IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CONSUMER DATA INDUSTRY ASSOCIATION, *Plaintiff*,	§	
v.	§	No. 1:19-CV-00876-RP
STATE OF TEXAS THROUGH KEN PAXTON IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF TEXAS, *Defendant*.	§	

DEFENDANT'S RESPONSE IN OPPOSITION TO PLAINTIFF'S OBJECTIONS TO REPORT AND RECOMMENDATION

By this action, Plaintiff Consumer Data Industry Association ("CDIA"), an association of consumer credit reporting agencies ("CRAs"), seeks declaratory and injunctive relief against enforcement of Texas Business & Commerce Code § 20.05(A)(5).[1] CDIA argues that the Federal Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 *et seq.*, preempts § 20.05(A)(5). CDIA sues Ken Paxton, in his official capacity as Attorney General of Texas ("Defendant"), on the theory that the Texas Attorney General can enjoin violations of the Texas Business and Commerce Code.

Defendant moved to dismiss under Federal Rules of Civil Procedure 12(b)(1) (because CDIA alleges—at most—a contingent, hypothetical injury, which is insufficient to establish this Court's jurisdiction) and 12(b)(6) (because the FCRA does not preempt § 20.05(A)(5)). Dkts. 8, 10. CDIA responded that it alleged injury-in-fact because it "has alleged and/or this Court may draw the reasonable inference that member CRAs would be required to take some number of steps in order to come into compliance with [§ 20.05(A)(5)] and avoid an enforcement action," and further argued that its preemption claim has merit. Dkt. 9 at 7, 8-16.

[1] Herein, "§ 20.05(A)(5)" refers to that section of the Texas Business and Commerce Code.

REPORT AND RECOMMENDATION

The Court referred Defendant's motion to dismiss to United States Magistrate Judge Susan Hightower, who issued her Report and Recommendation on July 22, 2020. Dkt. 26 ("R&R"). The R&R recommended dismissal for lack of jurisdiction "[b]ecause CDIA's members do not have a ripe claim for adjudication based on the current facts," and, consequently, "would fail to satisfy the injury in fact element of standing." Dkt. 26 at 8 (citing *Warth v. Seldin*, 422 U.S. 490, 499 n.10 (1975)).[2] The R&R also recommended that CDIA not receive leave to amend its complaint because, without any ripe claim, "the Court does not have subject matter jurisdiction over this matter," and "amendment would be futile." Dkt. 26 at 9 (citing *TOTAL Gas & Power N. Am., Inc., v. FERC*, 859 F.3d 325, 332, 339 (5th Cir. 2017)).

On August 5, 2020, CDIA filed objections to the R&R, Dkt. 28, and a motion for leave to amend its complaint, Dkt. 29. Defendant responds and respectfully urges the Court to adopt the Magistrate Judge's well-reasoned recommendation and dismiss this case without leave to amend.

STANDARD OF REVIEW

In reviewing a report and recommendation on a case-dispositive motion, "[a] judge shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made[.]" W.D. TEX. L. R., App'x C, R. 4(b); *see also* 28 U.S.C. § 636(b)(1). The Court is not required to conduct a de novo review when the objections are frivolous, conclusive, or general in nature. *Battle v. United States Parole Comm'n.*, 834 F.2d 419, 421 (5th Cir. 1987). Nor does the Court need to review provisions of the report and recommendation that are not objected to, although it certainly has discretion to do so, under any standard it deems appropriate. *Thomas v. Arn*, 474 U.S. 140, 154 (1985).

[2] "Because the Court f[ound] that CDIA lacks the requisite standing to litigate its claims," the R&R concluded that it "need not address the parties' arguments relating to preemption." Dkt. 26 at 9.

ARGUMENT AND AUTHORITY

I. The Report and Recommendation Correctly Concluded that CDIA Cannot Establish the Court's Jurisdiction.

a. This case does not present a ripe dispute.

Under Article III of the Constitution, federal courts are confined to adjudicating "cases" and "controversies." *United Transp. Union v. Foster*, 205 F.3d 851, 857 (5th Cir. 2000) (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95 (1998)). To be a case or controversy for purposes of Article III jurisdiction, litigation "must be ripe for decision, meaning that it must not be premature or speculative." *Shields v. Norton*, 289 F.3d 832, 835 (5th Cir. 2002); *see also Choice Inc. of Tex. v. Greenstein*, 691 F.3d 710, 715 (2012) ("The justiciability doctrines of standing, mootness, political question, and ripeness 'all originate in Article III's case or controversy language[.]'") (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006)). Thus, like standing, "ripeness is a constitutional prerequisite to the exercise of jurisdiction." *Shields*, 289 F.3d at 835.

