

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

CARLOS PERFINO and JESS ZURANICH, )  
 )  
 Plaintiffs, )  
 )  
 v. )  
 )  
 STEVE HARDY, DIRECTOR; ELIZABETH )  
 GAVIA; LORI AJAX, )  
 )  
 Defendants. )  
 )

2:09-cv-00833-GEB-KJM

ORDER GRANTING IN PART AND  
DENYING IN PART DEFENDANTS'  
MOTION TO DISMISS

On October 28, 2009, State Defendants Steve Hardy, Elizabeth Gavia, and Lori Ajax (collectively "Defendants") filed a motion under Federal Rule of Civil Procedure ("Rule") 12(b)(6) to dismiss with prejudice Plaintiffs' First Amended Complaint ("FAC"). The motion was heard on December 21, 2009. For the reasons stated below, Defendants' motion is granted in part and denied in part.

**I. FACTUAL AND LEGAL ALLEGATIONS**

Plaintiffs Carlos Perfino ("Perfino") and Jess Zuranich ("Zuranich") allege the following federal claims against Defendants: Fifth Amendment takings claims, federal procedural and substantive due process claims and federal Equal Protection Clause claims. Plaintiffs allege the following claims under California law against Defendants: interference with contractual relations and intentional inducement of breach of contract, inverse condemnation and negligence. Plaintiffs also seek injunctive and declaratory relief based on federal and state law.

Plaintiffs' claims are premised on Defendants' use of Title 4, Section 62 of the California Code of Regulations ("Section 62") as their basis for denying Plaintiffs a liquor license. Plaintiffs

1 allege their federal and state rights were violated when Defendants  
2 prohibited them from owning a bar based on the conclusion that Section  
3 62 precluded Perfino from being issued a liquor license because he was  
4 a correctional officer. Plaintiffs allege that Section 62 does not  
5 apply to correctional officers and that when Section 62 was used to  
6 deny Perfino a liquor license, Zuranich was also denied a liquor  
7 license because of Perfino's status as a correctional officer.

8 Plaintiffs sought a liquor license for a bar they desired to  
9 operate with two other men. Plaintiffs entered an "oral partnership  
10 agreement" with those men to own and operate a Latino-themed bar in  
11 January 2008 ("partners"). (FAC ¶¶ 12-14.) The partners formed a  
12 limited liability company, Linear Marketing Media Group LLC dba Playa  
13 Azul ("LLC"), to which one of the partners, Juan G. Ayala ("Ayala"),  
14 agreed to transfer a liquor license he had from a previously owned bar  
15 in exchange for a one fourth interest in the LLC. (Id. ¶¶ 14-16.)  
16 The partners, through the LLC, applied to the California Department of  
17 Alcoholic Beverage Company ("ABC") for the agreed-upon transfer and on  
18 April 1, 2008, the LLC received "a temporary ABC license." (Id. ¶¶  
19 17, 38.)

20 Plaintiffs allege difficulties concerning the temporary  
21 liquor license developed between them and Defendant Elizabeth Gavia  
22 ("Gavia") of the ABC around the opening night of the bar.  
23 Specifically, the temporary liquor license the LLC received did not  
24 authorize vendors to sell the bar liquor without clearance from the  
25 ABC and proof of clearance on the ABC's vendor database. Plaintiffs  
26 allege they informed Gavia of the bar "opening date via phone calls  
27 and e-mail," and Gavia responded that "it was going to be taken care  
28 of;" yet around March 28, 2008, Gavia refused to clear the bar for the

1 purchase of alcohol, which resulted in the bar having no alcohol to  
2 sell on opening night or the rest of that weekend. (Id. ¶ 32.)  
3 Plaintiffs allege "Gavia knowingly withheld the temporary permit."  
4 (Id.)

