

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CARLOS PERFINO; JESS ZURANICH,)
)
 Plaintiffs,)
)
 v.)
)
 EX OFFICIO STEVE HARDY,)
 DIRECTOR OF THE STATE OF)
 CALIFORNIA DEPARTMENT OF ALCOHOLIC)
 BEVERAGE CONTROL [A.B.C.];)
 ELIZABETH GRAZIA OF THE A.B.C.;)
 LORI AJAX OF THE A.B.C.; JUAN G.)
 AYALA; HERBITO GARCIA,)
)
 Defendants.)
)

2:09-cv-00833-GEB-KJM
ORDER

Defendants the State of California Department of Alcoholic Beverage Control ("ABC"), Steve Hardy, Elizabeth Grazia, and Lori Ajax move for dismissal of Plaintiffs' four claims alleged against these movants under Federal Rule of Civil Procedure ("Rule") 12(b)(6), arguing Plaintiffs fail to state a claim upon which relief can be granted. However, Plaintiff conceded at the hearing on the motion that ABC is not sued and that the reference to the "State of California" is merely for the purpose explaining the entity that employs the named defendants; these Defendants are referenced herein collectively as "the State Defendants." Plaintiffs oppose the motion.

1
2 STANDARD

3 On a motion to dismiss, the Court must assume the
4 truthfulness of all material facts alleged and construe all inferences
5 reasonably to be drawn from the facts in favor of the responding
6 party. NL Industries, Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir.
7 1986). To survive a motion to dismiss, a plaintiff needs to plead
8 "only enough facts to state a claim to relief that is plausible on its
9 face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007).
10 Dismissal is appropriate, however, where the plaintiff fails to state
11 a claim supportable by a cognizable legal theory. Balistreri v.
12 Pacifica Police Dep't., 901 F.2d 696, 699 (9th Cir. 1990).

13 DISCUSSION

14 Plaintiffs Carlos Perfino and Jess Zuranich allege federal
15 and state claims against the State Defendants based on the allegations
16 that the State Defendants destroyed Plaintiffs' business opportunity
17 to have a bar when the State Defendants refused to transfer a liquor
18 license to a limited liability company ("the LLC"), which Plaintiffs
19 created with two other men as the business to operate a Latino-themed
20 bar. (Compl. ¶¶ 14, 17-20.) Defendant Juan Ayala, one of the four
21 referenced men, agreed to transfer his liquor license from a
22 previously owned bar to the LLC, in exchange for one-fourth interest
23 in the LLC. (Compl. ¶ 16.) ABC employee Gravia told these men before
24 the liquor license could be transferred to the LLC, all four men would
25 have to be named on the liquor license. (Compl. ¶ 17.) Although a
26 temporary license was issued, Defendant Ajax subsequently "told
27 [Plaintiff] Perfino that he could not be on the liquor license, lease,
28 or anything, because Perfino was a correctional officer employed at

1 . . . Folsom State Prison [in California]." (Compl. ¶ 19.) Ajax
2 relied on Title 4 of the California Code of Regulations, section 62
3 ("Section 62") as the basis for denying Perfino a liquor license,
4 stating that Perfino's status as a California correctional officer
5 prohibited him from having a liquor license. (Compl. ¶¶ 19-22; 24-
6 25.) Section 62 states in relevant part:

7 No license authorized by the Alcoholic Beverage
8 Control Act shall be held by, or issued or
9 transferred to, any person holding office in, or
10 employed by, any agency of the State of California
11 or any of its political subdivisions when the
12 duties of such person have to do with the
13 enforcement of the Alcoholic Beverage Control Act
14 or any other penal provisions of law of this State
15 prohibiting or regulating the sale, use, possession
16 or manufacture of alcoholic beverages. This rule
17 is deemed to apply specifically, but without
18 limiting its effect, to any persons employed in the
19 Department of Justice of the State of California,
20 in any district attorney's office, in any sheriff's
21 office, in any local police department, or in the
22 Department of Alcoholic Beverage Control. This
23 rule shall not prohibit the ownership of any
24 license interest by any local law enforcement
25 officer or local reserve law enforcement officer
26 where the licensed premises are located in a county
27 other than that in which he is employed as a law
28 enforcement officer. *This rule shall apply to any
person mentioned herein who has any ownership
interest, directly or indirectly, in any business
to be operated or conducted under an alcoholic
beverage license*

CAL. CODE REGS. tit. 4, § 62 (emphasis added).

