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 REPLY IN SUPPORT OF OBJECTION TO THE REPORT AND RECOMMENDATION OF THE U.S. MAGISTRATE JUDGE

Plaintiff, Consumer Data Industry Association ("CDIA"), by and through counsel, and consistent with its Motion for Leave to File Reply in Support of Objection to the Report and Recommendation of the U.S. Magistrate Judge, submits this Reply ("Reply") to the Defendant's Response in Opposition to Plaintiff's Objections to Report and Recommendation [Dkt. No. 30] ("Response"). CDIA sought leave to file this Reply so that it could respond to new arguments raised by the Defendant as a basis for dismissal of this case (i.e., sovereign immunity) and that CDIA should not be granted leave to amend because it 'unduly delayed' in seeking relief; and to further respond to other arguments. As set forth more fully below, CDIA respectfully submits that this Court should not adopt the Report and Recommendation of the Magistrate Judge, and requests that this Court deny Defendant's Motion to Dismiss.

I. Defendant's New Sovereign Immunity Argument Should Be Denied.

Defendant makes a passing argument, for the first time in its Response, that CDIA's

Complaint should be dismissed under the theory that sovereign immunity bars the case – a completely independent basis for dismissal never before mentioned in this case. Pursuant to Fed. R. Civ. P. 12(b)(6), a party who wishes to assert lack of subject-matter jurisdiction must assert the defense in a responsive pleading or may assert it in a motion to dismiss. If not raised in the initial pleading or motion to dismiss, a subsequent motion to dismiss for failure to state a claim may be raised in "(A) in any pleading allowed or ordered under Rule 7(a)[1]; (B) by a motion under Rule 12(c) (Motion for Judgment on the Pleadings); or (C) at trial." Fed. R. Civ. P. 12(g)(2).[2]

Fundamental fairness requires that a party should have a full opportunity to be heard on issues raised before this Court. Inserting what is effectively a completely new motion to dismiss on a complex legal issue into a Response to the R&R (especially even when the R&R makes no mention of the legal issue) is patently unfair. Therefore, CDIA respectfully requests that this Court decline to consider whether sovereign immunity bars this case, or in the alternative, direct the Defendant to file a proper motion to dismiss and permit CDIA an opportunity to fully brief the issue in response. If this Court is inclined, however, to consider this new basis for dismissal, the Court should find that sovereign immunity does not bar this Court from deciding the federal preemption question presented in this case as set forth more fully below.

The Supreme Court has long recognized the right of a person to sue a state actor charged with enforcement of a state law that the person alleges to be preempted by federal law. *See, e.g., Verizon Maryland, Inc. v. Public Service Comm. Of Maryland*, 122 S. Ct. 1753 (2002); *Pacific Gas and Elec. Co.*, 103 S. Ct. 1713 (1983). The *Ex parte Young* exception to the Eleventh

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[1] Rule 7(a) permits the parties to file specific pleadings, including a complaint and an answer to a complaint, among other irrelevant papers; however, Rule 7(a) does not contemplate this scenario.
[2] Although Fed. R. Civ. P. 12(h)(3) provides that "[if] a court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action" it does not suggest a defendant need not raise the issue in a motion properly brought before the court.

Amendment "permits suits for prospective ... relief against state officials acting in violation of federal law." *Green Valley Special Utility Dist. v. City of Schertz Texas*, 2020 WL 4557844, *6 (5th Cir. 2020). As the *Green Valley* Court explained:

> For the ***Young*** exception to apply, three criteria must be satisfied: (1) A "plaintiff must name individual state officials as defendants in their official capacities," *Raj v. La. State Univ.*, 714 F.3d 322, 328 (5th Cir. 2013); (2) the plaintiff must "allege [ ] an ongoing violation of federal law," *Verizon Md. Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645, 122 S.Ct. 1753, 152 L.Ed.2d 871 (2002); and (3) the relief sought must be "properly characterized as prospective," *id.* To determine whether the exception applies, we conduct a simple, "straightforward inquiry," *Air Evac EMS, Inc. v. Tex., Dep't of Ins.*, 851 F.3d 507, 517 (5th Cir. 2017), and we do not consider the merits of the underlying claims, *see Austin*, 943 F.3d at 998.

