

1 LEWIS BRISBOIS BISGAARD & SMITH LLP  
JON P. KARDASSAKIS, SB# 90602  
2 Jon.Kardassakis@lewisbrisbois.com  
MICHAEL K. GRIMALDI, SB# 280939  
3 Michael.Grimaldi@lewisbrisbois.com  
633 West 5<sup>th</sup> Street, Suite 4000  
4 Los Angeles, CA 90071  
Telephone: 213.250.1800  
5 Facsimile: 213.250.7900

6 Attorneys for Defendant P.F. CHANG’S CHINA  
BISTRO, INC.  
7

8 UNITED STATES DISTRICT COURT  
9 NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION.  
10

11 ANNA MARIE PHILLIPS, on behalf of herself  
and others similarly situated,  
12

13 Plaintiff,

14 vs.

15 P.F. CHANG’S CHINA BISTRO, INC., a  
Delaware corporation, and Does 1 through 50,  
16 inclusive,

17 Defendants.  
18  
19  
20  
21  
22

CASE NO. 5:15-cv-00344 (RMW)

**P.F. CHANG’S CHINA BISTRO, INC.’S MOTION  
TO DISMISS:**

- 1. **PLAINTIFF’S COMPLAINT FOR FAILURE  
TO STATE A CLAIM (FRCP 12(B)(6))**
- 2. **PLAINTIFF’S INJUNCTION REQUEST FOR  
LACK OF STANDING (FRCP 12(B)(1))**

[Concurrently Filed with the Request for  
Judicial Notice and Proposed Order]

The Hon. Ronald M. Whyte

Date: Friday, April 10, 2015  
Time: 9:00 a.m.  
Crtrm: 6, 4th Floor

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

**NOTICE OF MOTION TO DISMISS**

**PLEASE TAKE NOTICE** that on April 10, 2015 at 9 a.m., or as soon thereafter as the matter may be heard in Courtroom 5 (4th Floor) of the above-entitled court, located at 280 South 1st Street, San Jose, California 95113, defendant P.F. Chang’s China Bistro, Inc. (“P.F. Chang’s”) will, and hereby does, move the Court under Federal Rules of Civil Procedure 12(B)(1) and 12(B)(6) for an order dismissing the Complaint of plaintiff Anna Marie Phillips. The 12(B)(1) motion is made on the grounds that plaintiff lacks Article III standing to enjoin P.F. Chang’s. The 12(B)(6) motion is made on the grounds that, even *assuming* plaintiff has standing, she has failed to state a claim under any of the causes of action in her Complaint. This motion is based on this notice, the concurrently-filed memorandum of points and authorities, the request for judicial notice, and all other facts the Court may or should take notice of, all files, records, and proceedings in this case, and any oral argument the Court may entertain.

DATED: February 27, 2015

LEWIS BRISBOIS BISGAARD & SMITH LLP

By: \_\_\_\_\_

Jon P. Kardassakis  
Michael K. Grimaldi  
Attorneys for Defendant P.F. CHANG’S CHINA  
BISTRO, INC.

**TABLE OF CONTENTS**

		PAGE
1		
2		
3	I. Introduction and Statement of Issues to be Decided. ....	1
4	II. Background Facts and Summary of Allegations .....	2
5	A. Gluten-Free Menu Items Cost More to Prepare. ....	2
6	B. P.F. Chang’s Gluten-Free Menu and Plaintiff’s Alleged Price Discrimination. ....	3
7	III. Rule 12(b)(6) Standard.....	5
8	IV. Even If Plaintiff Has Celiac Disease, She Is Not Disabled and Thus Has No Viable Claim under the Unruh Act, the DPA, or the ADA. ....	5
9	V. P.F. Chang’s Policy of Charging All Guests the Same Price for Gluten-Free Menu Items Does Not Constitute Discrimination on the Basis of a Disability. ....	9
10	VI. The Price P.F. Chang’s Charges for Its Gluten-Free Menu Items Does Not Include an Unlawful “Surcharge” under the ADA Because the Gluten-Free Menu Item Prices Are Applicable to All Guests. ....	11
11	VII. Plaintiff’s Citation to an ADA Regulation Requiring Special Orders of Unstocked Goods Is Irrelevant to This Action. ....	13
12	VIII. Plaintiff Fails to and Is Unable to Allege That P.F. Chang’s Discriminates Against Those with Celiac Disease (Intentionally or Otherwise) in Violation of the Unruh Act. ....	14
13	IX. Plaintiff’s Claim that P.F. Chang’s Violated the UCL Unlawful Prong Fails Because Plaintiff Has Not Plead a Violation of the Unruh Act or DPA. ....	16
14	X. Plaintiff’s Claim that P.F. Chang’s Violated the UCL Unfairness Prong Fails Because There Is Nothing Fundamentally Unfair about Charging All Guests the Same Price for Gluten-Free Menu Items.....	16
15	XI. Plaintiff’s “Quasi-Contract/Unjust Enrichment” Claim(s) Fails Because This Is Not a Viable Cause of Action Under California Law. ....	19
16	XII. Rule 12(b)(1) Standard.....	20
17	XIII. Plaintiff Lacks Standing to Enjoin P.F. Chang’s Because She Has Failed to Allege Facts Demonstrating an Imminent Threat of Future Injury. ....	21
18	XIV. Conclusion.....	23
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

