UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

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

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 The request for a preliminary injunction has been withdrawn.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

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

CONSUMER DATA INDUSTRY ASSOCIATION,	§	
	§	
Plaintiff	§	
	§	CIVIL ACTION NO:
V.	§	
	§	
STATE OF TEXAS THROUGH KEN PAXTON, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF TEXAS,	§	
	§	
Defendant	§	

PLAINTIFF'S FIRST AMENDED
COMPLAINT FOR DECLARATORY JUDGMENT

COMES NOW Plaintiff, Consumer Data Industry Association ("CDIA"), and files this First Amended Complaint for Declaratory Judgment regarding the statute enacted by the 86th Regular session of the Texas Legislature as S.B. 1037, captioned "Relating to Limitations on the on the Information Reported by Consumer Reporting Agencies" ("SB 1037"). Senate Bill 1037 was signed into law by the Governor and effective May 31, 2019. Senate Bill 1037 amends Texas Business and Commerce Code Chapter 20 "Regulation of Consumer Credit Reporting Agencies" by adding § 20.05(a)(5) to include requirements of consumer reporting agencies relating to the content of consumer reports, which law is preempted by the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. §1681 *et seq*.

In support of its complaint, the Plaintiff CDIA would show as follows.

I. PARTIES

1. Plaintiff CDIA is an international trade association founded in 1906, which is organized under the laws of Missouri with its principal place of business in Washington, D.C. CDIA's membership includes the three nationwide credit reporting agencies ("CRAs"), Experian, Equifax, and Trans Union, and other CRAs that furnish information concerning Texas consumers. In its more than 100-year history, CDIA has worked with the U.S. Congress and with State legislatures to develop laws and regulations governing the collection, use, maintenance, and dissemination of consumer report information. In this role, CDIA participated in the efforts leading to the enactment of the FCRA in 1970 and every subsequent amendment to the FCRA. In this role, CDIA also represents the interests of the consumer reporting industry before every State legislature.

2. Defendant State of Texas through Attorney General Ken Paxton, acting in his official capacity, can be served by delivering service to General Paxton with a copy to Darren McCarty, Deputy Attorney General for Civil Litigation, Price Daniels, Sr. Building, 209 West 14th Street, 8th Floor, Austin, Texas 78701.

II. JURISDICTION AND VENUE

3. This action arises under the FCRA, 15 U.S.C. §§ 1681c[1] and 1681t(b)[2] and the Declaratory Judgment Act, 28 U.S.C. §§2201 and 2202. This Court has jurisdiction pursuant to 28 U.S.C. § 1331. Plaintiff's cause of action is based upon, and seeks judicial interpretation of, 15 U.S.C. § 1681 *et seq.*, including but not limited to § 1681c, which is given express preemptive

[1] https://www.govinfo.gov/content/pkg/USCODE-2010-title15/html/USCODE-2010-title15-chap41-subchapIII-sec1681c.htm
[2] https://www.govinfo.gov/content/pkg/USCODE-2011-title15/html/USCODE-2011-title15-chap41-subchapIII-sec1681t.htm

effect by § 1681t (b)(1)(E) as they relate to Texas' attempt to limit consumer report content governed by the FCRA.

4. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b)(2) because a substantial part of the events or omissions giving rise to the claim occurred within this District. In addition, Defendant resides in this District. *See* 28 U.S.C. § 1391(b)(i).

III. FACTUAL BACKGROUND

5. This action seeks to prevent the State of Texas ("Texas") from undermining the accuracy, integrity, and reliability of consumer report information that is essential to the "needs of commerce" and the "efficiency of the banking system" throughout the United States by impermissibly regulating the content of consumer reports. *See*, 15 U.S.C. § 1681.

6. This harm is threatened by the enactment of legislation amending Tex. Bus. & Com. Code Chapter 20, to attempt to prohibit CRAs doing business in Texas from including certain information in their consumer reports in Texas, which amendments are codified in Tex. Bus. & Com. Code § 20.05(a) (5) (the "Texas Law") and any enforcement thereof by the State of Texas.

