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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

PRO PUBLICA, INC.,

Plaintiff,

v.

COMMANDER DEREK D.
BUTLER; VICE ADMIRAL DARSE
E. CRANDALL, JR.; CARLOS DEL
TORO; CAROLINE D. KRASS; and
LLOYD J. AUSTIN, III,

Defendants.

Case No.: 22-cv-1455-BTM-KSC

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANTS’
PARTIAL MOTION TO DISMISS**

[ECF NO. 40]

Pending before the Court is Defendants’ motion to partially dismiss Plaintiff’s first amended complaint. (ECF No. 40). For the reasons discussed below, the motion will be granted in part and denied in part.

I. BACKGROUND

Plaintiff Pro Publica, Inc., filed its amended complaint on May 19, 2023. (ECF No. 38). Plaintiff is a nonprofit news organization and alleges that the Navy is “denying the public meaningful and timely access” to records in court-martial proceedings. (Id. at ¶ 1). According to Plaintiff, the Navy denies the public access

1 to court records in all cases ending in acquittals. (Id. at ¶¶ 61, 72). Specifically,
2 Plaintiff alleges it was denied access to court records in the Navy’s prosecution of
3 Seaman Apprentice Ryan Mays. (Id. at ¶¶ 4–6).

4 Plaintiff brought suit against the following defendants: Vice Admiral Darse
5 E. Crandall Jr., the senior uniformed attorney in the Navy and commanding officer
6 of the Navy’s Judge Advocate General Corps; Carlos Del Toro, the Secretary of
7 the Navy; Caroline D. Krass, General Counsel to the Department of Defense;
8 Commander Derek D. Butler, the military judge who presided over the *Mays* case;
9 and Lloyd J. Austin, III, the Secretary of Defense.

10 Plaintiff is seeking a declaratory judgment, a permanent injunction, and a writ
11 of mandamus. Plaintiff is seeking a writ of mandamus “directing Secretary Austin
12 to prescribe the uniform standards and criteria for conduct concerning public
13 access to docket information, filings, and records.” (Id. at ¶ 111). Plaintiff claims
14 that Secretary Austin has failed to properly carry out Article 140a of the Uniform
15 Code of Military Justice, 10 U.S.C. § 940a, which provides that the “Secretary of
16 Defense . . . shall prescribe uniform standards and criteria for” the “[f]acilitation” of
17 the public’s access to court records.

18 Defendants now move to partially dismiss the amended complaint and assert
19 that: (1) the Court lacks jurisdiction over Plaintiff’s mandamus claim because
20 Plaintiff is seeking “to compel a non-ministerial and discretionary act”; (2) Plaintiff
21 can only challenge policies currently in effect; (3) Plaintiff lacks standing to assert
22 claims on behalf of Seaman Mays; and (4) Plaintiff’s claims against Defendants
23 Butler, Krass, and Austin are improper because those defendants cannot provide
24 Plaintiff relief. (ECF No. 40).

25 Under Federal Rule of Civil Procedure 8, each pleading must include “a short
26 and plain statement of the claim showing that the pleader is entitled to relief” and
27 must “give the defendant fair notice of what the . . . claim is and the grounds upon
28 which it rests.” See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)

1 (quoting Fed. R. Civ. P. 8(a)(2)). Federal Rule of Civil Procedure 12(b) permits
2 dismissal for “lack of subject-matter jurisdiction” and for “failure to state a claim
3 upon which relief can be granted.” Fed. R. Civ. P. 12(b).

4 A complaint may survive a motion to dismiss only if it contains enough facts
5 to “state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S.
6 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). The court must be able to
7 “draw the reasonable inference that the defendant is liable for the misconduct
8 alleged.” *Id.* at 663. “Threadbare recitals of the elements of a cause of action,
9 supported by mere conclusory statements, do not suffice.” *Id.* In reviewing a Rule
10 12(b)(6) motion, the Court accepts as true all facts alleged in the complaint and
11 draws all reasonable inferences in favor of the plaintiff. *al-Kidd v. Ashcroft*, 580
12 F.3d 949, 956 (9th Cir. 2009).