5 Further, around the time the liquor license was to be  
6 transferred to the LLC, Gavia informed the partners that all of their  
7 names had to be on the liquor license and that "the application had to  
8 be submitted to her specified escrow company . . . Capital City  
9 Escrow, Inc." (Id. ¶ 18.) On April 10, 2008, however, Gavia  
10 informed Perfino that his name could not be "on the liquor license,  
11 lease, or anything because Perfino was a correctional officer employed  
12 at California State Penitentiary[,] also known as Folsom State  
13 Prison," and therefore Section 62 prohibited him from being involved  
14 with the bar. (Id. ¶ 19.) Section 62 provides, in relevant part:

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

1 CAL. Code Regs. tit. 4, § 62 (emphasis added). Perfino told Gavia  
2 that Section 62 did not apply to him because correctional officers “do  
3 not have the power to make arrests once they are off duty and do not  
4 have duties to enforce the ABC laws.” (Id. ¶ 20.) Gavia then agreed  
5 to “speak with her supervisor about the issue, and [returned] three or  
6 four minutes later.” (Id. ¶ 22.) Gavia remained adamant that Perfino  
7 could not be on the liquor license application and “told [Zuranich]  
8 that he needed to sign a document that would remove [Perfino’s] name  
9 from the application.” (Id.)

10 Further, Plaintiffs allege “[d]uring approximately April 10,  
11 2008[,] [to] May 16, 2008,” Gavia “coached” Ayala to “get the other  
12 partners off the license, off the lease, off the insurance, and out of  
13 the partnership[] so that [Ayala] would be the only owner/holder of  
14 the ABC license.” (Id. ¶ 23.) Gavia also informed Ayala that “if  
15 within one week, by April 18, 2008, the license/lease and insurance  
16 [was] not in [Ayala’s] name alone, she would arrest Ayala and Perfino.  
17 (Id. ¶ 24.)

18 “Plaintiffs attempted to correct the situation” by speaking  
19 with Lori Ajax (“Ajax”) of the ABC, who was recommended to Plaintiffs  
20 by someone “who worked in the legal department of the ABC.” (Id. ¶  
21 25). On or around May 16, 2008, Ajax “advised Zuranich that everyone  
22 could be on the license and the lease, and [Perfino] was okay to be on  
23 the license and buy the liquor.” (Id.) On June 2, 2008, the ABC  
24 public website listed the partners as temporary licensees, yet a day  
25 later, the partners were no longer listed as temporary licensees on  
26 the ABC website. (Id. ¶ 35).

27 Perfino wrote Ajax on July 3, 2008, notifying her of the  
28 situation and requesting that their names be added to the liquor

1 license. However, "Plaintiffs believe that . . . Ajax is the person  
2 that caused [the partners] to be dropped as licensees." (Id. ¶¶ 34,  
3 36.) Plaintiffs allege the partnership between Ayala and Plaintiffs  
4 dissolved and Ayala changed the locks on the bar in July 2008. (Id. ¶  
5 31.)

6 Plaintiffs allege that Gavia denied them a permanent liquor  
7 license to prevent Plaintiffs from competing for customers with her  
8 friend who owned a similarly-themed Mexican bar close to the location  
9 where Plaintiffs' bar was located. (Id. ¶ 27.) Further, Plaintiffs  
10 allege that Gavia, with full knowledge of their partnership,  
11 "improperly, wrongfully, and illegally interfered with the partnership  
12 agreement, as follows":

13 advising [Ayala] on how to remove [Perfino] and  
14 [Zuranich] from the license application, from the  
15 lease and insurance, and partnership . . . [and] to  
breach [Ayala's] partnership agreement with  
[Plaintiffs]. . .

16 (Id. ¶¶ 28, 29.) Plaintiffs allege [o]nce you obtain a temporary  
17 permit, the applicant is on his way to obtaining a permanent permit."

18 (Id. ¶ 44.) Plaintiffs also name four correctional officers with ABC  
19 alcohol licenses as support for their allegations that denial of their  
20 application for a permanent liquor license was unlawful. (Id. ¶ 49.)

## 21 **II. LEGAL STANDARDS**

22 When deciding a motion to dismiss, the Court accepts "all  
23 material allegations in the complaint as true and contrue[s] them in  
24 light most favorable to [Plaintiffs]". NL Indus., Inc. v. Kaplan, 792  
25 F.2d 896, 898 (9th Cir. 1986). "To survive a motion to dismiss, a  
26 complaint must contain sufficient factual matter, accepted as true, to  
27 'state a claim to relief that is plausible on its face.'" Ashcroft v.  
28 Iqbal, 129 S.Ct. 1937, 1949 (2009) (quoting Bell Atl. Corp. v.