7. The Texas Law is preempted by FCRA § 1681t(b)(1)(E).

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.

9. This action seeks a declaration as to the preemptive effect of 15 U.S.C. §1681t(b)(1) as applied to the Texas Law with which Plaintiff's members must otherwise comply.

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.

A. TEXAS SENATE BILL 1307

11. Senate Bill 1037, captioned "Relating to Limitations on the Information Reported by Consumer Reporting Agencies," was signed into law by the Texas Governor on May 31, 2019. Senate Bill 1037 was effective immediately upon signing.

12. Senate Bill 1037 amended the Texas Fair Credit Reporting Act ("Texas FCRA") to add Tex. Bus. & Com. Code § 20.05(a)(5), which attempts to prohibit a CRA from preparing a consumer report containing information related to a medical collection account, specifically:

> … [a] collection account with a medical industry code, if the consumer was covered by a health benefit plan at the time of the event giving rise to the collection and the collection is for an outstanding balance, after copayments, deductibles, and coinsurance, owed to an emergency care provider or a facility-based provider for an out-of-network benefit claim…

Tex. Bus. & Com. Code § 20.05(a)(5).

B. FCRA PROVISIONS AND FEDERAL PREEMPTION

13. When enacting the Fair Credit Reporting Act, the U.S. Congress found that:

> (1) The banking system is dependent upon fair and accurate credit reporting. Inaccurate credit reports directly impair the efficiency of the banking system, and unfair credit reporting methods undermine the public confidence which is essential to the continued functioning of the banking system.
>
> (2) An elaborate system has developed for investigating and evaluating the credit worthiness, credit standing, credit capacity, character, and general reputation of consumers.
>
> (3) Consumer reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers.
>
> (4) There is a need to ensure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy.

15 U.S.C. § 1681(a). Congress also made clear that purpose of the FCRA is to:

> [R]equire that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information….

15 U.S.C. § 1681(b).

14. In order to meet the FCRA goals, Congress required that the accuracy and integrity of consumer report information be subject to a uniform, national standard. It prohibited states from interfering in those aspects of consumer reporting that are fundamental to the national uniformity of the system. *See, gen.*, 15 U.S.C.§ 1681t. The statute thus enumerates express limits on the impact of state law regarding consumer reports, including the information contained in consumer reports. The FCRA, at § 1681t, in pertinent part, specifically prohibits states from attempting to regulate the content of consumer reports as follows:

> (b) General exceptions
> No requirement or prohibition may be imposed under the laws of any State:
> (1) with respect to any subject matter regulated under
> * * *
> (E) **section 1681c of this title, relating to information contained in consumer reports,** except that this subparagraph shall not apply to any State law in effect on September 30, 1996.

15 U.S.C. § 1681t(b)(1)(E) (emphasis added). Thus, any state law that attempts to regulate the content of consumer reports is preempted under the FCRA (unless it was in effect on September 30, 1996).

15. The Texas Law regulates the content of consumer reports by prohibiting the inclusion of certain medical account information in reports in Texas. Tex. Bus. & Com. Code § 20.05(a)(5), added by SB 1037, in pertinent part, prohibits the following:

> SECTION 1. Section 20.05, Business & Commerce Code, is amended by amending Subsection (a) and adding Subsection (d) to read as follows:
>
> (a) Except as provided by Subsection (b), a consumer reporting agency may not furnish a consumer report containing information related to:
>
> ***
>
> (5) a collection account with a medical industry code, if the consumer was covered by a health benefit plan at the time of the event giving rise to the collection and the collection is for an outstanding balance, after copayments, deductibles, and coinsurance, owed to an emergency care provider or a facility-based provider for an out-of-network benefit claim; or

See S.B. 1037, enrolled text (the prohibited information will be referred to as "Medical Account Information").[3]

16. This attempt at regulation of consumer report content is expressly prohibited by the FCRA.

17. The activities of CRAs, including Plaintiff's members, are governed by the FCRA.

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.