As the R&R explained, "[w]hether any of CDIA's members may be subject to enforcement under [§ 20.05(A)(5)] depends on contingent factors, including whether CDIA's members violate the Statute, whether the Attorney General discovers the violation, and whether the Attorney General exercises its discretion to enforce the Statute." Dkt. 26 at 8. "Based on these contingencies, any threat of litigation between the State and CDIA's members is too speculative at this time to constitute a specific and concrete threat of litigation between its members and the State," and, "[a]ccordingly, the claim is not ripe for review." *Id.* (citing *Texas v. United States*, 523 U.S. 296, 300 (1998); *Shields*, 289 F.3d at 835–36 (recognizing that ripeness is a constitutional prerequisite to subject-matter jurisdiction)).[3]

[3] The R&R set out its analysis and supporting authority in full at Dkt. 26 at 6-9 (citing *Orix Credit All., Inc. v. Wolfe*, 212 F.3d 891 (5th Cir. 2000); *United Transp. Union v. Foster*, 205 F.3d 851 (5th Cir. 2000); *Shields v. Norton*, 289 F.3d 832 (5th Cir. 2002); *Texas v. United States*, 523 U.S. 296 (1998)).

The Court should adopt the R&R because federal courts are without jurisdiction to resolve issues "involving contingent future events that may not occur as anticipated or indeed may not occur at all." *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580–81 (1985) (quotation omitted). And CDIA does not (and cannot) dispute that "[a] court should dismiss a case for lack of 'ripeness' when the case is abstract or hypothetical." *Sureshot Golf Ventures, Inc. v. Topgolf Int'l, Inc.,* 754 F. App'x 235, 239–40 (5th Cir. 2018), *cert. denied*, 139 S. Ct. 1330 (2019) (quoting *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 833 F.2d 583, 586–87 (5th Cir. 1987)); *see also* Dkt. 28 at 8. Consequently, where—as here—there is no concrete, impending injury to a party, a dispute has not "matured sufficiently to warrant judicial intervention." *Warth v. Seldin*, 422 U.S. at 499 n.10.

CDIA objects to this straightforward conclusion, arguing that "uncertainties always exist in potential enforcement actions," and that under the R&R's reasoning, "no claim challenging the validity of a rule or statute could ever be brought pre-enforcement." Dkt. 28 at 7. This mischaracterizes the R&R, which explicitly recognized that a pre-enforcement challenge can be ripe under appropriate circumstances. Dkt. 26 at 7 (citing *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 164-67 (2014)). That "contingencies" render "any threat of litigation between the State and CDIA's members [] too speculative at this time," does not negate that principle. Dkt. 26 at 8.

b. CDIA's objections do not change this result.

1. CDIA utterly fails to grapple with—let alone satisfy—the standard for a justiciable pre-enforcement challenge. Rather, it points to two instances where the Attorney General has acted under statutes *other than* § 20.05(A)(5). First, it notes the Texas Attorney General's participation in a 31-state action—initiated in 2012 by Ohio Attorney General Mike DeWine—in which a number of CRAs voluntarily agreed to make consumer-friendly changes to their practices. Dkt. 28 at 13-14. Second, it identifies a 2017 lawsuit the Texas Attorney General filed against Equifax under Texas's Deceptive Trade Practices Act in connection with a data security breach. Dkt. 28 at 13. CDIA offers no basis for

the Court to conclude that either of these matters involved Chapter 20 of the Texas Business and Commerce Code, let alone § 20.05(A)(5) thereof—the specific provision at issue here. This is insufficient to establish a ripe dispute.

Still, CDIA contends that "the presumption that the Defendant had taken no [enforcement] action against CDIA members was material to the Magistrate Judge's finding," urging the Court to reject the R&R on the theory that it "relied on an assumed fact that was not accurate." Dkt. 28 at 13, 14. Tellingly, CDIA cites no portion of the R&R that assumed (or found) "that the Defendant had taken no [enforcement] action against CDIA members." And pointing this out only supports dismissal, because it is CDIA's burden to show a ripe dispute in order to establish jurisdiction. *See, e.g.*, *Mississippi State Democratic Party v. Barbour*, 529 F.3d 538, 545 (5th Cir. 2008) ("plaintiff[] bears the burden of establishing standing and ripeness.") (citation omitted). Had it done so here, the R&R would not have recommended dismissal.