**TABLE OF AUTHORITIES**

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

PAGE

Cases

*Anderson v. Macy’s, Inc.*,  
943 F. Supp. 2d 531 (W.D. Pa. 2013) ..... 9, 11, 12

*Ariz. ex rel. Goddard v. Harkins Amusement Enters., Inc.*,  
603 F.3d 666 (9th Cir. 2010)..... 12

*Ashcroft v. Iqbal*,  
129 S. Ct. 1937 (2009) ..... 5

*Bell Atl. Corp. v. Twombly*,  
550 U.S. 544 (2007) ..... 5

*Blakemore v. Sup. Ct.*,  
129 Cal. App. 4th 36 (2005)..... 18

*Bodley v. Macayo Rests., LLC*,  
546 F. Supp. 2d 696 (D. Ariz. 2008)..... 10

*Cel-Tech Commc’ns, Inc. v. L.A. Cellular Tel. Co.*,  
20 Cal. 4th 163 (1999)..... 19

*Chapman v. Pier 1 Imports*,  
631 F.3d 939 (9th Cir. 2011)..... 20

*D’Lil v. Best W. Encina Lodge & Suites*,  
538 F.3d 1031 (9th Cir. 2008)..... 20

*Dare v. Ca.*,  
191 F.3d 1167 (9th Cir. 1999)..... 11, 12

*DeLil v. El Torito Rest.*,  
1997 WL 714866 (N.D. Cal. 1997)..... 21

*Doe v. Mut. of Omaha Ins. Co.*,  
179 F.3d 557 (7th Cir. 1999)..... 12

*Drum v. San Fernando Valley Bar Ass’n.*,  
182 Cal. App. 4th 247 (2010)..... 16, 17

*Earhart v. William Low Co.*,  
25 Cal. 3d 503 (1979)..... 19

*Earll v. Ebay Inc.*,  
2012 U.S. Dist. LEXIS 180528 (N.D. Cal. Dec. 20, 2012) ..... 15

*Eisenberg v. Alameda Newspapers, Inc.*,  
74 Cal. App. 4th 1359 (1999)..... 20

1 *Epstein v. Wash. Energy Co.*,  
83 F.3d 1136 (9th Cir. 1996)..... 15

2

3 *Fortyune v. Am. Multi-Cinema, Inc.*,  
364 F.3d 1075 (9th Cir. 2004)..... 10

4 *Fraser v. Goodale*,  
342 F.3d 1032 (9th Cir. 2003)..... 7, 8

5

6 *Gallagher v. Sunrise Assisted Living of Haverford*,  
268 F. Supp. 2d 436 (E.D. Pa. 2003) ..... 8

7 *Harris v. Capital Growth Investors XIV*,  
52 Cal. 3d 1142 (1991)..... 14, 15, 21

8

9 *Henry v. Univ. Tech. Inst.*,  
559 F. App'x 648 (9th Cir. 2014)..... 6

10 *Hernandez v. Cnty. of Monterey*,  
2014 U.S. Dist. LEXIS 138247 (N.D. Cal. Sept. 29, 2014)..... 9

11

12 *Horizons Unlimited v. Santa Cruz-Monterey-Merced Managed Med. Care Comm'n*,  
2014 U.S. Dist. LEXIS 93330 (E.D. Cal. July 1, 2014)..... 15

13 *In re Acacia Media Techs. Corp.*,  
2005 U.S. Dist. LEXIS 37009 (N.D. Cal. July 19, 2005) ..... 18

14

15 *In re Ins. Installment Fee Cases*,  
211 Cal. App. 4th 1395 (2012)..... 17

16 *In re Toyota Motor Corp. Unintended Acceleration Litig.*,  
754 F. Supp. 2d 1145 (C.D. Cal. 2010)..... 19

17

18 *Johnson v. MP Quail Chase LLC*,  
2013 U.S. Dist. LEXIS 2986 (E.D. Cal. Jan. 7, 2013)..... 21

19 *Jolley v. Chase Home Finance, LLC*,  
213 Cal. App. 4th 872 (2013)..... 18

20

21 *Klein v. Chevron U.S.A., Inc.*,  
202 Cal. App. 4th 1342 (2012)..... 16

22 *Koebke v. Bernardo Heights Country Club*,  
36 Cal. 4th 824 (2005)..... 14

23

24 *Koire v. Metro Car Wash*,  
40 Cal. 3d 24 (1985)..... 15

25 *Krist v. Kolombos Rest., Inc.*,  
688 F.3d 89 (2d Cir. 2012)..... 9

26

27 *Kunert v. Mission Fin. Servs. Corp.*,  
110 Cal. App. 4th 242 (2003)..... 17

28

1 *Lance Camper Mfg. Corp. v. Republic Indem. Co.*,  
 44 Cal. App. 4th 194 (1996)..... 20

