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

CONSUMER DATA INDUSTRY ASSOCIATION, Plaintiff, v. STATE OF TEXAS, *through Ken Paxton, in his official capacity as Attorney General of the State of Texas*, Defendant.	§	1:19-CV-876-RP

ORDER

Before the Court are Defendant's Motion to Dismiss Plaintiff's Amended Complaint, filed January 4, 2021 (Dkt. 41); Consumer Data Industry Association's Response to Defendant's Motion to Dismiss Amended Complaint, filed February 2, 2021 (Dkt. 44); and Defendant's Reply in Support of Motion to Dismiss Plaintiff's Amended Complaint, filed February 23, 2021 (Dkt. 47).[1]

I. Background

On May 31, 2019, the State of Texas amended the Texas Fair Credit Reporting Act by enacting Texas Business & Commerce Code § 20.05(a)(5) (the "Statute"). Section 20.05(a)(5) limits the information credit reporting agencies may include in an individual's credit report. Dkt. 36 ¶¶ 11-12. 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

[1] On April 8, 2021, the Court referred the motion to the Magistrate Court for Report and Recommendation. Dkt. 48. It is hereby **ORDERED** that the referral to the Magistrate Court is **WITHDRAWN**.

> 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. 36 ¶ 1. CDIA filed this lawsuit on September 9, 2019, asserting that § 20.05(a)(5) is preempted by the Federal Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 *et seq.* CDIA seeks declaratory and injunctive relief. Dkt. 36 ¶¶ 36-44.

The State moves to dismiss CDIA's First Amended Complaint under Rules 12(b)(1) and 12(b)(6).

II. Legal Standards

A party seeking to challenge the court's subject matter jurisdiction to hear a case may file a motion under Rule 12(b)(1). *Home Builders Ass'n of Miss., Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998). When a Rule 12(b)(1) motion is filed in conjunction with other motions under Rule 12, the court should consider the Rule 12(b)(1) jurisdictional attack before addressing any attack on the merits. *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001).

A. Rule 12(b)(1) Lack of Subject Matter Jurisdiction

The party claiming federal subject matter jurisdiction must show that the court indeed has that jurisdiction. *Willoughby v. U.S. ex rel. U.S. Dep't of the Army*, 730 F.3d 476, 479 (5th Cir. 2013). A federal court properly dismisses a case or claim for lack of subject matter jurisdiction when it lacks the statutory or constitutional power to adjudicate the claims. *Home Builders Ass'n of Miss.*, 143 F.3d at 1010. In ruling on a Rule 12(b)(1) motion, the court may consider: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint, undisputed facts, and the court's resolution of disputed facts. *Spotts v. United States*, 613 F.3d 559, 566 (5th Cir. 2010). The trial court is "free to weigh the evidence and satisfy itself" that subject matter

jurisdiction exists. *MDPhysicians & Assocs., Inc. v. State Bd. of Ins.*, 957 F.2d 178, 181 (5th Cir. 1992) (quoting *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981)).

B. Rule 12(b)(6) Failure to State a Claim

Rule 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 plaintiff." *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007) (citation 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 plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678.

> 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 by 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 argues that the Court lacks subject matter jurisdiction because (1) CDIA lacks standing, (2) CDIA's claim is not ripe for review, and (3) the State is entitled to Eleventh Amendment immunity from suit. The State further argues that, even if CDIA can show subject

matter jurisdiction, its complaint fails to state a claim under Rule 12(b)(6) because the FCRA does not expressly preempt the Statute. The Court addresses the jurisdictional challenge first. *Ramming*, 281 F.3d at 161.

A. Subject Matter Jurisdiction

1. Standing

The State contends that CDIA lacks standing because it has not alleged an injury in fact. CDIA asserts that its allegations regarding the costs to comply with the Statute and threatened enforcement are sufficient to confer Article III standing.