13 When a motion to dismiss is granted, “[l]eave to amend should be granted
14 unless the pleading ‘could not possibly be cured by the allegation of other facts.’”
15 *Velez v. Cloghan Concepts LLC*, 387 F. Supp. 3d 1072, 1078 (S.D. Cal. 2019)
16 (quoting *Ramirez v. Galaza*, 334 F.3d 850, 861 (9th Cir. 2003)). When assessing
17 whether leave to amend should be granted, district courts should consider “four
18 factors: bad faith, undue delay, prejudice to the opposing party, and/or futility.”
19 *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir. 2001).

20 II. DISCUSSION

21 A. Writ of Mandamus

22 A writ of mandamus “compel[s] a federal official to perform a duty” and may
23 issue “only if: (1) the . . . claim is clear and certain; (2) the official’s duty is
24 nondiscretionary, ministerial, and so plainly prescribed as to be free from doubt,
25 and (3) no other adequate remedy is available.” *Patel v. Reno*, 134 F.3d 929, 931
26 (9th Cir. 1997).

27 Defendants claim that Secretary Austin promulgated any standards or
28 guidance required by Article 140a. According to Defendants, Plaintiff cannot

1 satisfy the standard for mandamus because Secretary Austin exercised his
2 discretion in determining which standards to enact under Article 140a, and thus
3 there is no clear duty to enforce against the Secretary.

4 At this stage, the Court disagrees. To be sure, Plaintiff's amended complaint
5 recognizes that guidelines have been issued. (ECF No. 38 at ¶ 43); see *also* (ECF
6 No. 45). However, Plaintiff has alleged that the Navy routinely denies the public
7 access to court records. Indeed, according to Plaintiff, the Navy does not provide
8 court records in all cases resulting in acquittals. The essence of Plaintiff's claim is
9 that the Secretary has failed to fulfil his obligations under Article 140. Plaintiff is
10 claiming that the Secretary is using Article 140a to prevent public access to court
11 records when the purpose of Article 140a is to facilitate public access to court
12 records.

13 Plaintiff has plausibly alleged that the issued guidelines are clearly
14 inconsistent with Congress' mandate in Section 940a. That section instructs the
15 Secretary to use "the best practices of Federal and State courts" when facilitating
16 public access to court records. 10 U.S.C. § 940a. If the Navy is denying the public
17 access to court records in all cases ending in acquittals, then Plaintiff's claim that
18 the Secretary has failed to comply with Section 940a is plausible.

19 To issue the writ, the Court need not specifically instruct the Secretary on
20 which standards to issue. Instead, the Court need only conclude that the issued
21 guidelines are clearly insufficient under Section 940a, and that the Secretary must
22 promulgate new guidelines merely sufficient under the section. That would not be
23 improper. See *Knuckles v. Weinberger*, 511 F.2d 1221, 122 (9th Cir. 1975) ("[T]he
24 fact that a statute requires construction by the administrator or the court in order
25 to determine what duties it creates does not mean that mandamus is not proper to
26 compel the officer to perform the duty, once it is determined."). Indeed,
27 Defendants' argument presupposes that Plaintiff could not bring a mandamus
28 claim even if the Secretary's guidelines denied the public access to court records

1 in virtually every case. The Court disagrees with that argument.

2 In short, because Plaintiff has plausibly alleged that the Secretary has clearly
3 failed to issue sufficient standards under Section 940a, the Court declines to
4 dismiss the mandamus claim on this ground. Defendants have not sought to
5 dismiss the mandamus claim on any other ground, and thus the Court will not at
6 this time assess the other factors for the issuance of the writ.