2

3 *Land v. Baptist Med. Ctr.*,  
 164 F.3d 423 (8th Cir. 1999)..... 7

4 *Lujan v. Defenders of Wildlife*,  
 504 U.S. 555 (1992) ..... 20, 22

5

6 *Maulding v. Sullivan*,  
 961 F.2d 694 (8th Cir.1992)..... 8

7 *McLorn v. Cmty. Health Servs.*,  
 456 F. Supp. 2d 991 (S.D. Ill. 2006) ..... 8

8

9 *Melchior v. New Line Prods., Inc.*,  
 106 Cal. App. 4th 779 (2003)..... 19

10 *Molski v. Mandarin Touch Rest.*,  
 385 F. Supp. 2d 1042 (C.D. Cal. 2005)..... 22

11

12 *Moore v. J.B. Hunt Transp., Inc.*,  
 221 F.3d 944 (7th Cir. 2000)..... 8

13 *Munson v. Del Taco, Inc.*,  
 46 Cal. 4th 661 (2009)..... 1, 14, 15

14

15 *Nat’l Fed’n of the Blind v. Target Corp.*,  
 452 F. Supp. 2d 946 (N.D. Cal. 2006) ..... 12

16 *O’Campo v. Ghoman*,  
 2013 U.S. Dist. LEXIS 106016 (E.D. Cal. July 26, 2013)..... 21

17

18 *Raisin Bargaining Ass’n v. Hartford Cas. Ins. Co.*,  
 715 F. Supp. 2d 1079 (E.D. Cal. 2010)..... 20

19 *Rodriguez v. Putnam*,  
 2013 U.S. Dist. LEXIS 67090 (C.D. Cal. May 8, 2013)..... 7

20

21 *Rubio v. Capital One Bank*,  
 613 F.3d 1195 (9th Cir. 2010)..... 18

22 *Slade v. Hershey Co.*,  
 2011 U.S. Dist. LEXIS 81270 (M.D. Pa. July 26, 2011) ..... 8

23

24 *Sprewell v. Golden State Warriors*,  
 266 F.3d 979, 988 (9th Cir. 2001)..... 5

25 *Weaving v. City of Hillsboro*,  
 763 F.3d 1106 (9th Cir. 2014)..... 6

26

27 *Weyer v. Twentieth Century Fox Film Corp.*,  
 198 F.3d 1104 (9th Cir. 2000)..... 12

28

1 *Williamson v. McAfee, Inc.*,  
2014 U.S. Dist. LEXIS 117565 (N.D. Cal. Aug. 22, 2014)..... 19

3 Statutes

4 28 C.F.R. § 36.201 ..... 9, 10  
5 28 C.F.R. § 36.202 ..... 10  
6 28 C.F.R. § 36.301 ..... 11  
7 28 C.F.R. § 36.302 ..... 10  
8 28 C.F.R. § 36.307 ..... 13  
9 42 U.S.C. § 12102 ..... 6, 8  
10 42 U.S.C. § 12182 ..... 9, 10  
11 Cal. Bus. & Prof. Code § 17200..... 1  
12 Cal. Civ. Code § 51 ..... 1, 6, 7, 14  
13 Cal. Civ. Code § 54 ..... 1, 5  
14 Cal. Gov. Code § 12926 ..... 7

15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

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

Other Authorities

*2014 List of Most Allergy-Friendly Restaurant Chains*,  
AllergyEats (Mar. 4, 2014) ..... 4

*2015 List of Most Allergy-Friendly Restaurant Chains*,  
AllergyEats (Feb. 23, 2015) ..... 4

*Celiac Disease*, U.S. Nat’l Library of Med., Nat’l Inst. of Health,  
A.D.A.M. Med. Encyclopedia (Feb. 1, 2014) ..... 7

O’Brien, *Celiac Disease Foundation Doesn’t Back Class Action over Gluten-Free Menu  
at P.F. Chang’s*, Legal Newsline (Feb. 10, 2015) ..... 18

*One in Three Americans Now Avoiding Gluten*,  
Celiac.com (Apr. 5, 2013) ..... 2

*P.F. Chang’s China Bistro: A Great Place for Food-Allergic/Gluten-Intolerant Diners to Eat*,  
AllergyEats ..... 4

Shah, *Woman Sues P.F. Chang’s Over “Discriminatory” Gluten-Free Menu Pricing*,  
Eater (Feb. 2, 2015) ..... 18

Strom, *A Big Bet on Gluten-Free*,  
N.Y. Times, Feb. 18, 2014, at B1 ..... 2

*Tips for Restaurants (and Counsel) in a Gluten-Free World*,  
Law360 (Aug. 22, 2014) ..... 3