1 Twombly, 550 U.S. 544, 570 (2007)). Dismissal is appropriate,  
2 however, where the plaintiff fails to state a claim supportable by a  
3 cognizable legal theory. Balistreri v. Pacifica Police Department,  
4 901 F.2d 696, 699 (9th Cir. 1990).

### 5 III. ANALYSIS

#### 6 A. Federal Constitutional Claims

7 Defendants seek dismissal of Plaintiffs' federal claims  
8 alleged under the Taking Clause of the Fifth Amendment, the Due  
9 Process Clauses of the Fifth and Fourteenth Amendments and the Equal  
10 Protection Clause of the Fourteenth Amendment. Defendants also argue  
11 Plaintiff Zuranich lacks standing to maintain these claims.

12 Plaintiffs' procedural due process claims must be based on a  
13 recognized property interest. "Property interests are not created by  
14 the Constitution, but 'by existing rules or understandings that stem  
15 from an independent source such as state law-rules or understandings  
16 that secure certain benefits and that support claims of entitlement to  
17 those benefits.'" Thornton v. City of St. Helens, 425 F.3d 1158, 1164  
18 (9th Cir. 2005) (citing and quoting Bd. of Regents v. Roth, 408 U.S.  
19 564, 577 (1972)). "Under California law, a liquor license **issued**  
20 pursuant to the Alcoholic Beverage Control act is a valuable property  
21 right." Dash, Inc. v. Alcoholic Beverage Control Appeals Bd., 683  
22 F.2d 1229, 1233 (9th Cir. 1981) (referencing Etchart v. Pyles, 106  
23 Cal. App. 2d 549 (1951)) (emphasis added). However, "[i]t is well  
24 settled that the **right** to possess, make or deal in intoxicating liquor  
25 is not a privilege, nor such a property right that state legislation  
26 prohibiting, restricting, or regulating its manufacture, use,  
27 possession, distribution, or sale violates the Fourteenth Amendment of  
28 the Constitution." Tokaji v. State Bd. of Equalization, 20 Cal. App.

1 2d 612, 614 (1937) (emphasis added); accord Yu v. Alcoholic Bev. etc.  
2 Appeals Bd., 3 Cal. App. 4th 286, 296 (1992) (citing Tokaji and  
3 stating "the very earliest decisions interpreting the [California]  
4 Alcoholic Beverage Control Act . . . [have all] held that 'there is no  
5 inherent right to sell intoxicating liquors . . . .'"") California  
6 "courts view[] a liquor license as different from a license to conduct  
7 any other business, and believe[] that a license to sell liquor is not  
8 a proprietary right within the meaning of the due process clause of  
9 the Constitution, nor is it a contract; it is but a permit to do what  
10 would otherwise be unlawful . . . ." Yu, 3 Cal. App. 4th at 296.

11 Further, under California law "the mere application for a  
12 [permanent liquor license] . . . confers no vested property interest  
13 in the applicant." Contra Costa Theatre, Inc. v. City of Concord, 511  
14 F. Supp. 87, 90 (N.D. Cal. 1980), aff'd 686 F.2d 798 (9th Cir. 1982),  
15 cert. denied, 460 U.S. 1085 (1983) (discussing application for use  
16 permit); cf. Shamie v. City of Pontiac, 620 F.2d 118, 120 (6th Cir.  
17 1980) (holding that a first time liquor license applicant is not  
18 entitled to procedural due process rights under Michigan law); Lewis  
19 v. City of Grand Rapids, 356 F.2d 276, 286-87 (6th Cir. 1966) (finding  
20 Plaintiff "did not own a license to operate a liquor establishment,  
21 and the opportunity to seek approval to become an owner was not, in  
22 [the Court's] view, a property right").

23 Only "where regulations establishing entitlement to the  
24 benefit are . . . mandatory in nature" may licensing "applicants . . .  
25 have a property interest protectable under the Due Process Clause."  
26 Foss v. Nat'l Marine Fisheries Serv., 161 F.3d 584, 588 (9th Cir.  
27 1998). Here, the FAC shows Plaintiffs' temporary liquor license was  
28 effective April 1, 2008, to July 31, 2008. The statute under which

1 Plaintiffs' temporary liquor license was issued states, in relevant  
2 part:

3 The department ***in its discretion*** may issue a  
4 temporary permit [for a period not to exceed four  
5 calendar months] to the transferee of any license  
6 to continue the operation of the premises during  
7 the period a transfer application for the license  
8 from person to person at the same premises is  
9 pending and when [certain conditions are met].