Id. at *6 (emphasis in original). In *Verizon Maryland*, the Supreme Court held that a claim for declaratory and injunctive relief from an order of Maryland's Public Service Commission regarding the payment of certain fees on the basis that it violated the Telecommunications Act of 1996 satisfied the *Ex parte Young* exception, and that sovereign immunity did not bar the federal preemption claim. *Verizon*, 122 S. Ct. at 1761. The Fifth Circuit in *Green Valley*, analyzing *Verizon Maryland* as "instructive," held that where a plaintiff's complaint seeks injunctive relief to enjoin state officials from prospectively enforcing a state law that is preempted by federal law, the "straightforward inquiry" required by *Verizon Maryland* is satisfied, and the *Ex parte Young* exception applies. *Green Valley, 2020 WL 4557844.* at *8. In *Green Valley*, some of plaintiff's claims focused on prospective injunctive relief and others requested retrospective relief. *Id.* at *7. The Fifth Circuit explained "[b]ecause at least one form of prospective relief is possibly available to Green Valley, its claims…are not barred by the Eleventh Amendment." *Id.* Similarly, CDIA seeks a declaration that state law is preempted by federal law, and the case should proceed.

The *City of Austin v. Paxton* case, relied on by Defendant, does not change the outcome here. 943 F.3d 993 (5th Cir. 2019). There, the City of Austin challenged a Texas state law that it claimed interfered with its local ordinance, which had been purportedly adopted consistent with federal law. *Id.* In attempting to demonstrate a likelihood of enforcement, the City of Austin cited to cases where the Attorney General had *intervened* in cases involving other ordinances enforced by municipalities – none of which had any "overlapping facts with [the City's] case or [were] even remotely related to the Ordinance [at issue]." *Id.* at 1001. Thus, the fact that the Attorney General had chosen to intervene in other, wholly unrelated matters as against other persons could not be said to bear at all on whether the Attorney General was likely to take similar action with respect to the City of Austin's Ordinance. *Id.* Differentiating the case from those where injunctive relief was necessary to provide relief to parties who were required to come into compliance with law, such as the plaintiffs in *NiGen Biotech, LLC v. Paxton*,[3] the Fifth Circuit also noted that the City of Austin would suffer no harm absent court intervention. *Id.* (the City of Austin "faces no consequences if it attempts to enforce its Ordinance.").

Explaining the nexus between standing and *Ex parte Young* standards, the court said

> …it may be the case that an official's "connection to enforcement" is satisfied when standing has been established…at the point that a threatened injury becomes sufficiently imminent that an official can act, and there's a significant possibility that he or she will act to harm a plaintiff, the official has engaged in enough "compulsion or constraint" to apply the *Young* exception . . . **At the minimum, our caselaw shows that a finding of standing tends towards a finding that the Young exception applies to the state officials in question.**

Id. at 1002. In sum, the Fifth Circuit explained the *Ex parte Young* standard only "requires some scintilla of "enforcement" by the relevant state official with respect to the challenged law." *Id.*

Here there is more than a "scintilla of enforcement" by this Attorney General with respect to CDIA member CRAs' credit reporting activities. Under express provisions of Texas law, a

[3] 804 F.3d 389, 398 (5th Cir. 2015) (where plaintiff required a legal determination as to whether federal law preempted state law in order to structure and operate its business) ("…if NiGen succeeds in enjoining the AG's conduct…NiGen could again conduct business as usual.").

violation of the Texas' credit reporting laws, including §20.05(a), is deemed "a false, misleading, or deceptive act or practice" in violation of Texas' Deceptive Trade Practices Consumer Protection Act ("DTPA") found at Tex. Bus. & Com. Code § 17.41 *et seq*. Tex. Bus. & Comm. Code §20.12. Unlike the *City of Austin* case, which involved a question of whether the Attorney General would choose to intervene in an enforcement action brought by the City, the law at issue here is directly enforceable by the Attorney General. Tex. Bus. & Comm. Code §20.11. Indeed, this Attorney General, in the last five years alone, has brought multiple enforcement actions against CDIA member CRAs under the state's DTPA law related to their credit reporting practices – just as it could here. Therefore, while true that he has not yet brought a DTPA action to enforce §20.05(a)(5), this Attorney General has recently enforced Texas law against CDIA member CRAs under the same mechanism that he may use to enforce this new law. This demonstrates more than a 'scintilla' of enforcement, and the *Ex parte Young* exception applies. Like the plaintiffs in *NiGen*, and *Verizon*, CDIA members require certainty regarding the applicability of state law to their business in order to understand their rights and obligations moving forward. This Court should hold sovereign immunity is not a bar to this action.

II. CDIA Did Not Unduly Delay in Filing Its Motion for Leave to Amend.

Defendant argues that CDIA unduly delayed and failed to comply with the rules of this Court in seeking leave to amend to its complaint. [Dkt. 30, p.11.] This is a serious allegation that is wholly unsupported by the record before this Court. The Defendant does not cite a single rule with which it claims CDIA failed to comply. That is because the CDIA has not failed to comply with any rule of this Court.

