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3 IN THE UNITED STATES DISTRICT COURT  
4 FOR THE EASTERN DISTRICT OF CALIFORNIA  
5

6 CARLOS PERFINO AND JESS ZURANICH, )  
7 Plaintiffs, ) 2:09-cv-00833-GEB-KJM  
8 v. ) ORDER GRANTING DEFENDANTS'  
9 STEVE HARDY, DIRECTOR; ELIZABETH ) MOTION FOR SUMMARY JUDGMENT  
10 GAVIA, LORI AJAX, ) ON PLAINTIFF PERFINO'S  
11 Defendants. ) FEDERAL CLAIM & DISMISSING  
 ) PLAINTIFFS' REMAINING STATE  
 ) CLAIM UNDER 28 U.S.C. §  
 ) 1367(c)(3)\*

12 On March 29, 2010, Defendants Steve Hardy, Elizabeth Gavia  
13 and Lori Ajax ("Defendants") filed a motion for summary judgment on  
14 Plaintiffs' claims alleged in their first amended complaint. Later  
15 that same day an order was filed which decided Defendants' prior  
16 dismissal motion. The next day, on March 30, 2010, Defendants' filed  
17 an amended brief for their summary judgment motion in which they  
18 clarified that they only seek summary judgment on Plaintiffs' two  
19 claims that survived the March 29 dismissal order: Plaintiff Carlos  
20 Perfino's ("Perfino") federal equal protection claim and Plaintiffs'  
21 state claim for interference with contract. Defendants' motion on the  
22 remaining federal equal protection claim will be decided first. The  
23 crux of this claim is the allegation that Perfino was improperly  
24 prevented from obtaining a liquor license and operating a bar because  
25 of his status as a correctional officer. For the reasons stated

26 \_\_\_\_\_  
27 \* This matter is deemed to be suitable for decision without oral  
28 argument. E.D. Cal. R. 230(g).

1 below, Defendants' motion for summary judgment on Perfino's federal  
2 equal protection claim will be granted and Plaintiffs' remaining state  
3 claim will be dismissed without prejudice under 28 U.S.C. §  
4 1367(c)(3).

### 5 I. LEGAL STANDARD

6 A party seeking summary judgment bears the initial burden of  
7 demonstrating the absence of a genuine issue of material fact for  
8 trial. Celotex Corp. v. Catrett, 477 U.S., 317, 323 (1986). If this  
9 burden is satisfied, "the non-moving party must set forth, by  
10 affidavit or as otherwise provided in [Federal] Rule [of Civil  
11 Procedure] 56, specific facts showing that there is a genuine issue  
12 for trial." T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors  
13 Ass'n, 809 F.2d 626, 630 (9th Cir. 1987) (quotations and citation  
14 omitted) (emphasis in original). This requires that the non-moving  
15 party "come forward with facts, and not allegations, [that] controvert  
16 the moving party's case." Town House, Inc. v. Paulino, 381 F.2d 811,  
17 814 (9th Cir. 1967) (citation omitted); see also Beard v. Banks, 548  
18 U.S. 521, 527 (2006) (finding that a party opposing summary judgment  
19 who "fail[s] [to] specifically challenge the facts identified in the  
20 [moving party's] statement of undisputed facts . . . is deemed to have  
21 admitted the validity of [those] facts . . ."). "Mere argument does  
22 not establish a genuine issue of material fact to defeat summary  
23 judgment." MAI Sys. Corp. v. Peak Computer, Inc., 991 F.2d 511, 518  
24 (9th Cir. 1993).

25 All reasonable inferences that can be drawn from the facts  
26 provided "must be drawn in favor of the non-moving party." Bryan v.  
27 McPherson, 590 F.3d 767, 772 (9th Cir. 2009). However, only  
28 admissible evidence may be considered. See Orr v. Bank of America, NT

1 & SA, 285 F.3d 764, 773 (9th Cir. 2002) (stating that “[a] trial court  
2 can only consider admissible evidence in ruling on a motion for  
3 summary judgment”) (citations omitted); Beyene v. Coleman Sec. Servs.,  
4 Inc., 854 F.2d 1179, 1181 (9th Cir. 1988) (stating that “[i]t is well  
5 settled that only admissible evidence may be considered by the trial  
6 court in ruling on a motion for summary judgment”).