[3] https://capitol.texas.gov/tlodocs/86R/billtext/pdf/SB01037F.pdf#navpanes=0. Underlined language indicates language added in 2019 by S.B. 1037 to the existing statute

C. DEFENDANT'S ENFORCEMENT ACTIONS AGAINST CDIA MEMBERS

21. The Texas Attorney General has investigated multiple CDIA members related to their credit reporting business on at least two occasions in just the last five years.

22. First, in 2015, the Texas Attorney General, along with the Attorneys General of 29 other states investigated Experian, Equifax and Trans Union (the "NCAP Participants") alleging violations of the federal FCRA and related state laws.

23. The state Attorneys General alleged that the NCAP Participants violated the FCRA and state law by furnishing credit reports that contained inaccurate information. Additionally, the state Attorneys General noted that nearly 20% of consumer reports contained medical debt that resulted from involuntary, unplanned and unpredictable debt from medical services for which prices are rarely provided in advance.

24. The NCAP Participants denied that they violated the FCRA and state law, denied their reports were inaccurate, and otherwise denied any wrongdoing, but nonetheless voluntarily agreed to implement certain changes to their credit reporting practices as set forth in the National Consumer Assistance Plan ("NCAP").

25. Under NCAP, the NCAP Participants agreed to: (1) "prevent the reporting and display of medical debt identified and furnished by Collection Furnishers when the date of first delinquency is less than one hundred and eighty (180) days prior to the date that the account is reported to the CRAs;" and (2) "implement a process designed to remove or suppress known medical collections furnished by Collections Furnishers from files within the CRAs' respective credit reporting databases when such debt is reported either as having been paid in full by insurance or as being paid by insurance." *See* Assurance of Voluntary Compliance/Assurance of Voluntary Discontinuance attached hereto as Exhibit A ("Exhibit A"), para. IV(E)(3)(a), (c), respectively.

26. "Collection Furnishers" are defined to mean "collection agencies or debt purchasers that furnish data to any of the CRAs." *See* Exhibit A, para. IV(E)(1)(a).

27. The reporting restrictions set forth in Tex. Bus. and Com. Code § 20.05 apply not only to the NCAP Participants, but to any CRA that prepares reports in Texas, and it imposes broader requirements related to medical debt than NCAP in that it: (i) regulates consumer reports prepared by all CRAs, and not just the three participants in the NCAP settlement; (ii) prohibits the reporting of Medical Collection Account Information where a consumer was covered by insurance at the time the account was due, and does not just prevent the reporting of the Medical Account Information furnished by Collection Furnishers defined in NCAP when the date of first delinquency is less than 180 days prior to the date it is reported to the CRAs; and (iii) includes collection accounts for an outstanding balance, after copayments, deductibles, and coinsurance, owed to an emergency care provider or a facility-based provider for an out-of-network benefit claim, as opposed to the requirements under NCAP to only remove accounts where the debt was reported as having been paid in full by insurance or as being paid by insurance.

28. As a result, all member CRAs that have Medical Collection Account Information will be required to make substantial changes to their business operations with respect to Medical Collection Account Information, even if they previously adjusted their practices pursuant to NCAP.

29. The NCAP Participants and certain other member CRAs, and the companies that furnish information to those CRAs, utilize a specialized credit reporting format for the furnishing and reporting of credit report information, known as the Metro 2® Format, which is set forth in the Credit Reporting Resource Guide (the "CRRG"). The Metro 2® Task Force is comprised of representatives from Equifax, Experian, Innovis, and TransUnion. The Task Force maintains the

Metro 2® Format, a data specification created for data furnishers to report credit information to major credit reporting agencies in a standardized format. CDIA maintains and publishes the CRRG on behalf of the Taskforce.

30. Currently, the Metro 2® reporting format does not have a reporting field to indicate that the consumer was covered by a health benefit plan at the time that treatment was rendered by the medical provider. Nor does the Metro 2® reporting format have a reporting field to allow the furnisher to indicate that the consumer was seeking treatment for treatment that the health benefit plan would deem out of network. Thus, the CRAs that maintain medical information do not have a way to easily identify which information they currently maintain that would fall within the scope of the Texas Law.