21 Plaintiffs argue this reliance on Section 62 as the basis
22 for denying the liquor license violated their equal protection,
23 procedural and substantive due process, and takings constitutional
24 rights. Perfino, however, is the only Plaintiff who alleges he could
25 not be on the liquor license. (Compl. ¶ 19.) However, Plaintiff
26 Zuranich has not shown he has standing to challenge the refusal to
27 issue Plaintiff Perfino a liquor license. "[A] plaintiff generally
28 cannot rest his claim to relief on the legal rights or interests of

1 third parties." Wedges/Ledges of California, Inc. v. City of Phoenix,
2 Ariz., 24 F.3d 56, 62 (9th Cir. 1994) (internal citation and quotations
3 omitted). Since Plaintiff Zuranich has not shown he has standing to
4 challenge denial of the liquor license to Perfino, the State
5 Defendants' motion to dismiss Zuranich's federal claims is granted.

6 The State Defendants also seek dismissal of Perfino's
7 Fourteenth Amendment equal protection claim arguing essentially that
8 use of Section 62 to bar Perfino from getting a liquor license was not
9 illegal since a rational basis for the exclusion of California
10 correctional officers has been explained in cases interpreting Section
11 62. However, the State Defendants fail to provide any authority
12 showing that what is prescribed in Section 62 applies to a
13 correctional officer in Perfino's situation. Therefore, this
14 portion of the State Defendants' motion is denied.

15 The State Defendants also seek dismissal of Perfino's
16 Fourteenth Amendment procedural due process and substantive due
17 process claims, arguing Perfino does not allege a sufficient property
18 right required to sustain these claims. Perfino alleges the temporary
19 liquor license and his business interests in the bar are property
20 rights protected by the Due Process Clause. (Compl. ¶¶ 42-48.) The
21 State Defendants counter these claims fail because Perfino lacks a
22 property right in the liquor license he sought, and his business
23 interest in the LLC is not a sufficient property right.

24 "The substantive component of the Due Process Clause
25 protects those rights that are 'fundamental,' that is, rights that are
26 'implicit in the concept of ordered liberty.' Fundamental rights are
27 those rights created by the Constitution. Property interests, of
28 course, are not created by the Constitution. Rather they are created

1 and their dimensions are defined by existing rules or understandings
2 that stem from an independent source such as state law.” Greenbriar
3 Village, L.L.C. v. Mountain Brook, City, 345 F.3d 1258, 1262 (11th
4 Cir. 2003) (internal citations and quotations omitted).

5 California state liquor license law at issue recognizes that
6 “a liquor license has certain attributes of property. It certainly has
7 value and is sold commercially. But it is a type of property which the
8 state, under the police power, has the power to control and regulate.”
9 Reece v. Alcohol Beverage Control Appeal Board, 64 Cal.App.3d 675, 688
10 (1976). “It is well settled [in California] that the right to
11 possess, make or deal in intoxicating liquor is not a privilege, nor
12 such a property right that state legislation prohibiting, restricting,
13 or regulating its manufacture, use, possession, distribution, or sale
14 violates the Fourteenth Amendment of the Federal Constitution.” Cooper
15 v. State Bd. Of Equalization, 137 Cal.App.2d 672, 679 (1955) (citing
16 State Board of Equalization v. Superior Court, 5 Cal.App.2d 374, 377
17 (1935) (internal quotations omitted)). Therefore, Perfino’s
18 substantive due process claim predicated on a “state-granted
19 and-defined property right in the [liquor license] permit” fails to
20 allege a viable substantive due process claim, and this claim is
21 dismissed. Greenbriar Village, 345 F.3d at 1262.