**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION AND STATEMENT OF ISSUES TO BE DECIDED.**

Plaintiff Anna Marie Phillips alleges that P.F. Chang’s discriminated against her, and other guests with celiac disease or a gluten allergy/intolerance, because P.F. Chang’s charges \$1.00 more for some gluten-free menu items compared to non-gluten-free versions of menu items with the same name (but prepared differently). Plaintiff purports to bring this attempted class action on behalf of all persons who have been diagnosed with celiac disease or an allergy/intolerance to gluten and who purchased items from P.F. Chang’s gluten-free menu in California. Comp. ¶ 18. The Complaint asserts five causes of action for (1) violation of California’s Unruh Civil Rights Act (Cal. Civ. Code § 51 et seq.) (“Unruh Act”); (2) violation of California’s Disabled Persons Act (Cal. Civ. Code § 54 et seq.) (“DPA”)<sup>1</sup> based solely on an alleged violation of the Americans with Disabilities Act (“ADA”); (3) violation of the unfairness prong of the California Unfair Competition Law (Cal. Bus. & Prof. Code § 17200 et seq.) (“UCL”); (4) violation of the unlawful prong of the UCL; and (5) restitution based on quasi-contract/unjust enrichment.

As set forth herein, plaintiff’s claims must be dismissed in their entirety. Resolution of the following issues indisputably must be made in P.F. Chang’s favor because:

(1) Plaintiff has failed to plausibly allege that she is disabled under any applicable statute since her condition constitutes only a *minimal limitation* on the major life activity of eating. She can still consume all gluten-free foods. No authority supports plaintiff’s baseless position that she is disabled.

(2) P.F. Chang’s does not discriminate on the basis of a disability (or at all) since it charges all guests the same prices for gluten-free menu items. The price P.F. Chang’s charges to all guests for its gluten-free items does not include an unlawful “surcharge” under the ADA. The disability statutes only require equal access; they do not require businesses to reduce their prices or even alter their inventory. And while plaintiff’s Complaint fails on its face and as a matter of

---

<sup>1</sup> Civil Code §§ 54 to 55.3 are “commonly referred to as the ‘Disabled Persons Act,’ although it has no official title.” *Munson v. Del Taco, Inc.*, 46 Cal. 4th 661, 674 n.8 (2009).

1 law, the detrimental implications of allowing plaintiff's baseless claims to proceed impact an  
2 entire industry.

3 (3) P.F. Chang's did not violate the ADA regulation requiring special orders since that  
4 regulation only applies to "unstocked goods," which is not applicable in the restaurant setting.

5 (4) P.F. Chang's did not violate the UCL unlawful prong because plaintiff has not pled a  
6 violation of the Unruh Act or DPA. Plaintiff's claim that P.F. Chang's violated the UCL  
7 unfairness prong fails too because it is perfectly fair to charge all guests the same prices for  
8 gluten-free items. This practice conforms to the fundamental principle of equal treatment.

9 (5) Plaintiff's unjust enrichment claim fails because there is no cause of action in  
10 California for unjust enrichment. Plaintiff's quasi-contract claim is also fatally flawed because a  
11 valid express contract already existed between the parties based on the dining transactions.

12 (6) Plaintiff lacks Article III standing to enjoin P.F. Chang's because she has failed to  
13 allege any facts whatsoever demonstrating an imminent threat of future injury. Plaintiff's request  
14 for injunction also fails on the merits because plaintiff has no disability claim in the first place.

15 Plaintiff has not stated, nor could she ever state, a viable claim because each of these issues  
16 can only be decided in P.F. Chang's favor. Further, it would be futile for plaintiff to attempt to  
17 cure the fatal deficiencies in her Complaint through amendment. This case should be dismissed  
18 with prejudice.

## 19 **II. BACKGROUND FACTS AND SUMMARY OF ALLEGATIONS**

### 20 **A. Gluten-Free Menu Items Cost More to Prepare.**

21 In 2013, sales of gluten-free products were approximately \$10.5 billion and expected to  
22 grow to more than \$15 billion in 2016.<sup>2</sup> The number of U.S. adults who say they are choosing to  
23 cut down on or avoid gluten is "too large for restaurant operators to ignore," says one analyst.<sup>3</sup>

24  
25 <sup>2</sup> Strom, *A Big Bet on Gluten-Free*, N.Y. Times, Feb. 18, 2014, at B1, available at  
26 [www.nytimes.com/2014/02/18/business/food-industry-wagers-big-on-gluten-free.html](http://www.nytimes.com/2014/02/18/business/food-industry-wagers-big-on-gluten-free.html).

27 <sup>3</sup> *One in Three Americans Now Avoiding Gluten*, Celiac.com (Apr. 5, 2013),  
28 [www.celiac.com/articles/23241/1/One-in-Three-Americans-Now-Avoiding-Gluten/Page1.html](http://www.celiac.com/articles/23241/1/One-in-Three-Americans-Now-Avoiding-Gluten/Page1.html).

1 With that in mind, a recent Consumer Reports article “found that in every category except  
2 ready-to-eat cereal, the gluten-free versions were more expensive than their regular counterparts,  
3 about double the cost, and in some cases considerably more.”<sup>4</sup> Because of the higher costs to  
4 prepare, restaurants commonly charge more for gluten-free menu items.

