**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF TEXAS**
**AUSTIN DIVISION**

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| **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 OBJECTION TO THE REPORT AND RECOMMENDATION OF THE U.S. MAGISTRATE JUDGE**

COMES NOW Plaintiff, Consumer Data industry Association ("CDIA"), by and through counsel, and pursuant to 28 U.S.C. § 636(b)(1) and submits this Objection ("Objection") to the Report and Recommendation of the Magistrate [Dkt. No. 26] ("R&R"). The Magistrate recommends that this Court grant the Defendant's Motion to Dismiss CDIA's Complaint [Dkt. No. 8] without leave to amend. This Court should reject the findings and recommendations contained within the R&R because the Magistrate Judge erred procedurally and substantively. The Court should instead (1) find that CDIA has standing to pursue its claims raised in the Complaint, and (2) deny the Defendant's Motion to Dismiss. Alternatively, if this Court determines additional facts should be pleaded in a complaint, CDIA requests that this Court grant its Motion for Leave to Amend filed concurrently herewith, a copy of which is attached as **Exhibit A**.

## PROCEDURAL POSTURE

CDIA initiated this action seeking a declaratory judgment that a recent amendment to Tex. Bus. & Com. Code § 20.05 is preempted by the federal Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* ("FCRA"). CDIA is a trade association comprised of consumer reporting agencies ("CRAs") whose conduct is governed by the FCRA. Some CDIA members collect and maintain information that is permitted to be reported under FCRA § 1681c (with certain identifying information removed) but is now prohibited by Tex. Bus. & Com. Code § 20.05(a)(5) ("the New Texas Law"), and the Texas Attorney General would allege, under the Texas Attorney General's authority under the Texas Deceptive Trade Practices-Consumer Protection Act ("DTPA") set forth in Tex. Bus. & Com. Code § 17.47.[1] . On October 2, 2019, the Defendant moved to dismiss CDIA's Complaint and CDIA timely filed its response, but no order having issued on the matter, the parties continued to conduct discovery and were in the midst of preparing cross-motions for summary judgment when the R&R was issued on July 22, 2020 by the Magistrate Judge. This Objection followed.

## SUMMARY OF THE ARGUMENT

In the first instance, this Court should decline to adopt the R&R because the Magistrate Judge erred in recommending dismissal of CDIA's Complaint *without leave to amend* on the basis that the claims therein were not ripe – an issue that had never been raised by the Defendant, and about which CDIA had no opportunity to be heard. Under Fed. R. Civ. P. 15, and consistent with Supreme Court precedent, requests for leave to amend should be liberally granted, and the Magistrate Judge's decision not to do so was in error. Because the Magistrate Judge took up the

[1] Tex. Bus. & Com. Code § 20.12 provides as follows:
Sec. 20.12. DECEPTIVE TRADE PRACTICE. A violation of this chapter is a false, misleading, or deceptive act or practice under Subchapter E, Chapter 17.

matter of ripeness *sua sponte*, and because CDIA was given no opportunity to address the issue in any manner, the Magistrate Judge procedurally erred in recommending dismissal with prejudice.

Additionally, the Magistrate Judge erred in finding that CDIA's claim was not ripe for judicial review. Were the Magistrate Judge's conclusion correct, a person could never challenge state action in a court of law until she has been charged with a violation of the law, rendering the central purpose behind the Declaratory Judgment Act, 28 U.S.C. §2201, ineffectual. Moreover, the Magistrate Judge's analysis failed to apply the legal test established by the Supreme Court, , and her ruling was predicated on an incorrect factual assumption that the Defendant has never taken enforcement action with respect to any CDIA member. In fact, the Attorney General's office has initiated multiple investigations of CDIA member CRAs over the last five years. Thus, CDIA's pre-enforcement challenge is sufficiently ripe.

