

**UNITED STATES DISTRICT COURT
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 FOR THE
STATE OF TEXAS,**

Defendant.

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No. 1:19-CV-00876-RP

**CONSUMER DATA INDUSTRY ASSOCIATION’S
MOTION FOR LEAVE TO FILE
FIRST AMENDED COMPLAINT**

**TO THE HONORABLE JUDGE OF THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION:**

Plaintiff, Consumer Data Industry Association (“CDIA”), in accordance with Rule 15 of the Federal Rules of Civil Procedure, and Local Rule CV-7(b),¹ moves the Court for leave to file its First Amended Complaint, and in support thereof would show the Court the following:

BACKGROUND

On October 2, 2019, Defendant filed its Motion to Dismiss. CDIA timely responded to Defendant’s Motion seeking that it be denied or, in the alternative, that CDIA be allowed to amend its Complaint. On July 22, 2020, United States Magistrate Judge Susan Hightower issued her Report

¹ In accordance with Local Rule CV-7(b) a copy of the proposed amended complaint is attached. Exhibit A. No new claims have been added. The request for a preliminary injunction has been withdrawn.

and Recommendation on the Defendant’s Motion to Dismiss (“Report”).² The Report recommended that the District Court grant Defendant’s Motion to Dismiss and dismiss this case for lack of ripeness, and thus for lack of standing. The Report further recommended that the District Court deny Plaintiff CDIA leave to file an Amended Complaint “as amendment would be futile.” *See* Report, page 10. The recommendation was based on a determination that CDIA’s members do 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. Interestingly, the determination of ripeness was addressed *sua sponte*, as neither Plaintiff nor Defendant had raised or briefed the ripeness issue, nor did the Magistrate hold any hearings or give either party an opportunity to be heard on the Motion to Dismiss. The Report determined that the case was not ripe because:

Whether any of CDIA’s members may be subject to enforcement under the Statute 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. Based on these contingencies, any threat of litigation between the Statute 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. [citations omitted]. Accordingly, the claim is not ripe for review.”

Report at p. 8. In short, the Report opines that the law must be affirmatively violated, and the violation discovered by the Attorney General, before this lawsuit can be filed.

LAW AND ARGUMENT

The current scheduling order signed by the Court indicated the deadline to file a motion to amend or supplement pleadings was February 14, 2020. However, that Scheduling Order was entered pre-COVID and thus did not contemplate that Defendant’s Motion to Dismiss would not be ruled on until after the amendment deadline ran. Since the filing of the Defendant’s Motion to

² A copy of the Report is attached as Exhibit **B**.

Dismiss, the parties have engaged in discovery, cooperated on a proposed Joint Stipulation of Facts in support of their cross-motions for Summary Judgment, and were prepared to file their respective motions when the Report was issued.

Rule 15(a)(2) provides that a party may amend its pleading with the opposing party's written consent or the court's leave, and that courts should freely give leave when justice so requires. The determination of whether a party should be granted leave to amend is entrusted to the sound discretion of the district court. *See Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227 (1962). A district court must possess a "substantial reason" to deny a request for leave to amend. *Smith v. EIVIC Corp.*, 393 F.3d 590, 595 (5th Cir. 2004). Specifically, the Fifth Circuit examines five considerations to determine whether to allow leave to amend a complaint: 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*, 393 F.3d at 595. Absent any of these factors, the leave sought should be freely given. *Id.*

The factors instruct that CDIA should be allowed to amend its Complaint. The amendment will not unduly delay this lawsuit. The amendment is not being filed in bad faith or with dilatory motive. The amendment will merely be CDIA's first amendment of its Complaint. The amendment will not unduly prejudice the Defendant.

Therefore, the only outstanding issue is whether or not the amendment would be "futile". As set forth in CDIA's Objections to the Report, the effective result of the Report's recommendation is that a federal declaratory judgment action is not available in this civil case, and that CDIA members must violate the State law, exposing members to fines, penalties, and the expense and uncertainty of defending an enforcement action. The only solace would be if the Defendant unilaterally decides, in exercise of its prosecutorial discretion, not to enforce state law. However, in pre-litigation discussions

Defendant declined to give assurances to CDIA that such a suit will never be filed. Since CDIA filed this case, however, the Defendant has agreed not to enforce the law during the pendency of this action so this Court may reach the merits of the preemption claim.

The First Amended Complaint articulates in detail the two enforcement actions previously brought by this Attorney General against CDIA members and how the member CRAs had to change their day-to-day operations to comply with the settlement. *See* First Amended Complaint, ¶¶ 18-35. The First Amended Complaint alleges with more particularity facts related to the medical account information, its use in consumer reports, and compliance measures the businesses would have to undertake to address the Texas Law, if not found to be preempted by this Court, including but not limited to:

8. The Attorney General has declined to give Plaintiff assurances that it will never enforce Tex. Bus. & Com. Code § 20.05(a)(5) with respect to the medical account collection information that Plaintiff's members already report consistent with the FCRA.

* * *

10. A declaration construing the Texas Law as preempted would prevent Plaintiff's members from having to make material changes to their day-to-day business operations to come into compliance with the Texas Law, described below, and change the products they already provide which, while permissible under the federal Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq., would be prohibited by the Texas Law.

* * *

18. As of the effective date of the SB 1037, consumer reports prepared by some of Plaintiff's CRA members have included Medical Account Information where such information is furnished about the consumer to the CRA, consistent with the requirements of the FCRA.
19. Upon information belief, certain Medical Account Information would be viewed by the Attorney General as prohibited by the Texas Law.
20. Because certain of Plaintiff's members currently maintain Medical Account Information on consumers today, which the FCRA permits them to include in consumer reports, Plaintiff's members would have to make significant changes to their operations in order to come into compliance with the Texas Law.

Thus, the Amended Complaint will make explicit that which is implicit in the current version of the Complaint, and clearly demonstrates CDIA's claim is ripe and this Court has jurisdiction; thus, amendment would not be "futile."

CONCLUSION

For the foregoing reasons, CDIA submits that it is appropriate to grant leave to amend, and accordingly, CDIA requests leave to file the attached First Amended Complaint.

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

This will confirm that the undersigned has discussed this Motion with Defendant's counsel who indicates that she is opposed to same.

Edward D. Burbach
Edward D. ("Ed") Burbach

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of August, 2020, a true and correct copy of the foregoing document was filed electronically via the Court's CM/ECF system, causing electronic service upon all counsel of record.

/s/ Rebecca E. Kuehn
Rebecca E. Kuehn