Standing is a component of subject matter jurisdiction, and it is properly raised by a motion to dismiss under Rule 12(b)(1). *Cobb v. Cent. States*, 461 F.3d 632, 635 (5th Cir. 2006); *Lee v. Verizon Commc'ns, Inc.*, 837 F.3d 523, 533 (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. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). The party invoking federal subject matter jurisdiction bears the burden of establishing each element. *Ramming*, 281 F.3d at 161.

A plaintiff can establish standing under the Declaratory Judgment Act if it shows actual present harm or a significant possibility of future harm even though the injury in fact has not yet been completed. *Bauer v. Texas*, 341 F.3d 352, 357-58 (5th Cir. 2003). An allegation of future injury may establish standing if the threatened injury is "certainly impending or there is a substantial risk that

the harm will occur." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 n.5 (2013)).

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 Grp., Inc.*, 517 U.S. 544, 546 (1996).

In its Amended Complaint, CDIA alleges that:

- Some CDIA members currently include in their reports Medical Account Information that the Statute now prohibits. Dkt. 36 ¶ 18.
- The State has the authority to enforce the Statute and has never agreed not to enforce it against CDIA members. *Id.* ¶¶ 5-6, 8.
- Absent a declaration that the Statute is preempted by the FCRA, CDIA members will be forced to make material changes to their day-to-day business operations to comply with the Statute, including making changes to products currently provided in Texas. *Id.* ¶¶ 10, 20, 28.
- CDIA members which maintain Medical Account Information will have to undertake significant efforts and adopt processes to: (i) identify any information that would be implicated by the Statute; (ii) take steps to assure the removal of such data from their files or otherwise prevent such data from being included in consumer reports provided in Texas; and (iii) manage the collection of such information from the furnishers in the future to prevent its appearance. *Id.* ¶¶ 25-28, 34.
- These remediation efforts require material investments of time and resources. Similar undertakings regarding other changes to the credit reporting system have taken members years to complete. *Id.* ¶¶ 30-33.

In granting leave to amend, the Court found that amendment was not futile because Consumer Data alleged that its member organizations "will be required to make substantial changes to their

business operations." Dkt. 35 at 3 (citing *ESI/Emp. Sols., L.P. v. City of Dallas*, 450 F. Supp. 3d 700, 714 (E.D. Tex. 2020)); *see also Susan B. Anthony List*, 573 U.S. at 161 (finding that plaintiff sufficiently alleged injury in fact by alleging credible threat of enforcement). Taking CDIA's allegations as true, as the Court must at the motion to dismiss stage, the Court finds that CDIA has satisfied Article III's requirement of an injury in fact and has standing to bring this action.

2. Ripeness

The State next argues that CDIA's declaratory judgment claim is not ripe for review because any alleged injury to its members is contingent on future events, that is, an enforcement action by the Texas Attorney General. CDIA asserts that its claims present a pure question of law ripe for review and that an actual controversy exists between the parties as to whether the FCRA preempts the Statute.

Ripeness is a constitutional prerequisite to the exercise of subject matter jurisdiction. *Shields v. Norton*, 289 F.3d 832, 835 (5th Cir. 2002). It is "drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993). "A case or controversy must be ripe for decision, meaning that it must not be premature or speculative." *Shields*, 289 F.3d at 835. In assessing ripeness, a court must consider "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967), *overruled on other grounds by Califano v. Sanders,* 430 U.S. 99, 105 (1977).

Declaratory judgments typically are sought before an injury in fact has occurred and are ripe for adjudication where an actual controversy exists. *United Transp. Union v. Foster*, 205 F.3d 851, 857 (5th Cir. 2000). An actual controversy exists where a substantial controversy of sufficient immediacy and reality exists between parties having adverse legal interests. *Orix Credit All., Inc. v. Wolfe*, 212 F.3d

891, 896 (5th Cir. 2000). Generally, a case is ripe when any remaining questions are purely legal ones and no further factual development is required. *Id.* at 895.