10 CAL. BUS. & PROF. CODE § 24045.5 (emphasis added) ("Section 24045.5").

11 This statute further states:

12 Refusal by the department to issue or extend a  
13 temporary permit shall not entitle the applicant to  
14 petition for the permit pursuant to Section 24011,  
15 or to a hearing pursuant to Section 24012.

16 . . . .

17 Notwithstanding any other provision of law, a  
18 temporary permit may be canceled or suspended  
19 summarily at anytime if the department determines  
20 that good cause for the cancellation or suspension  
21 exists.

22 Id.

23 Section 24045.5 does not create a procedural property  
24 interest in obtaining a permanent liquor license. Here, Section 24011  
25 authorizes the department to refuse to extend a temporary liquor  
26 license without a hearing. Therefore, Plaintiffs do not have a  
27 constitutionally protected property interest in extending the  
28 effective period of their temporary liquor license and had no property  
right in the issuance of a permanent liquor license.

Therefore, Plaintiffs' federal procedural due process claims  
based on the existence of a property interest fail since Plaintiffs  
had no constitutionally cognizable property interest in a permanent  
liquor license they did not hold. Nor did Plaintiffs have a  
constitutionally cognizable property interest in any profit Plaintiffs



1 hoped to earn while doing business as a club with a permanent liquor  
2 license. Cf. Patel v. City of Sauk Centre, 631 F.Supp.2d 1139, 1146-48  
3 (D. Minn. Aug. 3, 2007) (stating unsuccessful applicant for liquor  
4 license had no procedural or "substantive" due-process claims because  
5 Minnesota law did not confer any "right" to such a license).

6 Further, Plaintiffs' allegation that their substantive due  
7 process rights were violated "seem[s] to assume that there is a  
8 general liberty interest to be free of arbitrary and capricious  
9 government action;" however, there is no such general right. Squaw  
10 Valley Development Co. v. Goldberg, 375 F.3d 936, 948-49 (9th Cir.  
11 2004) (referencing Nunez v. City of Los Angeles, 147 F.3d. 867, 873  
12 (9th cir. 1998)). The Ninth Circuit has held "that claims alleging  
13 governmental interference with property rights fall under the Fifth  
14 Amendment's Takings Clause." Madison v. Graham, 316 F.3d 867, 870  
15 (9th Cir. 2002) (referencing Armendariz v. Penman, 75 F.3d 1311, 1324  
16 (9th Cir.1996) (en banc)). The Ninth Circuit explained this is  
17 "because the Takings Clause provides an explicit textual source of  
18 constitutional protection against private takings, [therefore,] the  
19 Fifth Amendment (as incorporated by the Fourteenth), not the more  
20 generalized notion of substantive due process, must be the guide in  
21 reviewing the plaintiffs' claim of a private taking." Id. (internal  
22 quotations omitted). Since this precedent forbids Plaintiffs from  
23 transforming their economic and property right taking claims into  
24 substantive due process claims, Plaintiffs fail to state viable  
25 substantive due process claims, and those claims are dismissed.

26 Plaintiffs have also failed to allege a viable Fifth  
27 Amendment takings claim. Identification of "a property interest  
28 cognizable under the Fifth Amendment . . . [is] a 'bedrock

1 requirement' of any successful takings challenge." Tex. State Bank v.  
2 United States, 423 F.3d 1370, 1378 (Fed. Cir. 2005); accord C & E  
3 Servs., Inc. of Wash. v. D.C. Water & Sewer Auth., 310 F.3d 197, 200  
4 (D.C. Cir. 2002). "Because the Constitution protects rather than  
5 creates property interests, the existence of a property interest is  
6 determined by reference to 'existing rules or understandings that stem  
7 from an independent source such as state law.' " Phillips v. Wash.  
8 Legal Found., 524 U.S. 156, 164 (1998) (quoting Roth, 408 U.S. at  
9 577). Plaintiffs have not identified in their FAC a property interest  
10 cognizable under the Fifth Amendment. Therefore, Plaintiffs' federal  
11 takings claims are dismissed.