Finally, the Magistrate Judge erred in finding that because CDIA's claim was not ripe, CDIA did not have standing to litigate its claims. CDIA members have demonstrated they find themselves faced with a Hobson's choice of either: 1) investing significant time and resources to come into compliance with the New Texas Law, or 2) not complying with the New Texas Law and risk enforcement action by the Attorney General including civil penalties (which, by definition are penal in nature)[2] and/or facing private party litigation. Furthermore, the dispute would be resolved if the Texas Attorney General would simply stipulate that it will not enforce the New Texas Law. It has declined to do so.

[2] Under the New Texas Law the Attorney General may seek "injunctive relief and civil penalties in the amount of $2,000 per violation (each day is counted as a separate violation) plus attorney general expenses, court costs, investigative costs and attorney fees." *See* Tex. Bus. & Com. Code §§ 20.09 – 20.11

Like other plaintiffs facing new laws that significantly impair their day-to-day operations, CDIA has alleged sufficient facts (or is able to present additional facts in the First Amended Complaint) to demonstrate it has standing to bring this case.

**STANDARD OF REVIEW**

In reviewing a magistrate judge's report and recommendation, the district court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. 28 U.S.C. § 636(b). The district court must make a *de novo* determination of those portions of the report and recommendation to which an objection is made. *Id.*; *see also Calderon v. Waco Lighthouse for the Blind,* 630 F.2d 352, 355 (5th Cir. 1980). Even in the absence of an objection, the district judge reviews legal conclusions *de novo*. *In re Foster Mortgage Corp*., 68 F.3d 914, 917 (5th Cir. 1995). A *de novo* review requires independent consideration of factual issues based on the record. *Diaz v. United States*, 930 F.2d 832, 836 (11th Cir. 1991).

When standing is challenged on the pleadings under Fed. R. Civ. P. 12(b)(1), the court must accept as true all material allegations of the complaint and construe the complaint in favor of the plaintiff. *Ass'n of Am. Phys. and Surgeons, Inc. v. Tex. Med. Bd.*, at 550, quoting *Pennell v. City of San Jose,* 485 U.S. 1, 7, 108 S. Ct. 849, 855, 99 L.Ed.2d 1 (1988). Further, when considering a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the complaint must be liberally construed, with all reasonable inferences drawn in the light most favorable to the plaintiff. *Causey v. Sewell Cadillac-Chevrolet, Inc.*, 394 F.3d 285, 288 (5th Cir. 2004) (citing *Sloan v. Sharp,* 157 F.3d 980, 982 (5th Cir.1998)).

## ARGUMENT

### I. The Magistrate Judge Procedurally Erred – Twice: In Recommending Dismissal of the Complaint Without an Opportunity for CDIA to Be Heard on Ripeness, And in Recommending Denial of CDIA's Request for Leave to Amend.

The R&R recommends that this Court grant Defendant's Motion to Dismiss without affording CDIA any leave to amend, a draconian remedy generally reserved for the most facially frivolous and baseless of claims, and certainly inappropriate here. Having been provided no opportunity to address the ripeness claim until this Objection, or any opportunity to amend its Complaint, CDIA should not be foreclosed from access to this Court and denied the right to have its claim adjudicated.

The Defendant's Motion to Dismiss was based on an argument that CDIA lacked standing because it did not allege sufficient injury in fact under Article III of the Constitution. 'Ripeness' of the claim was never mentioned in the Motion. In her R&R, the Magistrate Judge summarized the arguments of the parties with respect to the question of injury, and then pivoted to ripeness, stating "the State's standing argument aligns closely with the issue of ripeness, which the Court addresses next." R&R, at 6. The parties were not asked to brief the issue of 'ripeness,' and the Magistrate Judge did not hold any hearings on the matter; nonetheless, recommending the Complaint be dismissed with prejudice for lack of standing. The Magistrate Judge explained "because CDIA's claim is not ripe for review, the Court does not have subject matter jurisdiction over this matter." *R&R,* at 8. CDIA acknowledges that both ripeness and standing may be considered by a court at any time. However, they are jurisdictional thresholds,[3] therefore, a court should not dismiss a complaint without leave to amend and without providing a full and fair opportunity for plaintiff to even be heard on the matter.