31. When NCAP was agreed upon, it included requirements that the NCAP Participants create two new Metro 2® format codes for the identification of covered medical debt that would be furnished so that they could identify those accounts to assure compliance with NCAP. *See* Exhibit A, para. IV(E)(3)(b).

32. The data changes required by the NCAP settlement were not fully implemented until September 2017, more than two years after the effective date of the NCAP settlement. Implementation of these changes required system changes at each of the CRAs as well as each of the furnishers which had to begin reporting with those codes, the training of furnishers on how to properly utilize the codes, and to change the reporting systems and related materials to identify those codes and report data in a compliant way.

33. Upon information and belief, it would take at least as long implement similar changes required to comply with the Texas Law.

34. All of Plaintiff's members that presently maintain medical collection account information will have to adopt similar processes as those contemplated under the NCAP Settlement in order to identify whether they have accounts that would be covered by Texas Law, and take steps to assure the removal of such data from their files, or otherwise prevent such data from being included in Texas consumer reports (i.e. suppression of the data).

35. The Texas Attorney General also initiated an investigation in 2017 into Equifax following a data breach reported by Equifax that year. In July 2019, the Federal Trade Commission, the Consumer Financial Protection Bureau, and the attorneys general of 48 states (including Texas), the District of Columbia, and Puerto Rico entered a settlement with Equifax in which Equifax agreed to implement and maintain a comprehensive data security program, provide certain other consumer benefits, and pay certain amounts in restitution and penalties, including $175 million to the state attorneys general.

IV. CAUSES OF ACTION

Count I: Declaratory Judgment

36. CDIA restates and realleges the foregoing paragraphs of this Complaint as though fully set forth herein.

37. Pursuant to the Declaratory Judgments Act, 28 U.S.C. §§ 2201(a) and 2202, Plaintiff requests that the Court enter a judgment interpreting the FCRA, 15 U.S.C. § 1681c, § 1681t, and its preemptive effect with regard to Tex. Bus. & Com. Code § 20.05(a)(5). Plaintiff prays that this Court declare the rights and obligations of the parties under those statutes.

38. Plaintiff CDIA and Defendant State of Texas have fundamental disagreements regarding the interpretation and application of 15 U.S.C. § 1681c, § 1681t, and Tex. Bus. & Com. Code § 20.05(a)(5). A declaration from this Court would resolve this controversy and provide the

parties with certainty regarding their legal rights and obligations related to the accurate and uniform reporting of Medical Collection Account Information.

39. Plaintiff CDIA thus requests that the Court declare the following:

a. That the FCRA, § 1681c, governs the content of consumer reports, including whether and what type of Medical Collection Account Information may be included in a consumer report;

b. That FCRA § 1681t(b)(1)(E) preempts state laws that attempt to govern or regulate the content of consumer report information;

c. That Tex. Bus. & Com. Code § 20.05(a)(5) is an attempt by the State of Texas to regulate the content of consumer reports; and

d. That Tex. Bus. & Com. Code § 20.05(a)(5) is therefore preempted by the FCRA pursuant to 15 U.S.C. § 1681t(b)(1)(E).

40. The interests CDIA seeks to protect in this action are central to CDIA's mission. CDIA's members will suffer immediate and irreparable harm if they are forced to even temporarily comply with state law that is preempted by the FCRA. The Court's favorable determination concerning the federal preemption and declaratory relief issues presented in this Complaint will prevent this harm.

41. Because Tex. Bus. & Com. Code § 20.05(a)(5) attempts to exclude otherwise reportable information from being included in consumer reports where the FCRA expressly permits the inclusion of such information, it is expressly preempted by federal law.

42. Because CDIA's member CRAs are subject to the prohibition set forth in Tex. Bus. & Com. Code § 20.05(a)(5), there is an actual controversy over which this Court has jurisdiction to award declaratory relief under 28 U.S.C. §§ 2201 *et seq*.