In his Response, Defendant states "[i]n raising its "alternative" request for leave to amend in response to Defendant's motion to dismiss, CDIA did not attach a proposed amended pleading"

[Dkt. 30, pp. 11-12.] to the brief in opposition to the Defendant's Motion to Dismiss. Thus, Defendant argues, leave to amend should be denied because CDIA unduly delayed in seeking relief and/or failed to comply with the rules. While it is factually correct that CDIA did not attach a proposed amended complaint to its Opposition to the Motion to Dismiss, the fact is that no rule of this Court requires CDIA to have done so.[4] It is routine practice in this Circuit that a party opposing a motion to dismiss request that the court deny the motion or in the alternative to grant it leave to amend. No rule requires an attached pleading to accompany such requested relief.

Defendant's reliance on *U.S. ex. Rel. Willard v. Humana Health Plan of Texas, Inc.,* 336 F.3d 375, 387 (5th Cir. 2003) is misplaced. In *Willard,* no error was found when the district court declined to grant leave to amend *a third time* to a plaintiff who had previously been granted leave to amend his complaint on two prior occasions to address the very deficiency at issue. *Id*. ("Here, Willard has already had two opportunities to amend the complaint. The record indicates that the second instance in which the district court granted Willard leave to amend was to cure the complaint's lack of specificity, which is the same basis on which Willard now argues he should be allowed to amend for a third time."). Having had <u>three</u> chances to state his claim with sufficient particularity, the plaintiff was not entitled to a fourth bite at the apple.

In *Willard*, the plaintiff did not expressly request leave to amend his pleading. The Fifth Circuit held that leave to amend was not improperly denied was that the plaintiff below had not

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[4] *Edionwe v. Bailey*, 860 F.3d 287, 294 (5th Cir. 2017) does not stand for the proposition that an amended complaint must be attached to an opposition to a motion to dismiss. *Edionwe* involved a case where a plaintiff sought leave to amend after hearings on a motion for judgment on the pleadings. *Id.* In one instance, his bare bones request for leave failed to advise the court the additional facts he would plead in any amended proceeding and leave to amend was denied. His later motion for leave, to which an amended complaint was attached, still failed to establish a constitutionally protected property interest in potential employment. Thus, the Fifth Circuit held there was no error because amendment would have been futile. *Id.* at 296.

effectively requested leave to amend or note the facts to be supplemented to the district court in the first instance: "…[plaintiff's] brief statement does not expressly request that Willard be given leave to amend and does not provide any indication of the grounds on which such an amendment should be permitted." *Id.* *Willard* and this case are not remotely on the same footing. CDIA has not been granted any leave to amend its initial Complaint, let alone two additional attempts to plead its case. In contrast to Willard's mere recitation of law in its brief, CDIA's Opposition clearly requested leave to amend and explained the information CDIA would supply in an Amended Complaint (which is now before the Court). [Dkt. 9, pp. 2, 8, n 8.]

Finally, Defendant cites *Performance Autoplex II Ltd. v. Mid-Continent Cas. Co.* for the proposition that "where a litigant fails to raise an issue before a magistrate judge" there has been a delay warranting denial of relief. 322 F.3d 847, 862 (5th Cir. 2003). Again, the facts and procedural posture of the *Performance* case demonstrate how unhelpful it is to the present case. There, the parties filed cross-motions for summary judgment, and the magistrate judge recommended dismissal. *Id.* at 852-53. During the objection process, Performance filed a motion to supplement the record to provide entirely new evidence to the district court judge than that which had been presented to the magistrate judge. *Id*. at 862. Applying a four-part test, the Fifth Circuit declined to find error in the district court's decision to refuse to allow Performance to submit evidence when Performance provided absolutely no reason why it failed to introduce the evidence with its original motion when the evidence had been made produced in discovery. *Id*.

Here, CDIA seeks no new relief, and is not late in requesting leave of Court, having requested it in its original Opposition. [Dkt. 9, pp. 2, 8.] Moreover, CDIA has not delayed in any aspect of litigating this case. The parties timely filed their initial papers and pleadings in this case, and since the matter was referred the magistrate judge in October, the parties have appeared before this Court for status and scheduling conferences, and the Defendant has propounded discovery to which CDIA timely and fully answered. The parties were in the process of negotiating a Joint Stipulation of Facts and on the verge of filing their cross-motions for summary judgment when the R&R was issued. The parties have proceeded diligently as instructed by this Court to advance the case. There has been no undue delay on the part of CDIA.

