suit, and Plaintiff does not collect annual dues. And the district court cited the Coplan Article's instruction that "ensuring an organization's responsiveness to its constituents may also be accomplished through voluntary association with the organization, combined with substantial financing for the organization's activities." *Id.* at 640. As explained above, KEI's constituency does not control KEI's functions or finance KEI's activities.

In *Oregon Advocacy Center v. Mink*, 322 F.3d 1101, 1112 (9th Cir. 2003), the Ninth Circuit affirmed the district court's grant of associational standing to an organization which represented the rights of individuals with mental illness, where it was undisputed "that people with disabilities constitute a majority of OAC's board of directors and that individuals who had received or were

receiving mental health services, or family members of such individuals, compose more than 60 percent of the advisory council” Here, Plaintiff does not contend that its constituency sits on either the board of directors or its board of advisors.

And finally, in *Friends of the Earth, Inc. v. Chevron Chemical Co.*, 129 F.3d 826, 829 (5th Cir. 1997), the Fifth Circuit affirmed the district court’s grant of associational standing to an organization which “elected the governing body of the organization,” and which “has a clearly articulated and understandable membership structure.” Here, KEI’s “constituency” does not elect its directors or advisors, and KEI lacks a membership structure whatsoever.⁸

III. CONCLUSION

For the reasons set forth above and in the Motion, because Plaintiff lacks both organizational and associational standing, the Court should grant the Motion and dismiss the Complaint with prejudice, for lack of subject-matter jurisdiction, under Rule 12(b)(1).

Respectfully submitted,

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⁸ Plaintiff also cites *U.S. Public Interest Research Group v. Bayou Steel*, No. 2:96-cv-00432 (E.D. La. Sept. 15, 1997). This opinion is unavailable on PACER, Westlaw, or LexisNexis, and Plaintiff did not attach a copy of the opinion to the Opposition.

CERTIFICATE OF SERVICE

I certify that on this 3rd day of July, 2018, I electronically sent a copy of the *Reply to Plaintiff's Memorandum in Opposition to Defendants' Motion to Dismiss* to all parties receiving CM/ECF notices in this case.

_____/s/
Alan C. Lazerow
Assistant United States Attorney