[3] *See Orix Credit Alliance, Inc. v. Wolfe*, 212 F.3d 891, 895 (5th Cir. 2000).

Contrary to the Magistrate Judge's finding, the amendment would not be 'futile.' The R&R notes that CDIA did not attach a proposed amended complaint to its Opposition to the Defendant's Motion to Dismiss, explaining further that "[without] a proposed amended complaint, the Court is unable to assess whether amendment is warranted." R&R, at 9 (citing *See Edionwe v. Bailey*, 860 F.3d 287, 294 (5th Cir. 2017).[4] However, neither the Federal Rules of Civil Procedure, nor any Local Rule of this Court requires a party to attach a First Amended Complaint to an opposition to a defendant's motion to dismiss for failure to state a claim. Nor would such a requirement be consistent with Rule 15(a) and Supreme Court precedent applying the same. CDIA should not be penalized for not having done so.

In any event, and as explained more fully in its Motion for Leave to Amend, CDIA's proposed first amendment to its Complaint articulates additional details regarding, *inter alia,* 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, all of which demonstrate the ongoing and imminent threat of harm faced by CDIA members. As such, amendment would not be "futile." If this

[4] The R&R's reliance on *Edionwe* is misplaced. The *Edionwe* case does not stand for the proposition that a party must include a proposed amended complaint with its opposition to a motion to dismiss in order to be granted leave to amend following a ruling on that motion to dismiss. *Edionwe* involves a case where the court entered judgment against the plaintiff, after hearings and an opportunity for all parties to be heard, in response to a Rule 12(c) motion for judgment on the pleadings, finding the defendants were entitled to sovereign immunity against all claims. *Id.* at 291. Plaintiff filed a motion to alter or amend the judgment and a separate motion for leave to amend his complaint reciting only "bare bones" allegations that did not apprise the court of additional facts. *Id.* In neither motion filed with the court was the plaintiff able to allege any additional facts in support of his argument that judgment should be set aside or leave to amend be granted. *Id*. *Edionwe* presents a very different procedural posture from that in which CDIA finds itself today, where CDIA has not been afforded the opportunity, until this Objection, to address the relevant issues in this case.

Court accepts the Magistrate Judge's recommendation to dismiss the Complaint, CDIA respectfully requests this Court grant its Motion for Leave to Amend.

## II. The Magistrate Judge Erred in Finding CDIA's Claim Unripe for Review.

This Court should reject the Magistrate Judge's R&R because CDIA's claim is ripe for judicial review. CDIA is not required to wait for Defendant to initiate an enforcement proceeding before a court may decide if the New Texas Law is preempted by the FCRA. The Magistrate Judge erred in finding that CDIA members failed to allege a claim that was sufficiently ripe for judicial review and, because the claim was unripe, that CDIA lacked standing to sue for a determination of the statue's enforceability.

The R&R states:

> 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 Statue. Based on the contingencies, any threat of litigation between the State and CDIA's members is too speculative at this time to constitute a specific and concreate threat of litigation between its members and the State.

R&R, at 8. Respectfully, these uncertainties always exist in potential enforcement actions. If this were the legal standard to be applied for questions of ripeness or standing, no claim challenging the validity of a rule or statute could ever be brought pre-enforcement. The Magistrate Judge clearly erred by failing to apply the facts of this case to the legal standard for ripeness, which error was potentially exacerbated by reliance upon a factual error regarding the Defendant's enforcement history.