## 7 **II. STATEMENT OF UNCONTROVERTED FACTS**

8 Plaintiffs’ Responsive Separate Statement of Undisputed  
9 Facts (“SSUF”) lists certain of Defendants’ facts as “disputed”;  
10 however, Plaintiffs fail to provide admissible evidence that  
11 controverts Defendants’ evidence. Further, Defendants have raised  
12 numerous evidentiary objections to Plaintiffs’ declarations and  
13 exhibits. Those objections requiring decision are discussed below.

14 Plaintiffs Perfino and Zuranich were interested in opening a  
15 Latino-themed bar, and in January 2008, they met with Juan Ayala at a  
16 Starbucks to discuss purchasing his Alcoholic Beverage Control (“ABC”)  
17 liquor license. (Pls.’ SSUF ¶¶ 21-22.) Ayala had advertised the sale  
18 of his ABC liquor license on craigslist. (Id. ¶ 22.) At their  
19 meeting, Ayala told Plaintiffs that his ABC liquor license was not  
20 active. (Id. ¶ 25.) Ayala also told Plaintiffs that he did not want  
21 to sell his ABC license but would agree to open a bar with Plaintiffs  
22 using his license. (Id. ¶ 24.) That same day, Plaintiffs, Ayala and  
23 Rigoberto Galvez orally agreed to form a limited liability company to  
24 open a bar called Playa Azul in Sacramento, California. (Id. ¶¶ 26-  
25 27.)

26 Ayala filed a request with the State of California ABC on  
27 February 26, 2008 to reinstate his surrendered ABC liquor license,  
28 license No. 48-446084. (Id. ¶ 30.) Ayala had originally obtained his

1 ABC liquor license on March 20, 2007. (Id. ¶ 19.) However, a month  
2 later, on April 18, 2007, Ayala surrendered the license. (Id. ¶ 20.)  
3 To reinstate a liquor license that has been surrendered for more than  
4 six months, an ABC licensing representative must conduct an  
5 investigation of the premises for which the license issued to ensure  
6 that tenancy exists and that the premises licensed have not been  
7 altered. (Id. ¶ 8.) Ayala's liquor license was for the premises  
8 located at 5420 Auburn Boulevard in Sacramento("the premises"). (Id.  
9 ¶ 36.)

10 On March 10, 2008, Defendant Gavia, an ABC licensing  
11 representative, was assigned to investigate the premises for which  
12 Ayala had been issued a liquor license. Gavia told Ayala on March 25,  
13 2008 that all persons listed on the lease for the premises must be  
14 qualified to hold an ABC license and must appear on the application.  
15 (Id. ¶ 43.) At that time, Ayala, Perfino, Zuranich and Galvez were  
16 named on the lease for the property at 5420/5430 Auburn Boulevard.  
17 (Id. ¶ 42.) Gavia also advised Ayala that a "Person to Person"  
18 transfer application was required to add additional people to his  
19 liquor license and this application had to be submitted before the  
20 liquor license could be re-instated. (Id. ¶¶ 10, 44.)

21 Ayala, Perfino, Zuranich and Galvez formed the Linear  
22 Marketing Group Media LLC (the "LLC"), for which articles of  
23 incorporation were filed on March 27, 2008. (Id. ¶ 45.) The LLC was  
24 formed for the purpose of operating a bar called Playa Azul at  
25 5420/5430 Auburn Boulevard, in Sacramento, California. (Id. ¶¶ 45-  
26 46.) That same day, Ayala submitted "an application for a Person to  
27 Person transfer" (the "application for transfer") to ABC "to add other  
28 persons to [his] license." (Id. ¶¶ 44, 47.) Specifically, "Ayala

1 [sought to] . . . transfer . . . [his] ABC license to [the LLC]."  
2 (Id. ¶ 47.) The application for transfer listed Perfino's occupation  
3 as a correctional officer. (Id. ¶ 55.)

4 The next day, on March 28, 2008, Ayala's ABC license was  
5 reinstated and the LLC was given a temporary permit to operate under  
6 while ABC investigated Ayala's application for transfer, and the  
7 members of the LLC to ensure they were qualified to hold a liquor  
8 license. (Id. ¶¶ 49, 51.) A temporary permit is issued before an ABC  
9 investigation of the prospective licensees is completed and is  
10 separate and distinct from an approved on-sale general public premises  
11 liquor license. (Id. ¶¶ 53-54.)