Contrary to CDIA's suggestion, courts deciding motions to dismiss may not "assume facts." Instead, they are bound by the allegations plaintiffs put before them, construing all well-pleaded facts as true. *See, e.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (in deciding a motion to dismiss, "[w]hen there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.") Thus, any failure of factual support here may only be attributed to CDIA itself.

2. The cases CDIA cites further support the R&R. CDIA's first authority—*Triple G Landfills, Inc. v. Board of Commissioners*—is unhelpful because it is an out-of-circuit case, and is therefore not controlling on this Court. Dkt. 28 at 7-9 (citing 977 F.2d 287, 288 (7th Cir. 1993)).

Next, CDIA invokes *Abbott Labs v. Gardner*. Dkt. 28 at 8-12 (citing 387 U.S. 136, 148 (1967), *abrogated by Califano v. Sanders*, 430 U.S. 99 (1977)). *Abbott Labs* challenged an administrative agency's "purport[edly] . . . authoritative interpretation of a statutory provision," which imposed greater

requirements than the plaintiffs "in good faith" believed were necessary to "meet[] statutory requirements." Dkt. 28 at 9 (quoting 387 U.S at 152-53). This had the effect of requiring the *Abbott* plaintiffs to choose between making a "costly investment to come into compliance" with the statute, or "risk 'serious criminal and civil penalties'" for violating the regulation, at potentially even greater expense. *Id.* But *Abbott Labs* did not involve a case like this one, where an official "has the authority to enforce" a challenged statue, but has not construed, administered, interpreted, or enforced it as to the plaintiff. *Cf. City of Austin v. Paxton*, 943 F.3d 993, 1002 (5th Cir. 2019).[4] Moreover, to the extent it is still good law, *Abbott Labs* simply stands for the unremarkable proposition that the ripeness doctrine's "basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements[.]" 387 U.S. at 148. For all the reasons in the R&R, CDIA has failed to allege anything more than an "abstract disagreement" here.

Finally, CDIA cites *Orix Credit Alliance, Inc. v. Wolfe*, arguing that "the Magistrate looked only to whether 'a specific and concrete threat of litigation' was likely to arise." Dkt. 28 at 8, n.5 (citing 212 F.3d 891, 895 (5th Cir. 2000)). But *Orix* merely quoted the *Abbott Labs* ripeness standard, and neither case found standing to bring a pre-enforcement statutory challenge *without* a specific and concrete threat of enforcement action by the defendant. Thus, *Orix* is no more helpful to CDIA that *Abbott Labs*.[5]

3. CDIA's attempts to distinguish the authorities that the R&R relied upon similarly fail. First, CDIA argues that in *Texas v. United*, "the State itself had yet to take any of the steps necessary to bring its conduct within possible scope of the law." Dkt. 28 at 11 (quoting 523 U.S. 296, 301 (1998)). Even

[4] *Infra*, I(c). CDIA concedes as much, noting that "[t]he Texas Attorney General is not an administrative agency." Dkt. 28 at 10.

[5] As the R&R noted, "CDIA relies on cases relating to criminal statutes and violations of the First Amendment, with a more lenient standard for standing and ripeness that allows for judicial intervention before enforcement." Dkt. 26 at 8 (citations omitted). To the extent CDIA attempts to rely upon those same authorities here, *see* Dkt. 28 at 18-19, they should be rejected for the same reasons in the R&R and the Defendant's briefing, *see* Dkts. 8, 10.

if CDIA had explained why this is relevant (it has not), CDIA has not alleged that CDIA has taken "any of the steps necessary to bring its conduct within" § 20.05(A)(5).[6] This attempt to distinguish *Texas* is unhelpful.

Next, CDIA seeks to distinguish *Shields v. Norton* on two theories. Dkt. 28 at 12 (citing 289 F.3d 832). First, it notes the *Shields* plaintiff's failure to satisfy a statutory pre-suit notice requirement, which was a jurisdictional prerequisite to a private cause of action under the Endangered Species Act. Dkt. 28 at 12; 289 F.3d at 835 (observing that pre-suit notice under Endangered Species Act is "the first step required in the litigation process"). Here, by contrast, CDIA has not alleged that Defendant has taken any "first step required" in any action to enforce § 20.05(A)(5) against any member CRA. Second, CDIA states that *Shields* supports the proposition that "a claim is not ripe for review . . . where the threatened litigation has not ripened after several years." Dkt. 28 at 12. Be that as it may, CDIA presents no evidence of "threatened litigation" under §20.05(A)(5) in this case. Nor did *Shields* hold that a case can *only* be unripe if "it has not ripened after several years." *Cf. id.* CDIA's discussion of *Shields* is unhelpful to its position.