### A. CDIA's Claim is Sufficiently 'Ripe' For Review Under Supreme Court Precedent.

The standard of ripeness, when properly applied, "deals with the time, if any, at which a party may seek pre-enforcement review of a statute or regulation." *Triple G Landfills, Inc. v. Board*

*of Commissioners*, 977 F.2d 287, 288 (7th Cir. 1993) (citing *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 140 (1974). "It seeks to avoid the premature adjudication of cases when the issues posed are not fully formed, or when the nature and extent of the statute's application are not certain." *Id*., citing *Abbott Lab. v. Gardner*, 387 U.S. 136, 148 (1967) (abrogated on other grounds). In *Abbott Lab.* the Supreme Court established a two-part standard for adjudicating the ripeness of a claim: "(1) whether the relevant issues are sufficiently focused so as to permit judicial resolution without further factual development, and (2) whether the parties would suffer any hardship by the postponement of judicial action." *Triple G Landfills, Inc.*, 977 F.2d at 289. The Fifth Circuit has adopted this two-part test, noting that:

> A court should dismiss a case for lack of "ripeness" when the case is abstract or hypothetical. The key considerations are "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." **A case is generally ripe if any remaining questions are purely legal ones; conversely, a case is not ripe if further factual development is required.**

*Orix Credit Alliance, Inc. v. Wolfe*, 212 F.3d 891, 895 (5th Cir. 2000), quoting *Abbott Lab., supra,* (emphasis added).[5]

The Supreme Court has explained that the rationale for the 'ripeness' doctrine "is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete

[5] Notwithstanding that the Fifth Circuit in *Orix* recognized the *Abbott Lab.* test for ripeness, the Magistrate did not address the test factors in the R&R. Instead the Magistrate looked only to whether "a specific and concrete threat of litigation" was likely to arise. *Orix* is not instructive here, as the relief requested in the declaratory judgment sought was an affirmative ruling that *res judicata* would bar "all future actions arising out of or related to" underlying financial transactions at issue between the parties. *Id.* at 896. The court rightly declined to use *res judicata*, a tool usually used as a shield, to be used as a sword to foreclose all future litigation relating to potential claims that were, at the time, "unasserted, unthreatened, and unknown" because such unforeseeable claims could not establish an immediate or real threat to the plaintiff. *Id.*

way by the challenging parties." *Abbott Lab.*, 387 U.S. at 148. At issue in *Abbott Laboratories*, was an action by the FDA Commissioner adopting a regulation to require specific labeling and other printed material on prescription drugs every time it was offered for sale or distribution. *Id.* at 138. The petitioners consisted of the majority of prescription drug manufacturers in the United States, which sought a declaratory judgment under the Administrative Procedures Act and the Declaratory Judgment Act, challenging the authority of the FDA Commissioner to adopt a regulation requiring such comprehensive labels. *Id.* at 138-39. The petition was filed before the FDA had taken any enforcement with respect to the labeling rule, but after the rule went into effect. *Id*.

In finding the matter was ripe for pre-enforcement adjudication, the Supreme Court found the first factor of the test satisfied because the issue raised by the complaint was "a purely legal one;" namely, whether the FDA Commissioner had legal authority to adopt the rule in the first instance. *Id.* at 149. Similarly, in reviewing a challenge to a local zoning ordinance, the Seventh Circuit in *Triple G* explained that the first prong of the ripeness test is satisfied where the lawsuit "mounts a facial attack upon the validity of the [law] itself, not a challenge to a particular administrative decision reached thereunder. The issues posed are purely legal . . . and would not be clarified by administrative proceedings or any other type of factual development." *Triple G*, 977 F.2d at 289.

As to the second factor of the ripeness test (i.e., the hardship borne by the plaintiff), the *Abbott Lab.* Court explained:

> …this is also a case in which the impact of the regulations upon the petitioners is sufficiently direct and immediate as to render the issue appropriate for judicial review at this stage. **These regulations purport to give an authoritative interpretation of a statutory provision that has a direct effect on the day-to-day business of all prescription drug companies; its promulgation puts petitioners in a dilemma that it was the very purpose of the declaratory**

> **judgment act to ameliorate.** As the District Court found on the basis of uncontested allegations '**Either they must comply with the every time requirement and incur the cost of changing over their promotional marketing and labeling or they must follow their present course and risk prosecution.'**

387 U.S. at 152 (emphasis added). In finding a sufficiently ripe claim, the Court explained the difficult choice left to the petitioners: costly investment to come into compliance with a rule that "they believe in good faith meets statutory requirements, but which clearly does not meet the regulation of the Commissioner" or risk "serious criminal and civil penalties for the unlawful distribution of 'misbranded' drugs." *Id*. at 152-53.

