

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

NO. 5:15-CV-634-FL

AVUTOX, LLC,)
)
Plaintiff,)
)
v.)
)
NORRIS COCHRAN in his official)
capacity as Acting Secretary of the United)
States Department of Health and Human)
Services,)
)
Defendant.)

ORDER

This matter is before the court upon defendant’s motion to dismiss for lack of jurisdiction and for failure to state a claim (DE 14). Pursuant to 28 U.S.C. § 636(b)(1)(B), United States Magistrate Kimberly A. Swank entered the memorandum and recommendation (“M&R”) wherein it is recommended that the court dismiss this action for lack of subject matter jurisdiction and for failure to state a claim. No objections were filed. Absent a specific and timely filed objection, the court reviews only for “clear error,” and need not give any explanation for adopting the M&R. See Diamond v. Colonial Life & Accident Ins. Co., 416 F.3d 310, 315 (4th Cir. 2005). Upon careful review of the record, “the 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)(1).

Upon careful review of the M&R and the record in this matter, the court adopts as its own the recommendation in the M&R. As correctly determined in the M&R, plaintiff’s claims in this matter are foreclosed by the Fourth Circuit’s recent decision in Cumberland Cty. Hosp. Sys., Inc.

v. Burwell, 816 F.3d 48, 49 (4th Cir. 2016). Here, as in Cumberland, “[t]he issuance of a judicial order now . . . directing the Secretary to hear [plaintiff’s] claims in the middle of the administrative process, would unduly interfere with the process and, at a larger scale, the work of the political branches.” Id. at 50. Accordingly, plaintiff’s claims seeking writ of mandamus, order directing administrative action, and declaratory judgment, must be dismissed for lack of subject matter jurisdiction and for failure to state a claim.

CONCLUSION

Based on the foregoing, the court ADOPTS the M&R and GRANTS defendant’s motion to dismiss. Plaintiff’s action is DISMISSED WITH PREJUDICE for lack of subject matter jurisdiction and for failure to state a claim. The clerk is DIRECTED to close this case.

SO ORDERED, this the 27th day of February, 2017.


LOUISE W. FLANAGAN
United States District Judge