5 Beyond the cost of the raw ingredients that factor into a price-point for gluten-free  
6 offerings, there are a host of other cost drivers for restaurants who elect to use the gluten-free label  
7 on menu items that cannot be ignored, such as:

8 (1) the time and resources involved in sourcing verifiably gluten-free ingredients;

9 (2) capital investment in additional kitchen equipment to reduce the risk of gluten exposure  
10 during cooking and development of new recipes;

11 (3) implementing specific cooking procedures and handling protocols across multiple  
12 restaurant locations;

13 (4) the risk of governmental enforcement action if gluten-free labeled menu items actually  
14 contain gluten; and

15 (5) personal-injury/consumer-fraud claims by any guest who claims to have been injured  
16 by consuming foods that were represented as gluten free.<sup>5</sup>

17 **B. P.F. Chang’s Gluten-Free Menu and Plaintiff’s Alleged Price Discrimination.**

18 P.F. Chang’s is a chain of full-service, upscale-casual dining restaurants that offers high-  
19 quality, Chinese-inspired cuisine in a contemporary bistro setting.<sup>6</sup> Domestically, P.F. Chang’s  
20 operates 211 branded restaurants. In addition to its many standard-menu items, P.F. Chang’s offers  
21 a range of gluten-free items for any customer who wishes to purchase a gluten-free meal.<sup>7</sup> P.F.  
22 Chang’s is considered one of the industry’s early pioneers and adopters of gluten-free dining  
23

24 <sup>4</sup> *Will a Gluten-Free Diet Really Make You Healthier?*, Consumer Reports, *supra*.

25 <sup>5</sup> *Tips for Restaurants (and Counsel) in a Gluten-Free World*, Law360 (Aug. 22, 2014)  
26 <http://www.law360.com/articles/570403/tips-for-restaurants-and-counsel-in-a-gluten-free-world>.

27 <sup>6</sup> See <http://www.pfcb.com/restaurants.html>.

28 <sup>7</sup> The Court can take judicial notice of P.F. Chang’s menu since it has been incorporated by  
reference in the Complaint. Request for Judicial Notice (“RJN”), Exs. 1-2.

1 options, having provided gluten-free menu options for well over a decade.<sup>8</sup> The celebrated brand  
 2 has received, and continues to receive, numerous accolades for its superior willingness and ability  
 3 to provide an optimal dining experience for people with food allergies like gluten and its best-in-  
 4 class food-allergy procedures, training, and knowledge. For example, P.F. Chang’s is proud that,  
 5 for the last two years in a row, it has been recognized as one of the most allergy-friendly  
 6 restaurants in the country by AllergyEats, the leading guide to allergy-friendly restaurants.<sup>9</sup>

7 The subject of this suit is P.F. Chang’s gluten-free menu. Comp. ¶ 3; RJN, Exs. 1-2.  
 8 Plaintiff alleges that P.F. Chang’s gluten-free menu items cost \$1.00 more per item compared to  
 9 the “regular” non-gluten-free version of that item. Comp. ¶ 14. Plaintiff characterizes this \$1.00  
 10 price differential between the gluten-free menu item and the regular-menu item as a “surcharge.”  
 11 Comp. ¶ 9, 16. However, plaintiff fails to acknowledge, or conveniently ignores, that gluten-free  
 12 menu *prices are the same* for all guests who wish to order from the gluten-free menu, including  
 13 those guests with celiac disease, a gluten allergy/intolerance, those who choose a gluten-free diet,  
 14 or simply those who would like to try a gluten-free meal that day.

15 Plaintiff alleges that P.F. Chang’s “discriminates” against guests like her with celiac  
 16 disease (and other guests with a gluten intolerance/allergy) because of the price differential  
 17 between the gluten-free and the non-gluten-free menu items. *Id.* ¶¶ 15-16, 18. Plaintiff does not  
 18 allege, nor could she, that P.F. Chang’s directly or intentionally discriminates against guests with  
 19 celiac disease, a gluten allergy, or a gluten intolerance. Nor does she allege that anyone forced her  
 20 to dine at P.F. Chang’s. She asserts that the “disparate pricing draws arbitrary distinctions between  
 21 \_\_\_\_\_

22 <sup>8</sup> See *P.F. Chang’s China Bistro: A Great Place for Food-Allergic/Gluten-Intolerant*  
 23 *Diners to Eat*, AllergyEats, [www.allergyeats.com/blog/index.php/p-f-changs-china-bistro-a-great-place-for-food-allergic-gluten-intolerant-diners-to-eat/](http://www.allergyeats.com/blog/index.php/p-f-changs-china-bistro-a-great-place-for-food-allergic-gluten-intolerant-diners-to-eat/).