Applying *Abbott Lab.* to CDIA's claim, it is clear that CDIA's claims are ripe. First, the issue before the Court – whether the FCRA preempts the New Texas Law, making it invalid – is purely a question of law. And "purely legal" questions are "generally ripe" for judicial review. *See Orix Credit*, 212 F.3d at 895 (citations omitted). Moreover, CDIA is procedurally in the same posture as the *Abbott Lab.* plaintiffs; namely, suit was initiated after the law took effect, but before the regulator took any steps to enforce it.

Considering the second prong – the hardship suffered by the plaintiff – CDIA members face the same Hobson's choice as the *Abbott Lab.* plaintiffs: change their products in order to comply with the New Texas Law, or wait for enforcement[6]. As CDIA alleged in its Complaint, CDIA members maintain their data and prepare consumer reports consistent with the requirements of the FCRA. *See, e.g.,* Compl. ¶ 1. The FCRA permits the inclusion of the very information the New Texas Law attempts to prohibit. Compl. ¶ 12; *see also* 15 U.S.C. §1681c(a)(6). CDIA member CRAs would be required to make significant and costly changes to their data and products in order

[6] Indeed, the risk here is even more serious. The Texas Attorney General is not an administrative agency. It thus would bring a lawsuit to enforce the new Texas law, rather than an administrative action, against the CDIA member.

to come into compliance with the New Texas Law, Compl.¶¶ 16(d), 17, or continue providing consumer reports that contain the medical account information proscribed and wait for enforcement from the Attorney General, and civil litigation from consumers – *all for a law that is expressly preempted by act of Congress*. *See* 15 U.S.C. 1681t(b)(1)(E). This they do not have to do under the controlling precedent of *Abbot Lab*. and *Orix*. *See Abbott Lab, supra; Orix, supra.*

The cases relied on by the Magistrate Judge in the R&R are easily distinguished from the case at bar. In *Texas v. United States.*, 523 U.S. 296 (1998), the State of Texas challenged the requirements of Section 5 of the Voting Rights Act of 1965 which required the State to seek approval from the District Court for the District of Columbia or the Attorney General of the United States before making changes to its voting practices. *Id*. at 298-299. The State applied to the Attorney General of the United States for approval of new state laws as required. *Id*. at 299. The U.S. Attorney General did not object to the various new legislation but cautioned that "under certain foreseeable circumstances their implementation may result in a violation of Section 5" which would require preclearance. *Id*. Texas sued and sought a declaration that the Voting Rights Act did not apply to its legislation or its actions yet to be taken thereunder, and requested the court to "hold that under no circumstances can the imposition of [certain] sanctions constitute a change affecting voting." *Id*. at 301. The Supreme Court opined that the claim was not ripe and the controversy too speculative <u>because the State itself had yet to take any of the steps necessary to bring its conduct within possible scope of the law</u>. *Id.*

Notably, with respect to evaluating the hardship prong of the ripeness test, the Supreme Court distinguished the facts of the *Texas* case from *Abbott Lab.*, explaining:

> This is not a case like *Abbott Laboratories v. Gardner, supra,* at 152, 87 S. Ct., at 1517, where the regulation at issue had a "direct effect on the day-to-day business" of the plaintiffs, because they were compelled to affix required labeling to their products under threat of criminal sanction. Texas is not required to engage in, or to

> refrain from, any conduct, unless and until it chooses to implement one of the noncleared remedies. To be sure, if that contingency should arise compliance with the preclearance procedure could delay much needed action.

*Id.* Thus, where, as here, the regulation or law has a "direct effect on the day-to-day business of the plaintiffs" the issue is sufficiently ripe for judicial adjudication.

