

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

JOHN D. HORTON,

Plaintiff,

v.

Civil Action No. 1:23CV18

NATIONAL INSTANT CRIMINAL  
BACKGROUND CHECK SYSTEM,

Defendant.

ORDER ADOPTING IN PART AND REJECTING IN PART REPORT AND  
RECOMMENDATION [ECF NO. 23] AND DISMISSING CASE WITHOUT PREJUDICE

On February 10, 2023, the pro se Plaintiff, John D. Horton ("Plaintiff"), filed a Complaint against the Defendant, National Instant Criminal Background Check System ("NICS") [ECF No. 1]. Pursuant to 28 U.S.C. § 636 and the local rules, the Court referred the action to United States Magistrate Judge Michael J. Aloï (the "Magistrate Judge") for initial review [ECF No. 4].

On August 15, 2023, the Magistrate Judge entered a Report and Recommendation ("R&R") [ECF No. 23], recommending that Plaintiff's combined motions for Default Judgment and Declaratory Judgment [ECF No. 15] be denied, NICS's Motion to Dismiss [ECF No. 17] be granted, Plaintiff's Cross Motion [ECF No. 21] be denied, and Plaintiff's complaint [ECF No. 1] be dismissed with prejudice. The R&R informed the parties that they had fourteen (14) days plus an additional three (3) days from the date of the filing of the

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R&R to file "specific written objections identifying the portions of the Report and Recommendation to which objection is made, and the basis for such objection." It further warned them that the "[f]ailure to timely file objections . . . shall constitute a waiver of de novo review by the District Court and a waiver of appellate review by the Circuit Court of Appeals." ECF No. 23 at 8.

Despite being repeatedly warned of the consequences in failing to advise the Court and opposing counsel of pro se Plaintiff's most current address [ECF Nos. 3, 12], Plaintiff failed to update and maintain a current address against the Magistrate Judge's orders and Local Rule 83.03 of the Rules of General Practice and Procedure. Therefore, the Magistrate Judge continued to send copies of orders to Plaintiff, by certified mail, return receipt requested, to their last known address as shown on the docket. ECF Nos. 5, 12, 16, 18, 23. To date, no objections to the R&R have been filed.

When reviewing a magistrate judge's R&R, the Court must review de novo only the portions to which an objection has been timely made. 28 U.S.C. § 636(b)(1)(C). An objection must be specific and particularized to warrant such review. See United States v. Midgette, 478 F.3d 616, 621-22 (4th Cir. 2007). Otherwise, the Court will uphold portions of a recommendation to which a general

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objection or no objection has been made unless they are clearly erroneous. See Diamond v. Colonial Life & Accident Ins. Co., 416 F.3d 310, 315 (4th Cir. 2005); Midgette, 478 F.3d at 622.

The Court has reviewed the R&R for clear error. Diamond, 416 F.3d at 315. Because the Court **FINDS** a dismissal for lack of subject matter jurisdiction is without prejudice, see Norfolk Southern Railway Company v. Energy Development Corp., 312 F. Supp. 2d 833, 835 n.1 (S.D.W. Va. Mar. 24, 2004), and a dismissal for insufficient service of process is without prejudice, see Carrigan v. Eli Lilly and Co., No. 5:05CV131, 2006 WL 1705909 (N.D.W. Va. June 16, 2006), the Court **ADOPTS IN PART** and **REJECTS IN PART** the R&R [ECF No. 23], **DENIES** Plaintiff's Default Judgment and Declaratory Judgment [ECF No. 15], **GRANTS** NICS's Motion to Dismiss [ECF No. 17], **DENIES** Plaintiff's Cross Motion [ECF No. 21], and **DISMISSES WITHOUT PREJUDICE** Plaintiff's complaint [ECF No. 1]. The Court **DIRECTS** the Clerk to strike this case from the Court's active docket.

It is so **ORDERED**.

The Clerk shall transmit copies of this Order to counsel of record via email and the pro se Plaintiff via certified mail, return receipt requested.

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DATED: September 7, 2023



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THOMAS S. KLEE, CHIEF JUDGE  
NORTHERN DISTRICT OF WEST VIRGINIA