4. CDIA argues that ripeness was "an issue that had never been raised by the Defendant, and about which CDIA had no opportunity to be heard." Dkt. 28 at 2. This is wrong as a matter of both fact and law, and in any event, does not provide a basis to depart from the R&R, for two independent reasons.

First, courts have long recognized that "the doctrines of ripeness and standing 'often overlap in practice, *particularly in an examination of whether a plaintiff has suffered a concrete injury*'" –the inquiry relevant here. *Lopez v. City of Houston*, 617 F.3d 336, 342 (5th Cir. 2010) (quoting *Texas,* 497 F.3d at 496) (emphasis added). This is because, "[i]f the purported injury is 'contingent [on] future events that

[6] The Supreme Court in *Texas* further noted that, to the extent *Abbott Labs* remains relevant, it contemplated the "threat of criminal sanction," which is not at issue here. Dkt. 28 at 11-12 (citing *Texas*, 523 U.S. at 301) (distinguishing *Abbot Labs*, 387 U.S. at 152).

may not occur as anticipated, or indeed may not occur at all,' the claim is not ripe for adjudication." *Id.* (quoting *Thomas,* 473 U.S. at 580–81). This is precisely the case at bar, as the R&R correctly found.

Thus, though the motion to dismiss focused on a failure to show certainly impending injury-in-fact as required for standing, the Supreme Court has recognized these inquiries as overlapping for jurisdictional purposes. *See, e.g.*, *Driehaus*, 573 U.S. at 158-59 ("One recurring issue in our cases is determining when the threatened enforcement of a law creates an Article III injury . . . [W]e have permitted pre-enforcement review under circumstances that render the threatened enforcement sufficiently imminent."); *Warth*, 422 U.S. at 499 n.10 ("The standing question thus bears close affinity to questions of ripeness—whether the harm asserted has matured sufficiently to warrant judicial intervention.").[7] And contrary to CDIA's suggestion,[8] the Supreme Court has recognized that this principle holds "even where an issue presents purely legal questions[.]" *Id.* (quoting *Cent. & S.W. Servs., Inc. v. EPA,* 220 F.3d 683, 690 (5th Cir. 2000)).

Second, even if the ripeness and injury-in-fact inquiries were not, as a practical matter, the same in this case, "[s]ince standing and ripeness are essential components of federal subject-matter jurisdiction, the lack of either can be raised at any time by a party or by the court." *Sample v. Morrison,* 406 F.3d 310, 312 (5th Cir. 2005) (per curiam); *see also, e.g.*, *In re Jillian Morrison, L.L.C.*, 482 F. App'x 872, 875 (5th Cir. 2012) (collecting cases). As a jurisdictional issue, courts "may raise ripeness *sua sponte*[.]" *Rosedale Missionary Baptist Church v. New Orleans City*, 641 F.3d 86, 90–91 (5th Cir. 2011). Thus, "purported failure to adequately brief [] ripeness . . . does not result in waiver," and

[7] *See also* Michael Aaron DelGaudio, *From Ripe to Rotten: An Examination of the Continued Utility of the Ripeness Doctrine in Light of the Modern Standing Doctrine*, 50 GA. L. REV. 625, 649 (2016) (observing that, despite a "theoretical distinction between the functions performed by the two doctrines-that standing determines whether the party bringing suit is proper, whereas ripeness determines whether the suit is being brought at the proper time . . . [s]tanding in particular has undergone monumental substantive changes which, when coupled with small changes to ripeness, have resulted in the standing and ripeness inquiries merging on an abstract and practical level.").

[8] *See, e.g.,* Dkt. 28 at 8, 9, 10.

the R&R committed no error in recommending dismissal on that basis. *Lower Colorado River Auth. v. Papalote Creek II, L.L.C.*, 858 F.3d 916, 921–22 (5th Cir. 2017) (cleaned up) (citations omitted).

In any event, Defendant's filings make no secret of their argument that CDIA cannot show injury-in-fact, giving CDIA ample opportunity to respond, regardless of whether this requirement is being viewed through "the doctrine[] of ripeness [or] standing," both of which "'often overlap in practice, particularly in an examination of whether a plaintiff has suffered a concrete injury.'" *Lopez v. City of Houston*, 617 F.3d at 342. Tellingly, CDIA's objections to the R&R raise no new arguments to support a finding of concrete, particularized, impending injury-in-fact. Neither does their proposed amended complaint.[9] CDIA fails to allege an injury sufficient to support the Court's exercise of Article III jurisdiction.

c. Recent Fifth Circuit precedent recognizes immunity as an additional reason this Court lacks jurisdiction.