Similarly, the decision in *Shields v. Norton*, on which the Magistrate Judge also relied, does not support the R&R here. 289 F.3d 832 (5th Cir. 2002). In *Shields*, the lawsuit was dismissed on the basis that there was no Article III case or controversy. *Id.* The Fifth Circuit found the plaintiff's claim to be unripe because under the Endangered Species Act a claim cannot be pursued until 60 days after a notice of violation is served on the offending party, and the plaintiff had not received a notice of violation. *Id* at 836. Moreover, in a letter to an organization of which the plaintiff was a board member, the Sierra Club (a non-governmental entity) had "disclaimed any plan to sue [the plaintiff] individually." *Id.* The Court went on to find that "[b]ecause the Sierra Club had not taken any action against the plaintiff for over four years, and disclaimed any plan to sue him individually, the court found that the threat of litigation was "hollowed" and "pulls it short of immediate." *Id*. Thus, *Shields* stands for the proposition that a claim is not ripe for judicial review where the litigation requires satisfaction of a condition precedent that has not been met, or where the threatened litigation has not ripened after several years. Here, there is no such procedural bar or element lacking that would bar CDIA's claim. The Attorney General could initiate an enforcement action at any time.

B. The Attorney General's Enforcement Record Against CDIA Members Supports a Finding of Both Ripeness and Standing.

The Magistrate Judge erred in concluding that potential enforcement action against the CRAs is "too speculative" because "[w]hether 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 exercise its discretion to enforce the Statue." R&R at 8. As support for this conclusion, the Magistrate Judge noted "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." *Id.,* citing *Susan B. Anthony List. v. Driehaus*, 573 U.S. 149, 164-67 (2014).

It is correct that CDIA's Complaint did not enumerate the multiple enforcement actions initiated by this Defendant against CDIA members over the last several years. Although CDIA contends that it should not have to allege that the Attorney General has enforced the laws that he is authorized to enforce in order to demonstrate ripeness or standing, it is clear that the presumption that the Defendant had taken no such action against CDIA members was material to the Magistrate Judge's finding.

In truth, in just the past five years, the Attorney General's office has brought civil enforcement actions against multiple CDIA members.[7] The Texas Attorney General joined a multi-state enforcement action in 2015 against Experian, Equifax, and Trans Union (which are all CDIA member CRAs) related to their credit reporting activities; *including, but not limited to, the inclusion of medical information contained in consumer reports*. *See* Assurance of Voluntary Compliance, appended hereto as Exhibit B ("AVC"); *see also* press release: https://www.texasattorneygeneral.gov/news/releases/attorney-general-paxton-announces-6-million-settlement-credit-reporting-agencies. In fact, as recently as July 23, 2020, the Texas Attorney General has cited to its role in the multi-state enforcement action against the CDIA

[7] Kenneth Paxton was elected to the office of the Attorney General for the State of Texas in 2014 and assumed office in January of 2015.

members as evidence of its authority.[8] The three CRAs denied wrongdoing, but nonetheless agreed to implement certain changes to their credit reporting practices set forth in the National Consumer Assistance Plan ("NCAP"). *See also* Exhibit A, Plaintiff's First Amended Complaint, ¶¶ 22-34.[9]

The Attorney General also filed suit under its Texas DTPA authority against Equifax in 2017 related to the data security incident experienced by its credit reporting business.[10] That investigation lasted two years, and ultimately the parties settled their claims. *See* press release: https://www.texasattorneygeneral.gov/consumer-protection/equifax. Defendant's enforcement actions are matters of public record of which this Court may take judicial notice of here. *Bain Enterprises LLC v. Mountain States Mut. Cas. Co*., 267 F. Supp. 3d 796, 819 (W.D. Tex. 2016) (citing *Longoria v. Thaler*, No. C–09–75, 2010 WL 986486, at *2 (S.D. Tex. Mar. 16, 2010) ("Courts may, for example, take judicial notice under [Federal Rule of Evidence] Rule 201(b)(2) of court records, scientific facts, weather records, or historical and geographical data.")).