12 While reviewing Ayala's application for transfer, Gavia was  
13 informed by her supervisor that section 62 of the California Code of  
14 Regulations ("section 62"), prescribes that correctional officers may  
15 not be issued a liquor license. (Id. ¶ 56.) On April 10, 2008, Gavia  
16 informed "Zuranich that Perfino did not qualify to hold an ABC liquor  
17 license because of his status as a correctional officer." (Id. ¶ 59.)

18 However, on May 8 or 9, 2008, before Gavia could complete  
19 her investigation of the application for transfer, Ayala "notified"  
20 Zuranich and Perfino that he "no longer wanted to be in business with  
21 . . . Zuranich because Zuranich had failed to put money into the  
22 business" and that "he wanted to withdraw the transfer application."  
23 (Id. ¶¶ 60-61.) "Before [Defendant] Gavia could finish her  
24 investigation of the transfer application, the application was  
25 withdrawn [by Ayala]." (Id. ¶ 72.)

26 Plaintiffs argue that Ayala withdrew the application for  
27 transfer since ABC officials informed Ayala that Perfino would not be  
28 able to hold a liquor license because of his status as a correctional

1 officer. Plaintiffs, however, have provided only inadmissible hearsay  
2 statements in support of this argument to which Defendants object.  
3 These objections are sustained. Plaintiffs, therefore, have not  
4 provided any admissible evidence that controverts Ayala's declaration  
5 that he withdrew his application for transfer because he no longer  
6 wanted to be in business with Zuranich.

7 On May 12, 2008, Ayala signed "ABC 209 form" to withdraw the  
8 application for transfer, in which he listed "fall out weth [sic]  
9 partner" as "the reason for withdrawal." (Id. ¶¶ 66, 67; Ayala Decl.  
10 Ex. 7.) A few days later, "[o]n May 16, 2008, [Defendant] Ajax sent  
11 notice to [the LLC] . . . at 5420/5430 Auburn Blvd., Sacramento, CA  
12 that . . . Ayala had withdrawn the application for transfer of [the]  
13 liquor license and . . . within 10 days of the date of the letter the  
14 application would be withdrawn and the temporary permit also  
15 withdrawn." (Pls.' SSUF ¶ 71.)

16 Ayala withdrew his application for transfer of his liquor  
17 license before Gavia made any recommendation to her supervisor as to  
18 whether the transfer application should be approved or denied. (Id.  
19 ¶¶ 15, 73.) Ultimately, it is an ABC supervisor who determines  
20 whether a transfer application will be approved or denied. (Id. ¶  
21 15.) Therefore, no final decision on Ayala's application for transfer  
22 of his liquor license was ever rendered. (Id. ¶ 74.)

### 23 **III. DEFENDANTS' REQUEST FOR SANCTIONS**

24 Defendants filed a reply brief in which they include a  
25 request that the Court impose sanctions upon Plaintiffs for submitting  
26 affidavits in "bad faith." (Reply 7-21.) Specifically, Defendants  
27 argue Plaintiffs' affidavits improperly advocate in support of  
28 previously dismissed claims, are filled with hearsay and statements

1 made without personal knowledge, and state improper legal conclusions.  
2 (Id.) Defendants, however, have not cited authority under which they  
3 seek to have sanctions imposed. Further, arguments raised for the  
4 first time in a reply brief need not be considered. See Zamani v.  
5 Carnes, 491 F.3d 990, 997 (9th Cir. 2007) (stating that “[t]he  
6 district court need not consider arguments raised for the first time  
7 in a reply brief.”) Therefore, Defendants’ request for sanctions is  
8 denied.