"Federal courts are without jurisdiction over suits against a state, a state agency, or a state official in his official capacity unless the State has waived its sovereign immunity or Congress has clearly abrogated it." *Moore v. La. Bd. of Elementary & Secondary Educ.*, 743 F.3d 959, 963 (5th Cir. 2014). *Ex Parte Young* recognized an end-run around this immunity, which "rests on the premise—less delicately called a fiction—that when a federal court commands a state official to do nothing more than refrain from violating a federal law, he is not the State for sovereign-immunity purposes." *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 255 (2011) (citation omitted).

But as the Fifth Circuit has recently made clear, the Texas Attorney General's prosecutorial authority alone is insufficient to invoke *Ex Parte Young*. *City of Austin v. Paxton*, 943 F.3d 993, 1002 (5th Cir. 2019). Rather, to obtain a pre-enforcement injunction, a plaintiff must show both that the Attorney General "has the authority to enforce" the challenged statue and that they are "likely to do

[9] *See infra*, II(a).

[so] here." *Id.* While the Fifth Circuit has recognized that a specific threat can satisfy *Ex Parte Young*, it has only done so when the alleged threat "intimat[ed] that formal enforcement was on the horizon" based on a specific wrongdoer's conduct. *NiGen Biotech, L.L.C. v. Paxton*, 804 F.3d 389, 392 (5th Cir. 2015). CDIA can identify no such threat here. This is insufficient to support federal jurisdiction. *Cf. Driehaus*, 573 U.S. at 164 (discussing indicia of enforcement).

II. The Report and Recommendation Properly Found That Amendment Would Not Cure the Jurisdictional Defect.

Federal Rule of Civil Procedure 15(a) governs requests for leave to amend. Granting leave is within the discretion of the trial court and shall be "freely given when justice so requires." FED. R. CIV. P. 15(a); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330 (1971). Nevertheless, leave to amend "is by no means automatic." *Wimm v. Jack Eckerd Corp.*, 3 F.3d 137, 139 (5th Cir. 1993) (citation omitted). Denying leave to amend is appropriate in cases of "1) undue delay, 2) bad faith or dilatory motive, 3) repeated failure to cure deficiencies by previous amendments, 4) undue prejudice to the opposing party, and 5) futility of the amendment." *Smith v. EMC Corp.*, 393 F.3d 590, 595 (5th Cir. 2004) (citing *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 864 (5th Cir. 2003)).

a. Amendment would be futile.

"[A] district court need not grant a futile leave to amend." *Legate v. Livingston*, 822 F.3d 207, 211 (5th Cir. 2016). "Futility is determined under Rule 12(b)(6) standards, meaning an amendment is considered futile if it would fail to state a claim upon which relief could be granted." *Id.* The R&R correctly concluded that leave to amend would be futile because, where "claimed injury remain[s] speculative . . . amendment would have been futile." *Brown v. Livingston*, 524 F. App'x 111, 116 (5th Cir. 2013) (citing *Briggs v. Mississippi,* 331 F.3d 499, 508 (5th Cir. 2003)).

CDIA argues that its "proposed first amendment to its Complaint articulates . . . the business of its member CRAs, the compliance changes that would need to be made if the New Texas Law is not preempted, and the historical enforcement proceedings initiated by this Defendant against CDIA

members related to their credit reporting activities," insisting that, given this, "amendment would not be 'futile.'" Dkt. 28 at 6. But this entirely misses the R&R's point that, "[b]ecause CDIA's claim is not ripe for review, the Court does not have subject matter jurisdiction over this matter. Therefore, amendment would be futile." Dkt. 28 at 9 (citing *TOTAL Gas & Power N. Am., Inc., v. FERC*, 859 F.3d 325, 332, 339 (5th Cir. 2017) (affirming district court's dismissal of plaintiff's claims because claims were unripe and amendment would be futile due to lack of subject matter jurisdiction).[10]