This Court should decline to adopt the R&R, which did not apply the ripeness test articulated by the Supreme Court and relied on an assumed fact that was not accurate. Instead, this Court should deny Defendant's Motion to Dismiss, direct the Defendant to Answer the

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[8] July 23, 2020 comments of Paul Singer, Texas Attorney General Senior Counsel for Public Protection. Attorney General Alliance, 2020 Virtual Meeting,"Attorney General Past Enforcement." Recording available at https://register.gotowebinar.com/recording/4757645495956376077 (comments begin at 16:38)

[9] As explained in detail in the First Amended Complaint, the report changes agreed to by the CRAs participating in the NCAP are not the same as the changes that all CRAs that have medical account information must make to come into compliance with Texas Law. The Texas Law applies to more CRAs than just those three CRAs that agreed to the NCAP Settlement.

[10] *See* State's Petition at https://www.texasattorneygeneral.gov/sites/default/files/images/admin/State%20of%20Texas%20v%20Equifax%20Inc.%2019_0722%20Petition.pdf

Complaint, and reset the parties' cross-motions for summary judgment back on the calendar. Alternatively, CDIA respectfully requests that this Court grant Plaintiff's Motion for Leave to Amend its Complaint.

## III. CDIA Has Standing to Pursue Its Claims.

The Magistrate Judge explained that she chose to address ripeness *sua sponte* because "the State's standing argument aligns closely with the issue of ripeness". R&R, p. 6. The R&R concludes that because the threat of litigation was too speculative to constitute a "specific and concrete threat of litigation" (an element of constitutional standing, but not ripeness), the claim was "not ripe for review." R&R, p. 8. But the R&R went on to state that "[b]ecause 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." *Id*. As set forth above, CDIA has demonstrated that its claim is ripe as there is a legitimate risk of enforcement from the Attorney General, who has sued CDIA members recently on various credit reporting claims arising under the New Texas Lw; thus, it has sufficient standing to bring these claims.[11]

This Court must take as true all well-pleaded facts, together with all reasonable inferences therefrom, in ruling on the Defendant's Motion to Dismiss. "[W]hen standing is challenged on the basis of the pleadings," we must "accept as true all material allegations of the complaint and ... construe the complaint in favor of the complaining party." *Ass'n of Am. Phys. and Surgeons, Inc. v. Tex. Med. Bd.*, at 550, quoting *Pennell v. City of San Jose,* 485 U.S. 1, 7 (1988) (citations and internal quotation omitted). Taking the facts and inferences as true, CDIA has clearly established that it has standing to maintain this action.

[11] While set out more fully in CDIA's Opposition to the Defendant's Motion to Dismiss, CDIA will briefly articulate why it has standing to proceed in this case.

Absent a ruling from this Court, CDIA members will suffer imminent legal and actual harm resulting from the New Texas Law – either by being forced to comply with the law or in waiting for an enforcement proceeding or civil litigation matter to be initiated. In particular, CDIA has alleged, and the Attorney General apparently concedes, that CRAs conducting business in Texas ***are required to comply with the New Texas Law***. *See* Defendant's Motion [8], at 3. CDIA has further alleged that:

(i) the FCRA permits CRAs to include medical collection account information in consumer reports so long as the information complies with FCRA rules; *see* Comp. ¶ 12;

(ii) the New Texas Law makes it unlawful for CRAs to include medical collection account information in consumer reports in Texas; *see* Comp. ¶ ¶ 11, 18;

(iii) CDIA members must make changes to their day to day operational activities to comply with the New Texas Law, including "reject[ing] all medical collection reporting in a broad class of medical services…in order to comply with the Texas Law;" *see* Comp. ¶ 16(c);

(iv) CDIA members should not have to comply with the New Texas Law because it is preempted by 15 U.S.C. § 1681t(b)(1)(E); *see* Comp.¶ 11; and

(v) the Attorney General may seek "injunctive relief and civil penalties in the amount of $2,000 per violation (each day is counted as a separate violation) plus attorney general expenses, court costs, investigative costs and attorney fees" should it enforce the New Texas Law against member CRAs. *See* Tex. Bus. & Com. Code §§ 20.09 – 20.11, *see also* Comp. ¶ 27.