12 Defendants also seek dismissal of Plaintiffs' equal  
13 protection claims, arguing Perfino fails to state an equal protection  
14 claim, and since Zuranich "is not a correctional officer" and was not  
15 denied a liquor license on that basis, Zuranich has no standing to  
16 contest the denial of a liquor license to Perfino based on Perfino's  
17 status as a correctional officer. (Mot. 3:6-7.) Plaintiffs allege in  
18 the FAC that Defendants violated their equal protection rights when  
19 Defendants "wrongfully" prevented Perfino "from owning a bar . . . in  
20 an arbitrary, irrational, and capricious manner . . ." (FAC ¶ 60.)  
21 Zuranich argues that even though he is "a non-correctional officer[,]  
22 . . . he was damaged in fact by the [D]efendants' violation of the  
23 equal protection rights of Perfino" when they used Perfino's status as  
24 a correctional officer to deny Perfino a liquor license. (Opp'n 7:10-  
25 13.) However, Zuranich "cannot rest his claim to relief on the legal  
26 rights or interest of [Perfino]." Wedges/Ledges of Cal. Inc. v. City  
27 of Phoenix, 24 F.3d 56, 62 (9th Cir. 1994) (internal citation  
28

1 omitted). Therefore, Zuranich lacks standing to maintain an equal  
2 protection claim, and this claim is dismissed.

3 Perfino alleges that “[D]efendants’ conduct in singling  
4 correctional officers from owning a bar, pursuant to [D]efendants’  
5 incorrect and uneven interpretation of . . . Section 62, constitutes  
6 violation of the Equal Protection Clause of the Fourteenth Amendment.”  
7 (FAC ¶ 60; Opp’n 8:4-8.) Perfino also alleges the ABC has treated  
8 four correctional officers more favorably than he was treated since  
9 they have received liquor licenses. (Id. ¶ 49). Perfino alleges he  
10 was denied a liquor license because ABC employee Gavia did not want  
11 his bar to compete for business with her friend’s bar, which was  
12 located in the same area. (Id. ¶¶ 27-29.) Perfino also infers in his  
13 allegations that Gavia used Perfino’s status as a correctional  
14 officer as a pretext to deny him a liquor license. (Id.)

15 In Village of Willowbrook v. Olech, the Supreme Court  
16 stated an equal protection claim can be brought by a “‘class of one,’  
17 where the plaintiff alleges that [he] has been intentionally treated  
18 differently from others similarly situated and that there is no  
19 rational basis for the difference in treatment.” 528 U.S. 562, 564  
20 (2000). Perfino alleges Defendants, on behalf of the ABC, denied him  
21 a liquor license “for reasons wholly unrelated to any legitimate state  
22 objective.” Esmail v. Macrane, 53 F.3d 176, 180 (7th Cir. 1995); See  
23 also N Group LLC v. Hawaii County Liquor Comm’n, Civ. No. 08-00516  
24 ACK-KSC, --- F. Supp. 2d ----, 2009 WL 5437851, at \*17 (D. Hawaii Mar.  
25 3, 2009) (finding Plaintiff adequately alleged a “class of one” Equal  
26 Protection claim even when Plaintiff only alleged “‘other liquor  
27 licensees’” were treated differently and not that other licensees were  
28 “similarly situated to Plaintiff” since “there [was a] reasonable

1 inference that they were"). Perfino's equal protection claim  
2 sufficiently alleges that Defendants treated him differently than  
3 similarly situated individuals and that there is no rational basis for  
4 the difference in treatment. Therefore, Defendants' motion to dismiss  
5 this claim is denied.

6 **B. Equitable Relief and Official Capacity Claims**

7 Defendants also seek dismissal of the official capacity and  
8 equitable relief claims in the FAC. These claims, however, have been  
9 mooted by the position Defendants expressed in a filing in response to  
10 an order issued after the hearing on the motion to dismiss, and after  
11 Plaintiffs filed a motion to compel Defendants to clarify their  
12 position as to whether or not it is ABC's official policy to deny  
13 correctional officers liquor licenses under Section 62. Although  
14 Defendants previously argued that Section 62 applies to correctional  
15 officers, Defendants' response to the order states: "While on the face  
16 Section 62 applies to law enforcement personnel, which would include  
17 correctional officers, the current position of [the] ABC regarding  
18 [Section 62] is that correctional officers are exempt from this  
19 section." (See Docket No. 49, Defs' Response 2:6-9). This response  
20 moots the official capacity and equitable relief claims in the FAC  
21 Therefore, these claims are dismissed.