The R&R concluded that CDIA does "not have a ripe claim for adjudication based on the current facts," and therefore "would fail to satisfy the injury in fact element of standing." Dkt. 26 at 8 (citing *Warth*, 422 U.S. at 499 n.10). As such, the Court should deny leave to amend, because "the district court lacks jurisdiction over requests for relief that are unripe." *In re Deepwater Horizon*, 546 F. App'x 502, 506 (5th Cir. 2013) (concluding that remand of unripe claims to district court was futile because of lack of jurisdiction over unripe claims). *See also, e.g.*, *Taylor v. Dretke*, 239 F. App'x 882, 884 (5th Cir. 2007) ("Because the amendment Taylor sought to make would have been futile in light of his failure to satisfy the actual injury requirement, the district court did not err in dismissing the complaint without sua sponte giving Taylor an opportunity to amend.") (citing *Jones v. Greninger,* 188 F.3d 322, 326–27 (5th Cir. 1999); *Jacquez v. Procunier,* 801 F.2d 789, 793 (5th Cir. 1986); *Hall v. United Ins. Co. of Am.,* 367 F.3d 1255, 1262 (11th Cir. 2004) (holding that "denial of leave to amend is justified by futility when the complaint as amended is still subject to dismissal.")).

b. Amendment is inappropriate because of CDIA's undue delay and failure to comply with the rules of this Court.

Pursuant to this Court's rules, "[w]hen a motion for leave to file a pleading, motion, or other submission is required, an executed copy of the proposed pleading, motion, or other submission shall be filed as an exhibit to the motion for leave." W.D. TEX. L.R. CV-7(b). In raising its "alternative"

[10] Moreover, as the Supreme Court itself said in *Abbott Labs*, "possible financial loss is not by itself a sufficient interest to sustain a judicial challenge to governmental action." 387 U.S. at 153.

request for leave to amend in response to Defendant's motion to dismiss, CDIA did not attach a proposed amended pleading. *See* Dkt. 9. Rather, it stated only that "CDIA requests leave to submit either an amended Complaint or evidence in support of its Complaint" and "CDIA would request leave to amend the Complaint to allege additional facts to establish standing." Dkt. 9 at 8, n.8. This does not meet the standard for obtaining leave to amend, and further supports a finding that leave should be denied because the request was made with undue delay.

In this vein, the R&R noted CDIA's failure to "attach[] a proposed amended complaint to its [response to the motion to dismiss], or describe[] any additional facts it would plead to cure the defects in its Complaint or otherwise adequately state a claim sufficient to survive a motion to dismiss." Dkt. 26 at 9 (citing *Edionwe v. Bailey*, 860 F.3d 287, 294 (5th Cir. 2017) (holding that leave to amend is not required where movant fails to apprise court of facts he would plead in amended complaint to cure any deficiencies)).

This is alone sufficient to deny leave to amend. *Edionwe*, 860 F.3d at 294. But it also emphasizes the undue delay CDIA has exhibited in waiting until its objections to the R&R to even attempt to cure the defect in its complaint. From the very beginning, Defendant has consistently argued that CDIA has not alleged adequate injury-in-fact, because it has not alleged any certainly impending injury. *See, e.g.* Dkt. 8 at 5-8 (explaining why CDIA cannot satisfy the settled requirement that "threatened injury must be certainly impending to constitute injury in fact.") (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410 (2013) (collecting cases)); Dkt. 10 at 1-6 (explaining why CDIA does not satisfy the requirements for pre-enforcement standing to sue and noting CDIA's concession that its complaint "does not allege all facts detailing the precise manner in which member CRAs will be forced to comply with Texas law.") (quoting Dkt. 9 at 7). That CDIA has failed to even attempt to rectify that until now further counsels against granting leave to amend. Indeed, "[a] party who neglects to ask the district court for leave to amend cannot expect to receive such dispensation from the court of appeals." *U.S.*

ex rel. Willard v. Humana Health Plan of Texas, Inc., 336 F.3d 375, 387 (5th Cir. 2003). The same logic applies when a litigant fails to raise an issue before a magistrate judge. *See generally Performance Autoplex II Ltd. v. Mid-Continent Cas. Co.*, 322 F.3d 847, 862 (5th Cir. 2003) ("Litigants may not [] use the magistrate judge as a mere sounding-board for the sufficiency of the evidence.") (quoting *Freeman v. County of Bexar*, 142 F.3d 848, 852 (5th Cir.1998)).

CONCLUSION

For the foregoing reasons, this Court should adopt the Report & Recommendation and dismiss this case without leave to amend. CDIA has not and cannot—on its proposed amended complaint or otherwise—allege a concrete, particularized injury-in-fact as required to establish the Court's Article III jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that that on August 19, 2020, this document was filed electronically via the Court's CM/ECF system, causing electronic service upon all counsel of record:

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