22 Nor has Perfino alleged a viable procedural due process
23 claim. “‘Due process’ cases typically focus on whether governments
24 can take away property without affording its owner an adequate notice
25 and opportunity to be heard. When courts analyze a procedural due
26 process claim or its analytically related cousin-substantive due
27 process (it arises when a government egregiously or arbitrarily
28 deprives one of his property)-they variously examine three things: (1)

1 whether there is enough of a property interest at stake to be deemed
2 "protectable"; (2) the amount of process that should be due for that
3 protectable right; and (3) the process actually provided, be it before
4 or after the deprivation. Sometimes courts can moot the examination
5 of one or two of those analytical components by passing on another."
6 Id. at 1264 (internal citations and quotations omitted). Here, since
7 Perfino has not alleged a sufficient federally protectable property
8 right, "no procedural due process claim exists" because "a
9 sufficiently certain property right under state law [has not been]
10 shown. " Id. at 1265. Therefore, this claim is dismissed.

11 Nor are Perfino's allegations that his business interests in
12 the LCC denied him a property interest sufficient to withstand the
13 dismissal motion since they are based on unsupported conclusory
14 statements, which are insufficient to allege a sufficient federally
15 protectable property right. Therefore, this claim is dismissed.

16 The State Defendants also seek dismissal of Perfino's Fifth
17 Amendment takings claim. To "state a claim under the Takings Clause
18 of the Fifth Amendment, [Perfino] must first establish that he
19 possesses a constitutionally protected interest in the property
20 taken." Abney v. Alameida, 334 F.Supp.2d at 1228 (citing McIntyre v.
21 Bayer, 339 F.3d 1097, 1099 (9th Cir. 2003)). Since Perfino has failed
22 to allege sufficient facts showing he possesses a constitutionally
23 protected interest in the property at issue, this claim is dismissed.

24 The State Defendants also seek dismissal of Plaintiffs'
25 state inverse condemnation claims for lack of a property interest. To
26 allege an inverse condemnation claim under the California
27 Constitution, a constitutionally protected property right must exist.
28

1 Since Perfino has failed to allege a property right under California
2 law, this claim is dismissed.

3 Further, Defendant Hardy seeks dismissal of Perfino's
4 official and individual capacity claims against him, arguing they are
5 insufficient to state viable claims. Perfino counters his official
6 capacity allegations against Hardy are under In Ex parte Young, 209
7 U.S. 123 (1908). However, Perfino alleges state injunctive and
8 declaratory relief claims in paragraph VII of his Complaint, which are
9 too unclear to state a viable claim. The claims in paragraph VII are
10 therefore dismissed.

11 However, Hardy has not shown that Perfino's official
12 capacity suit against him for prospective relief is not a viable claim
13 since Perfino's equal protection claim has survived the State
14 Defendants' motion. But to the extent Perfino seeks retrospective
15 relief (including any damages) in his official capacity suit against
16 Hardy, those claims are dismissed. Porter v. Jones, 319 F.3d 483, 491
17 (9th Cir. 2003) ("Under the doctrine of Ex parte Young, suits against
18 an official for prospective relief are generally cognizable, whereas
19 claims for retrospective relief (such as damages) are not.). Hardy's
20 motion to dismiss Perfino's individual capacity suit against him based
21 on Perfino's equal protection claim is denied.


22 The State Defendants also seek dismissal of Plaintiffs'
23 interference with contractual relations and intentional inducement of
24 breach of contract claims against Grazia and Ajax. Grazia and Ajax
25 argue they are immune from liability for these claims under California
26 Government Code sections 818.4, 820.2, and 821.2. Grazia and Ajax
27 have not provided sufficient authority that these immunities apply to
28 them, and admitted through counsel at the hearing on this motion

1 counsel did not have authority other than the text of the above
2 California Government Code sections. Since this authority does not
3 clearly show the motion should be granted, it is denied.

4 CONCLUSION

5 For the reasons stated above, the State Defendants' motion
6 to dismiss is denied in part and granted in part. Plaintiffs
7 requested that they be granted leave to file an amended complaint if
8 any portion of the motion is granted. Plaintiffs have ten days leave
9 from the date on which this order is filed to file an amended
10 complaint addressing any deficiency Plaintiffs opine they can cure.

11 Dated: October 5, 2009

12
13 

14 _____
15 GARIAND E. BURRELL, JR.
16 United States District Judge
17
18
19
20
21
22
23
24
25
26
27
28