22 **C. Plaintiffs' Inverse Condemnation Claims**

23 Defendants also seek dismissal of Plaintiffs' inverse  
24 condemnation claims, arguing there has been no taking of private  
25 property for "public use or public intent." (Mot. 13:5-12.)  
26 Plaintiffs counter that their property rights were taken from them  
27 "for the public purpose of enforcing Section 62 of the California Code  
28 of regulations . . . ." (Opp'n 21:1.)

1 Inverse condemnation is a procedural device for  
2 insuring that the constitutional proscription that  
3 private property shall not be taken or damaged for  
4 public use without just compensation having first  
5 been made to the owner is not violated. It is the  
6 name generally ascribed to the remedy which a  
7 property owner is permitted to prosecute to obtain  
8 the just compensation which the Constitution  
9 assures him when his property without prior payment  
10 therefor, has been taken **or damaged for public use.**

11 Fresno Police Officers Assn. v. State of California, 190 Cal.App.3d  
12 413, 416-17 (1987) (internal citation and quotations omitted) (emphasis  
13 added). Plaintiffs fail to allege they had a property interest that  
14 was taken or damaged for public use. Further, because of "various  
15 policy considerations . . . [,] inverse condemnation is an  
16 inappropriate and undesirable remedy in cases in which  
17 unconstitutional regulation is alleged," such as in this case with  
18 regard to Section 62. Agins v. City of Tiburon, 24 Cal.3d 266, 275  
19 (1979) overruled on other grounds in First English Evangelical  
20 Lutheran Church of Glendale v. Los Angeles County, 482 U.S. 304, 319  
21 (1987) and Air Quality Products, Inc. v. State of California, 96  
22 Cal.App.3d 340 (1979). Therefore, these claims are dismissed.

23 **D. Plaintiffs' Interference with Contractual Relations and**  
24 **Intentional Inducement of Breach of Contract and Negligence Claims**

25 Defendants also seek dismissal of Plaintiffs' interference  
26 with contractual relations and intentional inducement of breach of  
27 contract and negligence claims. Defendants argue these claims are  
28 prohibited by California Government Code Sections 820.2 ("Section  
820.2") and 821.2 ("Section 821.2") since these statutes bar "any  
liability arising out of [Gavia, Ajax, or Hardy's discretionary]  
decision to deny Plaintiffs' application for liquor license." (Mot.  
10:26-11:2; 14:7-26.) Perfino counters that Defendants' decisions were

1 "not discretionary decisions about a license. Instead they were  
2 improper actions to induce a person to breach a contract." (Opp'n  
3 19:7-8.) Perfino also argues that with regard to the negligence claim  
4 that it "is not about a licensing decision, but is instead about the  
5 [D]efendants' conduct in negligently interpreting Section 62 . . . ."  
6 (Opp'n 21:12-14.) Defendants rejoin that because Plaintiffs allege  
7 "Defendant Gavia was working in her capacity as an employee of ABC and  
8 that her actions arose out of job duties of determining whether  
9 Plaintiffs should be issued a liquor license," the claim for  
10 interference with the contractual relations against Gavia is barred.  
11 (Rely 6:6-10).

12 Section 820.2 states: "Except as otherwise provided by  
13 statute, a public employee is not liable for an injury resulting from  
14 his act or omission where the act or omission was the result of the  
15 exercise of the discretion vested in him, whether or not such  
16 discretion be abused." CAL. GOV'T CODE § 820.2. Section 821.2 states:

17 A public employee is not liable for an injury  
18 caused by his **issuance, denial, suspension or**  
19 **revocation of, or by his failure or refusal to**  
20 **issue, deny, suspend or revoke, any permit,**  
21 **license, certificate, approval, order, or similar**  
22 **authorization where he is authorized by enactment**  
23 **to determine whether or not such authorization**  
24 **should be issued, denied, suspended or revoked.**