Count II: Permanent Injunctive Relief

43. CDIA restates and realleges the foregoing paragraphs of this Complaint as though fully set forth herein.

44. CDIA and its members are entitled to the entry of injunctive relief in the form of a permanent injunction, prohibiting Defendant from enforcing Tex. Bus. & Com. Code § 20.05(a)(5) because it is preempted by 15 U.S.C. § 1681t(b)(1)(E).

CONDITIONS PRECEDENT

45. All conditions precedent for Plaintiff to recover in this action have been performed or have occurred.

PRAYER for RELIEF

WHEREFORE, PREMISES CONSIDERED, PLAINTIFF CDIA prays that the Defendant be cited to appear and answer herein, and, that upon final hearing, this Court enter declaratory judgment in favor of Plaintiff, and declare that Tex. Bus. & Com. Code § 20.05(a)(5) is preempted by the 15 U.S.C. § 1681t(b)(1)(E). Plaintiff CDIA thus asks that the Court declare the following:

(a) That the FCRA, § 1681c, governs the content of consumer reports, including whether and what type of Medical Collection Account Information may be included in a consumer report;

(b) That FCRA § 1681t(b)(1)(E) preempts state laws that attempt to govern or regulate the content of consumer report information;

(c) That Tex. Bus. & Com. Code § 20.05(a)(5) is an attempt by the State of Texas to regulate the content of consumer reports; and

(d) That Tex. Bus. & Com. Code § 20.05(a)(5) is therefore preempted by the FCRA pursuant to 15 U.S.C. § 1681t(b)(1)(E).

1. Plaintiff further prays that this Court enter a permanent injunction against Defendant from enforcing Tex. Bus. & Com. Code § 20.05(a)(5) on the grounds that it is preempted by 15 U.S.C. § 1681t(b)(1)(E).

2. Plaintiff further requests that the Court enter such other and further relief as the Court may deem just and proper.

August 5, 2020

Respectfully submitted,

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Attorneys for Plaintiff
Consumer Data Industry Association

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

CONSUMER DATA INDUSTRY ASSOCIATION, *Plaintiff*	§	
v.	§	**Case 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*	§	

REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE

TO: THE HONORABLE ROBERT PITMAN
UNITED STATES DISTRICT JUDGE

Before the Court are Defendant's Motion to Dismiss, filed on October 2, 2019 (Dkt. 8); Plaintiff's Response, filed on October 16, 2019 (Dkt. 9); and Defendant's Reply, filed on October 23, 2019 (Dkt. 10). On April 8, 2020, the District Court referred the motion and related filings to the undersigned Magistrate Judge for Report and Recommendation, pursuant to 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.

I. Background

On May 31, 2019, the State of Texas enacted Texas Business & Commerce Code § 20.05(a)(5) (the "Statute"), amending the Texas Fair Credit Reporting Act. Section 20.05(a)(5) limits information that credit reporting agencies may include in an individual's credit report. Specifically, § 20.05(a)(5) states:

> (a) Except as provided by Subsection (b), a consumer reporting agency may not furnish a consumer report containing information related to:

* * *

> (5) a collection account with a medical industry code, if the consumer was covered by a health benefit plan at the time of the event giving rise to the collection and the collection is for an outstanding balance, after copayments, deductibles, and coinsurance, owed to an emergency care provider or a facility-based provider for an out-of-network benefit claim . . . .

Plaintiff Consumer Data Industry Association ("CDIA") is an international trade association that represents the three nationwide credit reporting agencies – Experian, Equifax, and Trans Union – and other credit reporting agencies that furnish information concerning Texas consumers. Dkt. 1 at 2. CDIA filed this lawsuit on September 9, 2019, contending that § 20.05(a)(5) is preempted by the Federal Fair Credit Reporting Act ("FCRA"), 15 U.S.C. §§ 1681 *et seq*. CDIA requests declaratory and injunctive relief.

The State now seeks dismissal of all claims under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction, and under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. Dkt. 8 at 1.