24 <sup>9</sup> RJN, Ex. 3, *2015 List of Most Allergy-Friendly Restaurant Chains*, AllergyEats (Feb. 23,  
 25 2015), <http://www.allergyeats.com/blog/wp-content/uploads/2010/06/AllergyEats-Release-Best-Rated-Restaurants-FINAL-150223.pdf>; RJN, Ex. 4, *2014 List of Most Allergy-Friendly Restaurant Chains*, AllergyEats (Mar. 4, 2014), [www.allergyeats.com/blog/wp-content/uploads/2010/06/AllergyEats-Release-Best-Rated-Restaurants-FINAL-140304.pdf](http://www.allergyeats.com/blog/wp-content/uploads/2010/06/AllergyEats-Release-Best-Rated-Restaurants-FINAL-140304.pdf); see also *AllergyEats Releases 2015 List of Most Allergy-Friendly Restaurant Chains*, CNBC (Feb. 23, 2015), [www.cnbc.com/id/102445919#](http://www.cnbc.com/id/102445919#).

1 consumers with and without celiac disease.” *Id.* No facts are pled to support this assertion, nor  
 2 could there be. The gluten-free menu pricing is applicable to all guests. Despite the fact that  
 3 preparation of gluten-free menu items costs more and additional measures must be implemented,  
 4 plaintiff second guesses P.F. Chang’s gluten-free pricing. Comp. ¶¶ 15, 16. As set forth more fully  
 5 below, plaintiff’s allegations fail to establish any viable cause of action, and thus her Complaint  
 6 must be dismissed in total.

### 7 **III. RULE 12(B)(6) STANDARD**

8 A court must dismiss a complaint if the alleged facts do not entitle the plaintiff to relief.  
 9 See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 560-61 (2007). “[A] plaintiff’s obligation to provide  
 10 the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic  
 11 recitation of the elements of a cause of action will not do.” *Id.* at 555 (citation, alteration, and  
 12 internal quotation marks omitted). Nor is a court “required to accept as true allegations that are  
 13 merely conclusory, unwarranted deductions of fact, or unreasonable inferences.” *Sprewell v.*  
 14 *Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). And “the tenet that a court must accept  
 15 as true all of the allegations contained in a complaint is inapplicable to legal conclusions ... While  
 16 legal conclusions can provide the framework of a complaint, they must be supported by factual  
 17 allegations.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949-50 (2009).

### 18 **IV. EVEN IF PLAINTIFF HAS CELIAC DISEASE, SHE IS NOT DISABLED AND THUS HAS NO** 19 **VIABLE CLAIM UNDER THE UNRUH ACT, THE DPA, OR THE ADA.**

20 As a threshold issue, celiac disease does not qualify as a “disability” for purposes of the  
 21 Unruh Act or DPA/ADA.<sup>10</sup> To invoke protection under the ADA, plaintiff must show that she  
 22 suffers from a “disability” as defined in the ADA. E.g., *Weaving v. City of Hillsboro*, 763 F.3d

---

23  
 24 <sup>10</sup> A violation of the ADA constitutes a violation of the DPA. Civ. Code § 54.1(d). Plaintiff  
 25 alleges that P.F. Chang’s violated the ADA by placing a “surcharge” on gluten-free menu items.  
 26 Comp. ¶¶ 41-48. Plaintiff concludes that because P.F. Chang’s conduct violates the ADA, it also  
 27 violates the DPA. *Id.* ¶ 48. Based on this alleged ADA violation, plaintiff seeks an injunction  
 28 enjoining further surcharges by P.F. Chang’s on gluten-free orders by persons with celiac disease  
 or gluten sensitivities. *Id.* ¶ 49.

1 1106, 1111 (9th Cir. 2014). Under the ADA, “disability” is defined in relevant part as “a physical .  
 2 . . . impairment that substantially limits one or more major life activities of such individual.” 42  
 3 U.S.C. § 12102(1). Similarly, the Unruh Act prohibits discrimination based on a “disability” or a  
 4 “medical condition.” Civ. Code § 51(b). Counsel for P.F. Chang’s has not found a single case  
 5 where a court has held that celiac disease qualifies as a legal disability within the meaning of the  
 6 Unruh Act, the DPA, or the ADA. There is no basis for this Court to blaze that trail here. Under  
 7 any reasonable interpretation of these acts, a person cannot be considered “disabled” just because  
 8 he or she cannot eat certain foods. And, in any event, plaintiff has failed to allege plausible facts  
 9 showing that she is disabled.

10 *The definition of a protected disability is not unlimited.* Plaintiff contends that she is  
 11 disabled because “Celiac disease affects a major life activity of eating and impacts the digestive  
 12 system” (Comp. ¶ 44), making it medically necessary for her to consume a gluten-free diet (*id.* ¶  
 13 16). While eating and the digestive system are considered major life activities, plaintiff has pled  
 14 no allegations showing how a gluten-free diet “*substantially limits*” these major life activities. 42  
 15 U.S.C. §§ 12102(1), 12102(2)(A) (emphasis added). Instead, plaintiff merely alleges that celiac  
 16 disease “*affects*” a major life activity. Comp. ¶ 44. But that is clearly not the test. See, e.g., *Henry*  
 17 *v. Univ. Tech. Inst.*, 559 F. App’x 648, 650 (9th Cir. 2014) (affirming dismissal because plaintiff  
 18 failed to allege facts showing that he was disabled).

