

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

CONSUMER DATA INDUSTRY
ASSOCIATION,

Plaintiff,

v.

STATE OF TEXAS, *through Ken Paxton*
in his official capacity as Attorney General
of the State of Texas,

Defendant.

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1:19-CV-876-RP

ORDER

Before the Court is the report and recommendation of United States Magistrate Judge Susan Hightower concerning Defendant State of Texas’s (“the State”) Motion to Dismiss, (Dkt. 8), and all related briefing. (R. & R., Dkt. 26). Also before the Court is Consumer Data Industry Association’s (“Consumer Data”) Motion for Leave to File a First Amended Complaint. (Mot., Dkt. 29). The State is opposed to Consumer Data’s motion to amend. (Def.’s Opp., Dkt. 30, at 10–13). The report and recommendation is considered in conjunction with Consumer Data’s motion to amend, which was filed after the report and recommendation issued but before this Court had considered the report. Having considered the parties’ briefs, the record, and the relevant law, the Court grants Consumer Data’s motion to amend, (Dkt. 29). As a result, the Court further finds that the State’s motion to dismiss, (Dkt. 8), is moot, and as such the report and recommendation, (Dkt. 26), will not be adopted.

On April 8, 2020, the Court referred the State’s Motion to Dismiss, (Dkt. 8), to Judge Hightower for a report and recommendation under 28 U.S.C. § 636(b)(1)(B), Federal Rule of Civil Procedure 72, and Rule 1(d) of Appendix C of the Local Rules of the United States District Court for the Western District of Texas. (Order, Dkt. 24). In her report and recommendation, Judge

Hightower recommended granting the State’s motion to dismiss for lack of standing. (R. & R., Dkt. 26, at 10). Judge Hightower also recommended denying Consumer Data’s request to file an amended complaint as futile because Consumer Data had “not attached a proposed amended complaint to its Response, or described any additional facts it would plead to cure the defects in its Complaint.” (*Id.* at 9).

The Federal Rules of Civil Procedure permit a party to amend its pleading “once as a matter of course within 21 days of service of a responsive pleading,” but otherwise “only with the opposing party’s written consent or the court’s leave.” Fed. R. Civ. P. 15(a)(1)–(2). “The court should freely give leave when justice so requires.” Fed. R. Civ. P. 15(2). Rule 15(a) “requires the trial court to grant leave to amend freely, and the language of this rule evinces a bias in favor of granting leave to amend.” *Lyn–Lea Travel Corp. v. Am. Airlines*, 283 F.3d 282, 286 (5th Cir. 2002) (citation and internal quotation marks omitted). A district court may, however, deny leave to amend if it has a “substantial reason” to do so. *Id.*; *Mayeaux v. Louisiana Health Serv. & Indem. Co.*, 376 F.3d 420, 425 (5th Cir. 2004) (“[A]bsent a substantial reason such as undue delay, bad faith, dilatory motive, repeated failures to cure deficiencies, or undue prejudice to the opposing party, the discretion of the district court is not broad enough to permit denial.”) (internal citations removed). The futility of amendment is one such substantial reason to deny leave to amend. *Stripling v. Jordan Prod. Co., LLC*, 234 F.3d 863, 872–73 (5th Cir. 2000). A proposed amendment is futile if it fails to state a claim upon which relief could be granted. *Stripling, LLC*, 234 F.3d at 872–73.

Consumer Data’s proposed amended complaint provides more specificity as to the alleged injury sustained by Consumer Data’s members because of the state statute challenged in this declaratory judgment action. (Mot., Dkt. 29, at 4). The State opposes Consumer Data’s motion for leave to file its first amended complaint on the basis that Judge Hightower’s report and

recommendation recommended dismissing Consumer Data's claims for lack of subject matter jurisdiction. (*Id.*). However, Judge Hightower did not have the opportunity to review the proposed amended complaint for futility since Consumer Data had not yet filed its motion to amend.

Having reviewed Consumer Data's proposed amended complaint, the Court finds that amendment is not futile. A plaintiff can establish standing under the Declaratory Judgment Act if it shows "actual present harm or a significant possibility of future harm"... "even though the injury-in-fact has not yet been completed." *Bauer v. Texas*, 341 F.3d 352, 357–58 (5th Cir. 2003) (internal citations removed). The Supreme Court has stated that "[a]n allegation of future injury may suffice if the threatened injury is 'certainly impending,' or there is a 'substantial risk' that the harm will occur." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157–58 (2014) (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 n.5 (2013)).

In Consumer Data's proposed amended complaint, it adds detail regarding the "compliance measures the businesses would have to undertake" to comply with the Texas law it argues is preempted by federal law. (Dkt. 29, at 4). Because Consumer Data alleges that its member organizations "will be required to make substantial changes to their business operations," (Proposed Am. Compl., Dkt. 29-1, at 8), the Court finds that the proposed amendment is not futile. *See ESI/Employee Sols., L.P. v. City of Dallas*, 450 F. Supp. 3d 700, 714 (E.D. Tex. 2020) (finding standing under Declaratory Judgment Act where Plaintiff would have to "take action in order to become compliant" with city ordinance).

The Court finds that there is no substantial reason to deny leave, and that it is in the interest of justice to allow Consumer Data to file its amended complaint. Given these findings, and Rule 15's "bias in favor of granting leave to amend," the Court will grant Consumer Data's motion. *See Lynn-Lea Travel Corp.*, 283 F.3d at 286; *Mayeaux*, 376 F.3d at 425.

Accordingly, the Court **ORDERS** that Consumer Data's Motion for Leave to File a First Amended Complaint, (Dkt. 29), is **GRANTED**.

IT IS FURTHER ORDERED that the State's Motion to Dismiss, (Dkt. 8), is **MOOT**.

SIGNED on November 17, 2020.

A handwritten signature in blue ink, appearing to read "R. Pitman", written over a horizontal line.

ROBERT PITMAN
UNITED STATES DISTRICT JUDGE