II. Legal Standards

A. Subject Matter Jurisdiction and Standing

Federal district courts are courts of limited jurisdiction and may only exercise jurisdiction expressly conferred by the Constitution and federal statutes. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). A federal court has subject matter jurisdiction over civil cases "arising under the Constitution, laws, or treaties of the United States," and over civil cases in which the amount in controversy exceeds $75,000, exclusive of interest and costs, and in which diversity of citizenship exists between the parties. 28 U.S.C. §§ 1331, 1332.

Federal Rule of Civil Procedure 12(b)(1) allows a party to assert lack of subject matter jurisdiction as a defense to suit. A federal court properly dismisses a case for lack of subject matter

jurisdiction when it lacks the statutory or constitutional power to adjudicate the case. *Home Builders Ass'n of Miss., Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998). The burden of proof for a Rule 12(b)(1) motion to dismiss is on the party asserting jurisdiction. *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). "Ultimately, a motion to dismiss for lack of subject matter jurisdiction should be granted only if it appears certain that the plaintiff cannot prove any set of facts in support of his claim that would entitle plaintiff to relief." *Id.*

In ruling on a Rule 12(b)(1) motion, the court may consider any of the following: (1) the complaint alone; (2) the complaint plus undisputed facts evidenced in the record; or (3) the complaint, undisputed facts, and the court's resolution of disputed facts. *Lane v. Halliburton*, 529 F.3d 548, 557 (5th Cir. 2008). Dismissal for lack of subject matter jurisdiction is warranted when "it appears certain that the plaintiff cannot prove any set of facts in support of his claim that would entitle plaintiff to relief." *Gilbert v. Donahoe*, 751 F.3d 303, 307 (5th Cir. 2014) (quoting *Ramming*, 281 F.3d at 161).

B. Failure to State a Claim

Federal Rule of Civil Procedure 12(b)(6) allows a party to move to dismiss an action for failure to state a claim on which relief can be granted. In deciding a Rule 12(b)(6) motion to dismiss for failure to state a claim, the court "accepts all well-pleaded facts as true, viewing them in the light most favorable to the [nonmovant]." *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007) (internal quotation marks omitted). The Supreme Court has explained that a complaint must contain sufficient factual matter to state a claim to relief that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the [nonmovant] pleads factual content that allows the court to draw the reasonable inference that the [movant] is liable for the misconduct alleged." *Id.*

> While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact).

Twombly, 550 U.S. at 555 (cleaned up). The court's review is limited to the complaint, any documents attached to the complaint, and any documents attached to the motion to dismiss that are central to the claim and referenced in the complaint. *Lone Star Fund V (U.S.), L.P. v. Barclays Bank PLC*, 594 F.3d 383, 387 (5th Cir. 2010).

III. Analysis

The State seeks dismissal of all claims based on lack of subject matter jurisdiction and failure to state a claim. Courts generally consider jurisdictional attacks before addressing other grounds for dismissal. *Ramming*, 281 F.3d at 161. In CDIA's response, it argues that its Complaint includes sufficient facts to survive the State's Motion, but requests leave to file an amended complaint should the Court find its pleadings deficient. Dkt. 9 at 2, 8 n.8.

A. Defendant's Motion to Dismiss

The State argues that CDIA lacks standing because it has not suffered injury in fact. Dkt. 8 at 5-6. CDIA explains that it brings this lawsuit solely on behalf of its members through associational standing. Dkt. 9 at 3 n.6.

Standing is a component of subject matter jurisdiction, and it is properly raised by a motion to dismiss under Rule 12(b)(1). *See Cobb v. Cent. States*, 461 F.3d 632, 635 (5th Cir. 2006); *Lee v. Verizon Commc'ns, Inc.*, 837 F.3d 523, 534 (5th Cir. 2016). The requirement of standing has three elements: (1) injury in fact, (2) causation, and (3) redressability. *Bennett v. Spear*, 520 U.S. 154, 167 (1997). The injury cannot be merely "conjectural or hypothetical." *Summers v. Earth Island*

Inst., 555 U.S. 488, 493 (2009). Causation requires that the injury "fairly can be traced to the challenged action of the defendant," rather than to "the independent action of some third party not before the court." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976). Redressability requires that it is likely, "as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (internal quotation marks omitted). The party invoking federal subject matter jurisdiction bears the burden of establishing each element. *Ramming*, 281 F.3d at 161.