19 Plaintiff has failed to allege how a gluten-free diet substantially limits her quality of life  
 20 other than the fact that she cannot eat foods containing gluten. Plaintiff can still eat and digest  
 21 gluten-free foods. She does not allege how celiac disease affects her if she does eat foods  
 22 containing gluten. See Comp. ¶ 17. Nor does plaintiff allege an “impairment that is episodic or in  
 23 remission” that “substantially limit[s] a major life activity when active.” 42 U.S.C. § 12102(4)(D).  
 24 Indeed, individuals with celiac disease only need to follow a “well-balanced, gluten-free diet” to  
 25 stay well.<sup>11</sup>

26 \_\_\_\_\_  
 27 <sup>11</sup> *Celiac Disease*, U.S. Nat’l Library of Med., Nat’l Inst. of Health, A.D.A.M. Med.  
 28 (footnote continued)

1 Equally as fatal for plaintiff is that she has failed to allege how she is disabled under the  
 2 Unruh Act's definitions of "medical condition" or "disability." Civ. Code § 51(b). Counsel for  
 3 P.F. Chang's has not found a single case that held that celiac disease or a food allergy is a  
 4 "medical condition" or a "disability" under the Unruh Act. "Medical condition" is defined as a  
 5 health impairment related to cancer or "genetic characteristics." Gov. Code § 12926(i).<sup>12</sup> Plaintiff  
 6 does not allege that celiac disease is a "medical condition" under this definition. Plaintiff's  
 7 allegations that celiac disease *affects* a major life activity of eating and impacts the digestive  
 8 system" (Comp. ¶ 44) does not satisfy the substantially similar "disability" definition under the  
 9 Unruh Act.<sup>13</sup>

10 *Plaintiff's bid to be defined as disabled is contradicted by case law.* As numerous cases  
 11 have squarely found, merely having to abstain from eating certain types of foods does not  
 12 constitute a substantial limitation on eating. For example, in *Rodriguez v. Putnam*, 2013 U.S. Dist.  
 13 LEXIS 67090 (C.D. Cal. May 8, 2013), the court granted a motion to dismiss and dismissed an  
 14 ADA claim with prejudice, finding that a peanut allergy does not constitute a disability. The  
 15 plaintiff prisoner in *Rodriguez* had a peanut allergy and requested that he be provided with a  
 16 substitute meal when peanut butter or food containing peanuts was served. *Id.* at \*3-4. Despite this  
 17 request, plaintiff claimed to suffer multiple allergic reactions at the prison and sued, in part, on an  
 18 ADA theory. *Id.* at \*6-7. The court found that while eating is a major life activity, having a peanut  
 19 allergy was only a "*minimal limitation* on it" and "does not amount to a substantial limitation." *Id.*  
 20 at \*6 (emphasis added) (citing *Fraser v. Goodale*, 342 F.3d 1032, 1040 (9th Cir. 2003); *Land v.*  
 21 *Baptist Med. Ctr.*, 164 F.3d 423, 425 (8th Cir. 1999)).

22 Other courts have come to the same conclusion. In *Land v. Baptist Medical Center*, 164

23 \_\_\_\_\_  
 24 Encyclopedia (Feb. 1, 2014), [www.ncbi.nlm.nih.gov/pubmedhealth/PMH0001280](http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0001280).

25 <sup>12</sup> The Unruh Act defines "medical condition" to have the same meaning as defined in  
 Section 12926 of the Government Code. Civ. Code § 51(e)(3).

26 <sup>13</sup> The Unruh Act defines "disability" to mean "any physical disability as defined in  
 27 Sections 12926 and 12926.1 of the Government Code." Civ. Code § 56(e)(1). Notably, Gov. Code  
 § 12926(n) incorporates by reference the ADA definition of disability to the extent it is broader.

1 F.3d 423 (8th Cir. 1999), the court held that a day care student’s food allergy is not a disability  
2 under the ADA since it does not substantially limit the student’s ability to engage in a major life  
3 activity. Although the student could not eat peanuts, the court found that she did not “suffer[] an  
4 allergic reaction when she consumes any other kind of food or that her physical ability to eat is in  
5 any way restricted.” *Id.* at 425. So even though the student’s “allergic reaction to peanut-laden  
6 foods affects her eating and breathing, her allergy does not substantially or materially limit these  
7 major life activities within the definition of disability under the ADA.” *Id.* The court thus affirmed  
8 summary judgment in favor of the day care center. *Id.* at 427. In similar cases as *Land* where a  
9 plaintiff experiences an *avoidable* allergic reaction, courts have repeatedly determined that the  
10 condition is not a “disability” under the ADA.<sup>14</sup>

11 As the Ninth Circuit has made clear, courts must “carefully separate those who have  
12 simple dietary restrictions from those who are truly disabled” and permit only those with “severe  
13 dietary restrictions to enjoy the protections of the ADA.” *Fraser v. Goodale*, 342 F.3d 1032, 1045  
14 (9th Cir. 2003) (severe diabetes substantially limits eating). Plaintiff has not pled how celiac  
15 disease is a severe dietary restriction tantamount to diabetes. Thus, even giving the definition of  
16 “disability” a broad construction (42 U.S.C. § 12102(4)(A)), there can be no inference that  
17 plaintiff is disabled due to her intolerance to gluten.