The Court finds that CDIA's claims are ripe. CDIA's claims involve the purely legal question whether the FCRA preempts the Statute. In addition, CDIA alleges that its members will face hardship if forced to implement measures to comply with the Statute or risk a state enforcement action. Accordingly, CDIA's claims are ripe for adjudication.

3. Sovereign Immunity

The State argues that CDIA's claims are barred by Eleventh Amendment immunity because it has not consented to suit. CDIA asserts that its claims fall within an exception to sovereign immunity and therefore may proceed.

Sovereign immunity[2] is the privilege of the sovereign not to be sued without its consent. *Va. Off. for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 253 (2011). Under the doctrine of sovereign immunity, federal courts "may not entertain a private person's suit against a State" unless the State has waived its sovereign immunity or Congress has abrogated it by legislation. *Id.* at 253-54. Sovereign immunity acts as a jurisdictional bar and applies "regardless of the nature of the relief sought." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984).

It is well-established that sovereign immunity applies not only to actions in which a state itself is the named defendant, but also to actions against state agencies and state instrumentalities. *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429 (1997). "[A] suit against an arm or instrumentality of the State is treated as one against the State itself." *Lewis v. Clarke*, 137 S. Ct. 1285, 1293 (2017). Similarly,

[2] The Eleventh Amendment makes explicit reference to the States' immunity from suits "commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. As a result, courts often refer to sovereign immunity as "Eleventh Amendment immunity." As the Supreme Court has explained, however, "[t]he phrase is convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment." *Alden v. Maine*, 527 U.S. 706, 713 (1999).

where a lawsuit is brought against an employee in his or her official capacity, the suit may be barred by sovereign immunity. *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985).

The *Ex parte Young* exception to sovereign immunity "permits suits for prospective injunctive relief against state officials acting in violation of federal law." *Frew ex rel. Frew v. Hawkins.*, 540 U.S. 431, 437 (2004). For *Young* to apply, three criteria must be satisfied: (1) a plaintiff must name individual state officials as defendants in their official capacities; (2) the plaintiff must allege an ongoing violation of federal law; and (3) the relief sought must be properly characterized as prospective. *Green Valley Special Util. Dist. v. City of Schertz*, 969 F.3d 460, 471 (5th Cir. 2020). The Court should conduct a "straightforward inquiry" to determine whether the exception applies and not consider the merits of the underlying claims. *Id.*

The Court finds that the *Young* exception applies in this case. The first element is satisfied because CDIA named the Texas Attorney General as a defendant in his official capacity. Dkt. 36 ¶ 2. Second, CDIA alleges that the Statute is preempted by the FCRA and therefore presents an ongoing violation of federal law. *Id.* ¶ 7, 16. With respect to the final criterion, CDIA seeks an injunction prohibiting the Texas Attorney General from enforcing a preempted state law, relief properly characterized as prospective. *Id.* ¶ 44. *Green Valley Special Util. Dist. v. Walker*, 324 F.R.D. 176, 182 (W.D. Tex. 2018) (stating that "it is nearly axiomatic that an injunction prohibiting state administrative officials from enforcing preempted state regulations qualifies as prospective relief under *Ex Parte Young*"). Accordingly, the Court has subject matter jurisdiction over this matter.

B. Failure to State a Claim

The State argues that CDIA's complaint should be dismissed for failure to state a claim because the FCRA does not preempt the Statute as a matter of law. CDIA asserts that the FCRA expressly preempts any state law that attempts to prohibit or restrict the contents of consumer credit reports.

Congress' purpose is the "ultimate touchstone" for determining the existence and reach of preemption. *Franks Inv. Co. v. Union Pac. R.R. Co.*, 593 F.3d 404, 407 (5th Cir. 2010) (citing *Medtronic Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). Congress can show its purpose in one of two ways. First, Congress may indicate preemptive intent through a statute's express language. *Altria Grp., Inc. v. Good*, 555 U.S. 70, 76 (2008). Second, Congress may impliedly preempt state law "if the scope of the statute indicates that Congress intended federal law to occupy the legislative field, or if there is an actual conflict between state and federal law." *Id.* Preemption "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Morales v. TWA*, 504 U.S. 374, 383 (1992).