1. Associational Standing

An association has standing to sue on behalf of its members when "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). Participation of individual members generally is not required when the association seeks prospective or injunctive relief, as opposed to damages. *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 546 (1996).

The State contends that Plaintiff lacks standing because it is a trade organization that has not experienced a particularized injury in fact. Dkt. 8 at 5. The State argues that, as an organization, Plaintiff must show more than a "setback to the organization's abstract social interests." Dkt. 8 at 6 (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)). The State contends that Plaintiff has not alleged any impairment of its routine activities or drain on its resources, as is required for an organization to show injury in fact. *Id*. The State also argues that Plaintiff has articulated only a generalized grievance that does not amount to injury in fact. Dkt. 8 at 7. Any

"threatened injury must be certainly impending to constitute injury in fact," the State contends. *Id.* (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410 (2013)).

In response, CDIA argues that, in lawsuits concerning pre-enforcement of an allegedly illegal law, a plaintiff has standing when it has "alleged an actual and well-founded fear that the law will be enforced against them." Dkt. 9 at 4 (quoting *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 393 (1988)). CDIA contends that it has pled sufficient facts to allege an injury in fact on behalf of its members, including the threat of litigation by the Texas Attorney General against CDIA's members and the cost of the steps its members would have to take to come into compliance with § 20.05(a)(5). Dkt. 9 at 5, 7.

To determine whether CDIA has associational standing, the Court first analyzes whether CDIA's individual members would have standing to pursue a pre-enforcement action against the State to enjoin enforcement of the Statute. The parties disagree on whether there is an injury in fact sufficient to establish standing. The State argues that because it has not taken enforcement actions against any of CDIA's members, the purported injury is a mere generalized grievance. *See* Dkt. 8 at 7; Dkt. 10 at 6. The State's standing argument aligns closely with the issue of ripeness, which the Court addresses next. *See Warth v. Seldin*, 422 U.S. 490, 499 n.10 (1975) ("The standing question thus bears close affinity to questions of ripeness—whether the harm asserted has matured sufficiently to warrant judicial intervention.").

2. Ripeness

Ripeness is a constitutional prerequisite to a court exercising subject matter jurisdiction. *Shields v. Norton*, 289 F.3d 832, 835 (5th Cir. 2002). "A case or controversy must be ripe for decision, meaning that it must not be premature or speculative." *Id.* A declaratory judgment action is ripe for adjudication only where an actual controversy exists. *Orix Credit All., Inc. v. Wolfe*, 212

F.3d 891, 896 (5th Cir. 2000). "Declaratory judgments are typically sought before a completed injury in fact has occurred but still must be limited to the resolution of an actual controversy." *United Transp. Union v. Foster*, 205 F.3d 851, 857 (5th Cir. 2000) (cleaned up). An actual controversy exists "where a substantial controversy of sufficient immediacy and reality exists between parties having adverse legal interests." *Orix Credit,* 212 F.3d at 896. Whether particular facts amount to an actual controversy must be addressed on a case-by-case basis. *Id*. "[T]he ripeness inquiry focuses on whether an injury that has not yet occurred is sufficiently likely to happen to justify judicial intervention." *Id.* at 897 (internal quotation marks omitted). A case or controversy becomes ripe when a specific and concrete threat of litigation arises. *See id.*; *see also Shields*, 289 F.3d at 835. "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998) (internal quotation marks omitted).

3. Conclusion as to Standing

CDIA seeks declaratory and injunctive relief to protect its members from the purported adverse effects that the State's enforcement of the Statute would bring. Dkt. 9 at 5, 7. Both CDIA and the State contend that enforcement of the Statute is discretionary. *See* Dkt. 8 at 8 ("CDIA has no knowledge of how the Attorney General determines what cases to pursue . . . ."); *see also* Dkt. 9 at 4-5. CDIA does not allege that the State has subjected any of its members to an enforcement proceeding under the Statute or threatened any of its members with an enforcement action. *Cf. Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 164-67 (2014) (holding that petitioners had pre-enforcement standing where the administrative agency had enforced statute against them and others similarly situated).