#### 9 **IV. DISCUSSION**

##### 10 **A. Federal Equal Protection Claim**

11 Defendants argue they are entitled to summary judgment on  
12 Perfino’s equal protection claim since “there was no decision to deny  
13 [him] a liquor license,” and therefore, “Perfino cannot establish  
14 [that] a denial of a liquor license was based on an incorrect  
15 interpretation of Title 4 California Code of Regulations section 62.”  
16 (Am. P. & A. in Supp. of Mot. for Summ. J. 11:17-23.) Perfino  
17 responds, arguing that he “has established each element of his claim”  
18 and “[t]he fact that Juan Ayala later terminated the application  
19 doesn’t change the fact that the constitutional tort had already been  
20 committed.” (Mem. of P. & A. in Opp’n 8-14.) Perfino further argues  
21 that once Defendant Gavia told Zuranich that Perfino did not qualify  
22 for an ABC license because of his status as a correctional officer,  
23 the Defendants “completed the wrongdoing . . . [of] denying [him] the  
24 equal protections of law.” (Id. 4:21-24.)

25 Perfino’s complaint alleges a “class of one” equal  
26 protection claim. Specifically, Perfino alleges Defendants have  
27 “wrongfully instituted . . . an extension of an ABC regulation  
28 prohibiting ownership of a bar by a police officer to prohibit

1 [Perfino,] a correctional officer[, ] from owning a bar.” (First Am.  
2 Compl. ¶ 56.) Perfino also alleges Defendants are applying section 62  
3 “improper[ly]” and “uneven[ly]” since “sometimes [ABC] officials  
4 determine that Section 62 applies to bar correctional officers from  
5 having an [ABC] license, and sometimes [they determine that Section 62  
6 is not a bar].” (Id. ¶ 62.) Perfino further alleges that Gavia “had  
7 the unlawful and improper intent to help her friend’s bar by not  
8 allowing Playa Azul’s application . . . to go forward.” (Id. ¶ 27.)  
9 Perfino also alleges ABC issued liquor licenses to four other  
10 correctional officers. (Id. ¶ 49.)

11 Defendants argue that “Perfino cannot establish a violation  
12 under the Equal Protection Clause [because] no decision to deny an  
13 application or license was made.” (Am. P. & A. in Supp. of Mot. for  
14 Summ. J. 11:25-26.) The essence of this argument is that Ayala’s  
15 withdrawal of the application to transfer the liquor license caused  
16 Perfino’s injury rather than Defendants’ actions.

17 In the equal protection context, an individual challenging a  
18 government official’s allegedly unequal treatment “need not allege  
19 that he would have obtained [a government] benefit but for” the  
20 government’s treatment. Ne. Fla. Chapter of Associated Gen.  
21 Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 666 (1993)  
22 However, an equal protection plaintiff must “*demonstrate that [he is]*  
23 *ready and able to apply for . . . [the government benefit]* and that  
24 the [government official’s treatment] threatens to prevent [him] from  
25 applying on an equal basis with other[s] in his group.” Scott v.  
26 Pasadena Unified Sch. Dist., 306 F.3d 646, 657 (9th Cir. 2002)  
27 (emphasis added).



1           In this case, Perfino's ability to acquire the liquor  
2 license at issue was dependent upon Ayala's cooperation and  
3 willingness to transfer the liquor license to the LLC. During the  
4 pendency of Ayala's application for transfer of the liquor license to  
5 the LCC, the liquor license belonged to Ayala. When Ayala decided to  
6 withdraw the application, it extinguished Perfino's ability to acquire  
7 that specific liquor license. Therefore, it was Ayala's withdrawal of  
8 his application that prevented Perfino from being "ready and able to  
9 apply" for the liquor license at issue, not the Defendants' alleged  
10 arbitrary treatment of Perfino. Id. Since Ayala's withdrawal of his  
11 transfer application prevented Perfino from being ready and able to  
12 apply for the liquor license issued for the premises, any equal  
13 protection claim Perfino alleges based on Defendants' interpretation  
14 and application of Section 62 fails.

15           Perfino's class of one equal protection claim also fails  
16 because it is unsupported in the summary judgment record. "When an  
17 equal protection claim is premised on unique treatment rather than on  
18 a classification, [it is] . . . described . . . as a 'class of one'  
19 claim." N. Pacifica LLC v. City of Pacifica, 526 F.3d 478, 486 (9th  
20 Cir. 2008) (quoting Village of Willowbrook v. Olech, 528 U.S. 562, 564  
21 (2000)). "[T]he plaintiff in a 'class of one' case does not allege  
22 that the defendants discriminate against a *group* with whom [he] shares  
23 characteristics, but rather that the defendants simply harbor animus  
24 against [him] *in particular* and therefore treated [him] arbitrarily."  
25 Lazy Y Ranch Ltd. v. Behrens, 546 F.3d 580, 592 (9th Cir. 2008)  
26 (citing N. Pacifica, 526 F.3d at 486) (emphasis in original). To  
27 succeed on a "class of one" claim, "the plaintiff must establish that  
28 the [Defendants] intentionally, and without rational basis, treated