The FCRA seeks to promote "fair and accurate credit reporting" and protect consumer privacy by regulating the consumer reporting agencies that compile and disseminate personal information. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2200 (2021). The FCRA "imposes a host of requirements concerning the creation and use of consumer reports." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 335 (2016).

As originally enacted in 1970, the FCRA generally permitted state regulation of the consumer reporting industry. *Ross v. FDIC*, 625 F.3d 808, 812 (4th Cir. 2010). Congress later enacted the Consumer Credit Reporting Reform Act of 1996, which amended the FCRA by adding a stronger preemption provision, 15 U.S.C. § 1681t(b). *Id.* Its purpose, in part, was to avoid "a patchwork system of conflicting regulations." *Id.* Section 1681t(b)(1)(E) of the FCRA provides that

> No requirement or prohibition may be imposed under the laws of any State [ ] with respect to any subject matter regulated under . . . 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.

Section 1681c addresses the information which may be included in consumer reports. With respect to medical information, § 1681c(a)(6) states that a consumer reporting agency may not include:

> The name, address, and telephone number of any medical information furnisher that has notified the agency of its status, unless –
>
> (A) such name, address, and telephone number are restricted or reported using codes that do not identify, or provide information sufficient to infer, the specific provider or nature of such services, products or devices to a person other than the consumer; or
>
> (B) the report is being provided to an insurance company for a purpose relating to engaging in the business or insurance other than property and casualty insurance.

Section 1681c(a)(8) prohibits nationwide consumer reporting agencies from reporting the following information relating to medical debt of a veteran:

> any information related to a fully paid or settled veteran's medical debt that had been characterized as delinquent, charged off, or in collection if the consumer reporting agency has actual knowledge that the information is related to a veteran's medical debt and the consumer reporting agency is in compliance with its obligation under section 302(c)(5) of the Economic Growth, Regulatory Relief, and Consumer Protection Act.

CDIA thus has sufficiently alleged that the Statute is expressly preempted by Section 1681t(b)(1) because it concerns the same subject matter as Section 1681c of the FCRA: what medical debt information may be included in a consumer report. Other courts have reached the same conclusion concerning FCRA preemption. For example, in a case CDIA brought against Maine officials, the United States District Court for the District of Maine found that § 1681c(a)(8) concerning veterans' medical debt preempted state provisions on consumer reports of medical debt. *Consumer Data Indus. Ass'n v. Frey*, 495 F. Supp. 3d 10, 20-21 (D. Me. 2020). The court reasoned: "To be clear, a regulation of veteran's medical debt *is* a regulation of medical debt. To hold otherwise, and to say that a regulation within a subject matter is not a regulation of a subject matter, would lead to untenable

outcomes when applied to the rest of § 1681c." *Id.*; *see also Simon v. DirecTV, Inc.*, No. 09-cv-00852-PAB-KLM, 2010 WL 1452853, at *4 (D. Colo. Mar. 19, 2010), *R. & R. adopted*, 2010 WL 1452854 (D. Colo. Apr. 12, 2010) (finding that the FCRA preempted Colorado statute regulating criminal background information disclosed in consumer report); *Smith v. Equifax Info. Servs., LLC*, 522 F. Supp. 2d 822, 825 (E.D. Tex. 2007) (stating that "the FCRA preempts state law to the extent those laws are inconsistent with the FCRA").

Accordingly, the Court finds that CDIA has stated a claim for relief.

IV. Conclusion

For the reasons stated above, Defendant's Motion to Dismiss Plaintiff's Amended Complaint (Dkt. 41) is **DENIED**.

SIGNED on September 28, 2021.

ROBERT PITMAN
UNITED STATES DISTRICT JUDGE