III. The Issue of Ripeness Was Never Briefed by Either Party Before the R&R.

Defendant again alleges that CDIA is "wrong as a matter of both fact and law" when it argues that ripeness was never raised by the Defendant prior to the R&R. [Dkt. 30, p., 7] However, Defendant does not, and cannot, provide a single citation to any paper filed by it in which the words "ripe" or "ripeness" were ever used. It cannot, because the Defendant never raised ripeness as a basis for dismissal of the case.

Defendant supports his conclusion that CDIA was wrong as a matter of fact because "courts have long recognized that "the doctrines of ripeness and standing often overlap in practice, particularly in an examination of whether a plaintiff has suffered a concrete injury."" [Dkt. 30, p. 7] (citations omitted). Although a true statement of general principle, this Defendant, in this case, never once argued in its Motion to Dismiss or Reply in Support thereof that CDIA's claims were not ripe. CDIA's Opposition to the Motion to Dismiss never referred to "ripeness." Like *mens rea* and motive, which are commonly considered together in a criminal case but are wholly separate concepts, so is ripeness related to standing, yet remains a distinct legal issue. Never having been raised by the Defendant, it was a wholly new issue raised *sua sponte* by the Magistrate.

IV. The Case Law Addressed by CDIA Supports Denying the Motion to Dismiss.

Defendant's argument that CDIA has alleged nothing more than "an abstract disagreement" between his office and CDIA members blatantly disregards the issue before the Court. [Dkt. 30,

p. 6.] CDIA has alleged that the Texas law makes it illegal to distribute the very products which CDIA members sell. Under the state's mini-FCRA, the Attorney General has enforcement authority to seek injunctive relief and civil penalties for violations of the law and may also pursue the CRA for a violation of Texas' Deceptive Trade Practices-Consumer Protection Act, V.T.C.A., Bus. & C. Code § 17.41 *et seq.* V.T.C.A., Bus. & C. Code §§ 20.11 and 20.12, respectively. Though Defendant acknowledges that his enforcement authority against CDIA members under the law, and that the law provides for the imposition of fines and injunctive relief, Defendant argues that CDIA members cannot know if or when he will ever choose to enforce the law and thus there is no imminent threat of harm. Although that statement is true for any enforcement entity with discretionary authority, it does not affect CDIA's standing. If Defendant's position were correct, no federal preemption challenge to state law may be brought until the Attorney General first tries to enforce it. That is not the law.

The cases cited by CDIA in its Objection, *Abbott Labs.*, *and Texas v. U.S.*, demonstrate that the matter is ripe for consideration. Defendant suggests, incorrectly, that *Abbott Labs.* should not be followed because it is either not good law or is irrelevant because it pertains to claims involving administrative agency action only and not to questions of federal preemption of state laws. The Supreme Court, however, has affirmed that *Abbott Labs.* is foundational to its ripeness jurisprudence. Explaining that *Abbott Labs* "remains our leading discussion of the [ripeness] doctrine," the Supreme Court applied the test from Abbott Labs in evaluating a federal preemption challenge under the Atomic Energy Act. *Pacific Gas and Elec Co., v. State Energy Resources Conservation and Dev. Co.*, 103 S. Ct. 1713 (1983). Finding that the preemption claim was ripe for judicial review, the Court explained that the "question of preemption is predominantly legal" and explained that requiring the industry to proceed without knowing whether the state law was valid "would impose a palpable and considerable hardship on the [petitioners]" who had to operate their plants within the requirements of the law. *Id*. at 1720-21; *see also PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051, 2060-61 (2019) (discussion of how the Supreme Court "revolutionized" administrative law in its "landmark decision" - *Abbott Labs)*. Similarly, this pure question of law is ripe for adjudication by this Court.

V. Alternatively, Leave to Amend Should Be Granted.

Finally, on the issue of whether CDIA should be granted leave to amend in the even that the Court decides to grant Defendant's Motion to Dismiss, the law in this Circuit is clear. "Ordinarily, when a complaint is dismissed for lack of jurisdiction, including lack of standing, it should be without prejudice." *Green Valley Special Utility Dist. v. City of Schertz Texas*, 2020 WL 4557844 (5th Cir. Aug. 7, 2020), citing *Williams v. Morris*, 614 F. App'x 773, 774 (5th Cir. 2015) (per curiam); *see also In re Great Lakes Dredge & Dock Co.*, 624 F.3d 201, 209 (5th Cir. 2010) ("[I]f the district court had held that it lacked subject matter jurisdiction, it should have entered dismissal without prejudice...."). The Magistrate's R&R goes too far in recommending leave to amend be denied, and this Court should decline to adopt the recommendation. If the Court determines that the Complaint fails to satisfy Article III standing, the Court should grant the Defendant's Motion to Dismiss *without prejudice* and grant CDIA's Motion for Leave to Amend.

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.

September 2, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of September 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