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 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. *See Texas*, 523 U.S. at 300; *Shields*, 289 F.3d at 835-36. Accordingly, the claim is not ripe for review.

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. *See, e.g.*, *Susan B. Anthony*, 573 U.S. at 158-59, 165 (holding that threats of administrative enforcement and criminal prosecution combined to create pre-enforcement standing under circumstances presented); *see also Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (holding that, where a statute conflicts with a constitutional right and a credible threat of prosecution for a violation exists, a plaintiff "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief"); *Nat'l. Fed. of the Blind of Tex., Inc. v. Abbott*, 647 F.3d 202, 210 (5th Cir. 2011) ("Although various prudential standing principles have been relaxed in some First Amendment cases, this relaxation does not eliminate the distinct and independent requirement of Article III that the dispute between the parties must amount to a case or controversy.").

Because CDIA's members do not have a ripe claim for adjudication based on the current facts, the members would fail to satisfy the injury in fact element of standing. *See Warth,* 422 U.S. at 499 n.10. Because CDIA's members would not have standing to litigate on the current facts, CDIA cannot establish the elements required for associational standing. *See Hunt,* 432 U.S. at 343. Due

to lack of standing, CDIA has failed to invoke the Court's subject matter jurisdiction. *See Shields*, 289 F.3d at 835. Accordingly, CDIA's claims should be dismissed.

Because the Court finds that CDIA lacks the requisite standing to litigate its claims, the Court need not address the parties' arguments relating to preemption.

B. Plaintiff's Request for Leave to Amend

In its response, CDIA seeks leave to file an amended complaint if the Court finds its pleadings deficient. Dkt. 9 at 2, 8 n.8. Courts should freely grant leave to amend when justice so requires. FED. R. CIV. P. 15(a)(2). Courts should deny leave to amend when amendment would cause undue delay or undue prejudice to the opposing party, or the amendment would be futile or in bad faith. *Mayeaux v. La. Health Serv. & Indem. Co*., 376 F.3d 420, 425 (5th Cir. 2004). Amendment is futile where it "would fail to state a claim upon which relief could be granted." *Stripling v. Jordan Prod. Co., LLC*, 234 F.3d 863, 872-73 (5th Cir. 2000).

Because CDIA's claim is not ripe for review, the Court does not have subject matter jurisdiction over this matter. Therefore, amendment would be futile. *See 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).

Additionally, CDIA has not attached a proposed amended complaint to its Response, or described 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. Without a proposed amended complaint, the Court is unable to assess whether amendment is warranted. *See 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). Accordingly, CDIA's request for leave to amend should be denied.

IV. Recommendation

The undersigned **RECOMMENDS** that the District Court **GRANT** Defendant's Motion to Dismiss (Dkt. 8) and dismiss this case for lack of standing. The Court **FURTHER RECOMMENDS** that the District Court **DENY** CDIA leave to file an Amended Complaint, as amendment would be futile.

IT IS FURTHER ORDERED that this case be removed from the Magistrate Court's docket and returned to the docket of the Honorable Robert Pitman.

V. Warnings

The parties may file objections to this Report and Recommendation. A party filing objections must specifically identify those findings or recommendations to which objections are being made. The District Court need not consider frivolous, conclusive, or general objections. *See Battle v. United States Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987). A party's failure to file written objections to the proposed findings and recommendations contained in this Report within fourteen (14) days after the party is served with a copy of the Report shall bar that party from de novo review by the District Court of the proposed findings and recommendations in the Report and, except on grounds of plain error, shall bar the party from appellate review of unobjected-to proposed factual findings and legal conclusions accepted by the District Court. *See* 28 U.S.C. § 636(b)(1)(c); *Thomas v. Arn*, 474 U.S. 140, 150-53 (1985); *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428-29 (5th Cir. 1996) (en banc).

SIGNED on July 22, 2020.

SUSAN HIGHTOWER
UNITED STATES MAGISTRATE JUDGE