Reasonable inferences that flow from these Complaint allegations include:

(1) some member CRAs believe they currently collect and maintain medical account information on consumers that is subject to the New Texas Law for the purpose or including such data in consumer reports;

(2) those member CRAs would no longer be able to include this data, and thus must change their day-to-day operations to comply with the New Texas Law, including changing the type of information they collect and/or report in Texas;

(3) the Attorney General may initiate an enforcement action against the CDIA members who report such data in Texas; and

(4) those member CRAs must identify the data that they already maintain that may be subject to the New Texas Law and take appropriate measures to suppress or delete that information so it does not appear in reports in Texas, even though it is permitted to be included under Federal law.[12]

As the Supreme Court explained, a plaintiff must demonstrate some 'threatened or actual injury' resulting from the law about which he complains. *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 394 (1988), citing *Warth v. Seldin,* 422 U.S. 490, 499 (1975) (internal citations omitted).[13] "That requirement is met [where] the law is aimed directly at [the] plaintiffs, who, if

[12] This information was included in CDIA's Opposition to the Defendant's Motion to Dismiss but the Magistrate still found that CDIA failed to "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." R&R, at. 9. This too was error; as discussed in Section III.

[13] *Virginia v. Association of Booksellers Ass'n Inc.* does not stand for the proposition that the pre-enforcement judicial review of state law is limited to claims brought under the First Amendment. Instead, the Supreme Court noted that because the petitioners were asserting a violation of First Amendment rights they could assert the rights of themselves and other unnamed third parties "because of a judicial prediction or assumption that the very existence may cause others not before the court to refrain from constitutionally protected speech or expression." 484 U.S. at 392-93. The Supreme Court did not limit pre-enforcement review to First Amendment claims.

their interpretation of the statute is correct, will have to take significant and costly compliance measures or risk criminal prosecution." *Id*.

Going further, the Supreme Court has explained that "a plaintiff satisfies the injury-in-fact requirement where he alleges 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.'" *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158-59 (2014) (emphasis added). Moreover, the Supreme Court has made it abundantly clear that:

> When an individual is subject to such a threat, an actual arrest, prosecution, or other enforcement action is not a prerequisite to challenging the law. *See Steffel v. Thompson,* 415 U.S. 452, 459, 94 S. Ct. 1209, 39 L.Ed.2d 505 (1974) ("[I]t is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights").

*Driehaus*, 573 U.S. at 158-59 (emphasis added).

In its motion to dismiss, the Defendant suggests that CDIA's Complaint is lacking because it did not expressly allege that its members are currently selling prohibited medical information in violation of the New Texas Law; however, the law does not require that they do so. In fact, in the *Booksellers* case, the lawsuit was filed before the Virginia statute even took effect, and the plaintiffs presented as exemplars of the types of books they believed would be subject to the law. *Virginia v. Association of Booksellers Ass'n Inc.,* 484 U.S. at 642. A party should not have to confess to a violation of the law in order to sufficiently allege standing to seek a declaration of the court that the law is invalid.[14] CDIA has sufficiently alleged standing because the New Texas

[14] CDIA's Complaint implies that certain reports prepared by some of its members contain the information prohibited by Texas Law. CDIA's proposed First Amended Complaint, ¶ 18, makes it more explicit: "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 FCRA."

Law attempt to impose new requirements on the member's businesses that will require them to make changes in their day-to-day operations, or face yet another enforcement action from this Attorney General. Members should not have to make these changes, however, because the New Texas Law is preempted by the federal FCRA.

## CONCLUSION

For the foregoing reasons, CDIA respectfully submits that this Court should not adopt the Report and Recommendation of the Magistrate Judge, and respectfully request that this Court deny Defendant's Motion to Dismiss. Alternatively, if the Court deems necessary, CDIA requests that this Court grant its Motion for Leave to Amend and deem the First Amended Complaint attached thereto as filed, and for any other relief the Court deems proper and just.

August 5, 2020

Respectfully submitted,

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**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