1 the plaintiff differently from others similarly situated.” Id.  
2 (citations omitted). Further, “[a] class of one plaintiff must show  
3 that the discriminatory treatment was intentionally directed just at  
4 him, as opposed to being an accident or a random act.” Id. (quoting  
5 Jackson v. Burke, 256 F.3d 93, 96 (2d Cir. 2001)).

6 Perfino alleges in his complaint that ABC issued liquor  
7 licenses to other correctional officers. However, this allegation is  
8 unsupported by facts in the summary judgment record; no evidence has  
9 been submitted showing that another correctional officer was issued an  
10 ABC liquor license. Perfino, therefore, has provided “no evidence  
11 that [he] [was] treated differently than any other [correctional  
12 officer].” Aida Food and Liquor, Inc. v. City of Chicago, 439 F.3d  
13 397, 403 (7th Cir. 2006); see also Morris v. State Bar of California,  
14 No. CV F 09-0026 LJO GSA, 2010 WL 2353528, at \*8 (E.D. Cal. Jun. 9,  
15 2010) (rejecting class of one equal protection claim where plaintiff  
16 introduced “[n]o evidence . . . to support similarity in circumstances  
17 [or] any difference in treatment”). Therefore, Defendants’ motion for  
18 summary judgment on Perfino’s federal equal protection claim is  
19 granted.

#### 20 **B. Supplemental Jurisdiction Over Plaintiffs’ Remaining State Claim**

21 Since only Plaintiffs’ state claim for interference with  
22 contract remains, the court may consider whether to continue  
23 exercising supplemental jurisdiction over this claim. See Acri v.  
24 Varian Assocs., Inc., 114 F.3d 999, 1000 (9th Cir. 1997) (en banc)  
25 (suggesting that a district court may, but need not, sua sponte decide  
26 whether to continue exercising supplemental jurisdiction under 28  
27 U.S.C. § 1367(c) (3) after all federal law claims have been dismissed).

1 Under 28 U.S.C. § 1367(c)(3), a district court “may decline  
2 to exercise supplemental jurisdiction over a [state law] claim” when  
3 “all claims over which it has original jurisdiction” have been  
4 dismissed. “While discretion to decline to exercise supplemental  
5 jurisdiction over state law claims is triggered by the presence of one  
6 of the conditions in § 1367(c), it is informed by the . . . values of  
7 economy, convenience, fairness, and comity.” Acri, 114 F.3d at 1001  
8 (quotations omitted). “In the usual case in which all federal-law  
9 claims are eliminated before trial, the balance of [the] factors to be  
10 considered . . . point toward declining to exercise jurisdiction over  
11 the remaining state-law claims.” United Mine Workers of Am. v. Gibbs,  
12 383 U.S. 715, 726 (1966). “Further, primary responsibility for  
13 developing and applying state law rests with the state courts.”  
14 Curiel v. Barclays Capital Real Estate Inc., No. S-09-3074 FCD/KJM,  
15 2010 WL 729499, at \*1 (E.D. Cal. Mar. 2, 2010); see also Gibbs, 282  
16 U.S. at 726 (stating that “[n]eedless decisions of state law should be  
17 avoided”).

18 Here, judicial economy is not promoted by continuing to  
19 exercise supplemental jurisdiction over Plaintiffs’ state claim since  
20 the required further investment of federal judicial energy to preside  
21 over the remaining claim does not justify retention of jurisdiction.  
22 See Otto v. Heckler, 802 F.2d 337, 338 (9th Cir. Cir. 1986) (stating  
23 that “[t]he district court, of course, has the discretion to determine  
24 whether its investment of judicial energy justifies retention of  
25 jurisdiction”); Meza v. Matrix Serv., No. CIV. 2:09-3106 WBS JFM, 2010  
26 WL 366623, at \*4 (E.D. Cal. Jan. 26, 2010) (“There is no prevailing  
27 reason for this court to maintain jurisdiction to preserve judicial  
28 economy.”).