25 CAL. GOV'T CODE § 821.2 (emphasis added). "The [ABC] enjoys broad  
26 discretion with regard to licensing decisions." Richards v. Dep't of  
27 Alcoholic Beverages Control, 139 Cal. App. 4th 304, 318 (2006)  
28 (referencing Cal. Const., art. XX, § 22; Martin v. Alcoholic Bev. etc.  
Appeals Bd. 52 Cal. 2d 238, 248 (1959), superseded by amendments on  
other grounds, 1967 Amendments to the Act, Stats 1967, ch. (1525), as  
recognized in Dep't. of Alcoholic Beverage Control v. Superior Court

1 for Orange County, 268 Cal. App. 2d 67, 69 (1968)). Thus, a public  
2 employee employed by the ABC, a public entity authorized by law to  
3 determine whether a license should be issued or denied, "is immune  
4 from liability for an injury caused by the suspension, revocation,  
5 issuance, or denial of a license," or an otherwise discretionary act.  
6 Richards, 139 Cal. App. 4th at 318-19 (internal citations omitted).  
7 Immunity is limited to discretionary activities. Id. at 318  
8 (referencing Morris v. County of Marin, 18 Cal. 3d 901, 911-915,  
9 (1977), criticized on another point in Caldwell v. Montoya, 10 Cal.  
10 4th 972, 987, n. 8 (1995).

11 In their interference with contractual relations and  
12 intentional inducement of breach of contract claims, Plaintiffs  
13 allege Gavia and Ajax:

14 both knew full-well that [P]laintiffs had in place  
15 an agreement among bar owners to own and operate a  
16 bar, and that their conduct in advising one of the  
17 owners to delete them from ownership would  
18 necessarily interfere with [P]laintiffs[']  
contractual rights, and would further constitute an  
inducement by the [D]efendants to get the other  
owner to breach [its] contract with the  
[P]laintiffs.

19 (FAC ¶ 76.) Plaintiffs' claim that Gavia and Ajax interfered with the  
20 contract is not barred by Section 820.2 and Section 821.2 since these  
21 acts are not within Gavia and Ajax's discretion as ABC employees.  
22 Therefore, this portion of Defendants' motion is denied.

23 Plaintiffs allege in their negligence claim that Defendants  
24 each owed Plaintiffs a duty of care, which they "breached . . . . by  
25 negligently . . . enforc[ing] Section 62." (Id. ¶¶ 102-03.)  
26 Sections 820.2 and 821.2 bar each Defendant from being exposed to  
27 liability for acts based upon the exercise of their discretion to  
28 issue, deny, suspend, or revoke a license. Since "negligently

1 interpreting" Section 62 is within this discretion, Plaintiffs'  
2 negligence claim is dismissed.

3 **IV. LEAVE TO AMEND**

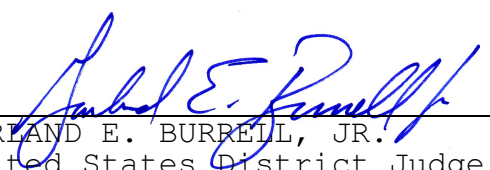
4 Defendants request that Plaintiffs not be given leave to  
5 amend. A district court may, in its discretion, deny leave to amend  
6 due to "undue delay, bad faith or dilatory motive on the part of the  
7 movant, repeated failure to cure deficiencies by amendments previously  
8 allowed, undue prejudice to the opposing party by virtue of allowance  
9 of the amendment, [and] futility of amendment." Foman v. Davis, 371  
10 U.S. 178, 182 (1962). Since Plaintiffs have been given leave to amend  
11 the claims dismissed in this order once before, and since Plaintiffs  
12 have not alleged facts showing they can cure the deficiencies  
13 discussed herein, the dismissal of Plaintiffs' claims is without leave  
14 to amend.

15 **V. CONCLUSION**

16 The following claims in Plaintiffs' FAC are dismissed  
17 without leave to amend:

- 18 (1) All of Zuranich's federal claims;  
19 (2) Perfino's substantive and procedural due process claims;  
20 (3) Perfino's Fifth Amendment takings claim;  
21 (4) All official capacity and equitable relief claims;  
22 (5) Plaintiffs' inverse condemnation claims;  
23 (6) Plaintiffs' negligence claims.

24 Dated: March 26, 2010

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27 GARLAND E. BURRELL, JR.  
28 United States District Judge