7 **B. Outdated Policies and Standing**

8 Next Defendants argue that Plaintiff cannot base its claims on outdated
9 policies and that plaintiff lacks standing to assert claims on behalf of Seaman
10 Mays. However, dismissal of Plaintiff's claims is not the appropriate remedy for
11 Defendants' argument that Plaintiff cannot base its claims on outdated policies.
12 Defendants' argument is more suitable for a motion to strike, and the Court
13 declines to sua sponte convert Defendants' motion into one. *See Thompson v.*
14 *Paul*, 657 F. Supp. 2d 1113, 1129 (D. Ariz. 2009) ("The Court is unaware, however,
15 of any situation in which a Rule 12(b)(6) motion may be used to strike certain
16 allegations in support of a claim, where the underlying claim itself is not
17 challenged."); *Fairhaven Health, LLC v. BioOrigyn, LLC*, No. 11-1802, 2021 U.S.
18 Dist. LEXIS 241794, *13 (W.D. Wash. Dec. 17, 2021) ("Rule 12(b)(6) may not be
19 used to challenge specific allegations in a complaint; Rule 12(f) is the proper
20 mechanism."). Because Defendants' argument regarding outdated policies does
21 not require dismissal of Plaintiff's claims, the Court will not dismiss Plaintiff's
22 claims.

23 In response to Defendants' argument that Plaintiff cannot assert claims on
24 behalf of Seaman Mays, Plaintiff represents that it is not doing so, and thus there
25 appears to be no disagreement for the Court to address. (ECF No. 41 at 20).
26 Further, Plaintiff may assert, as it has, that Defendants are preventing it from
27 obtaining records from Seaman Mays. (ECF No. 38 at ¶ 98); see *Va. State Bd. of*
28 *Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976)

1 (explaining that the constitutional right to free speech protects “the communication,
2 to its source and to its recipients both”). The Court thus also declines to dismiss
3 any of Plaintiff’s claims on this basis.

4 **C. Defendants Butler, Krass, and Austin**

5 Defendants claim that Defendants Krass and Austin must be dismissed
6 because Plaintiff has failed to state a plausible claim for mandamus relief. But
7 because the Court rejected that argument above, the Court must also reject
8 Defendants’ request for dismissal of Defendants Krass and Austin.

9 Last, Defendants seek to dismiss Defendant Butler and claim that he cannot
10 provide Plaintiff relief. The Court agrees that the amended complaint fails to
11 plausibly allege that Defendant Butler can provide Plaintiff relief. Essentially all the
12 allegations of the amended complaint pertain to the Navy and its policies. The trial
13 of Seaman Mays is over, which presumably ends Defendant Butler’s connection
14 to the case. Defendant Butler is thus dismissed from the case. To the extent
15 Plaintiff can show that Defendant Butler can provide it with relief, Plaintiff will be
16 granted leave to amend. *See Owens*, 244 F.3d at 712.

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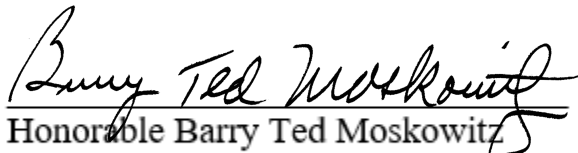
1 **III. CONCLUSION**

2 For the reasons stated, Defendants’ partial motion to dismiss is granted in
3 part and denied in part. Defendant Butler is dismissed from the case. Plaintiff may
4 file an amended complaint within fourteen (14) days of the day this order is entered,
5 which shall address any new policies or guidelines issued since it filed its amended
6 complaint and any further amendments as to Defendant Butler. No further motions
7 to dismiss may be filed except as to Defendant Butler.

8 The parties are to meet and confer to determine whether the facts at issue
9 can be stipulated to. If they can be, the parties are to inform the Court and submit
10 a proposed briefing schedule for dispositive motions. If discovery is needed, the
11 parties are to contact Judge Crawford’s chambers to establish an accelerated
12 discovery timeline. Dispositive motions should be filed within six (6) months.

13 **IT IS SO ORDERED.**

14 Dated: March 4, 2024

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16 Honorable Barry Ted Moskowitz
17 United States District Judge
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