18  
19  
20  
21 <sup>14</sup> See, e.g., *Slade v. Hershey Co.*, 2011 U.S. Dist. LEXIS 81270, at \*13-14 (M.D. Pa. July  
22 26, 2011) (finding that plaintiff is not disabled under the ADA since plaintiff could cure her  
23 breathing problem through simple measures such as avoiding exposure to nuts and keeping  
24 medication on her person); *McLorn v. Cmty. Health Servs.*, 456 F. Supp. 2d 991, 997 (S.D. Ill.  
25 2006) (mere periodic episodes of allergic reactions that occurred only when plaintiff was in direct  
26 contact with latex not a substantial impairment of a major life activity); *Gallagher v. Sunrise  
27 Assisted Living of Haverford*, 268 F. Supp. 2d 436 (E.D. Pa. 2003) (finding no disability where an  
28 employee with a severe allergy to animals worked in a nursing home allowing pets); *Moore v. J.B.  
Hunt Transp., Inc.*, 221 F.3d 944, 952 (7th Cir. 2000) (intermittent flare-ups may not render a  
condition a “disability” under the ADA); *Maulding v. Sullivan*, 961 F.2d 694 (8th Cir.1992)  
(plaintiff who was unable to work in a particular lab due to allergies was not disabled).



1     **V.     P.F. CHANG’S POLICY OF CHARGING ALL GUESTS THE SAME PRICE FOR GLUTEN-FREE MENU ITEMS DOES NOT CONSTITUTE DISCRIMINATION ON THE BASIS OF A**  
 2     **DISABILITY.**

3           Even assuming plaintiff is “disabled” under the law (she is not), she does not and cannot  
 4 allege that P.F. Chang’s discriminated against her based on her celiac disease. Simply put, P.F.  
 5 Chang’s gluten-free menu prices are the same for all guests.

6           Title III of the ADA prohibits public accommodations, such as restaurants, from  
 7 discriminating against any individual “on the *basis of disability* in the full and equal enjoyment of  
 8 the goods, services, facilities, privileges, advantages, or accommodations of any place of public  
 9 accommodation ...” 42 U.S.C. § 12182(a) (emphasis added); see also 28 C.F.R. §§ 36.201(a),  
 10 36.202. To state a claim under Title III, plaintiff must show: (1) discrimination on *the basis of a*  
 11 *disability*; (2) in the full and equal enjoyment of the goods, services, facilities, privileges,  
 12 advantages or accommodations of any place of public accommodation; (3) by the public  
 13 accommodation’s owner, lessor or operator. *Id.*; see also, e.g., *Hernandez v. Cnty. of Monterey*,  
 14 2014 U.S. Dist. LEXIS 138247, at \*17 (N.D. Cal. Sept. 29, 2014); *Anderson v. Macy’s, Inc.*, 943  
 15 F. Supp. 2d 531, 542-43 (W.D. Pa. 2013). The Unruh Act requires intentional discrimination. See  
 16 Sec. VIII, *infra*.

17           Plaintiff cannot plausibly allege that P.F. Chang’s discriminates against guests with celiac  
 18 disease by charging these persons more than other guests. Cf. Comp. ¶ 16. The gluten-free menu  
 19 and its related pricing is offered to all guests on an equal basis—*anyone* who wants gluten-free  
 20 items can order them. Plaintiff was given access to the “full and equal enjoyment of the goods”  
 21 that P.F. Chang’s offers, and that is all that is required. See, e.g., *Krist v. Kolombos Rest., Inc.*, 688  
 22 F.3d 89, 97 (2d Cir. 2012) (“Title III is designed to prevent a facility offering public  
 23 accommodation from denying individuals with disabilities ‘goods [and] services.’”) (citing 42  
 24 U.S.C. §§ 12182(a), 12182(b)(2)(A)(ii)). There can be no inference that P.F. Chang’s  
 25 discriminated against plaintiff based on her celiac disease.

26           Beyond that, because gluten-free versions of foods cost more to prepare, businesses must  
 27 be free to pass on the increased cost to guests who want these products. A business is free to sell a  
 28 gluten-free product for a different price than a non-gluten-free product. By plaintiff’s logic, a

1 paraplegic could sue the makers of wheelchair-accessible vans for charging more for them than  
2 similar vans without the wheelchair ramps or lifts used to make them accessible.

3 Plaintiff is actually, and inappropriately, requesting *preferential treatment* at P.F.  
4 Chang’s—and any other restaurant serving gluten-free items with prices that differ from the  
5 “regular” menu—for those persons with celiac disease or a gluten allergy. Plaintiff’s request is  
6 squarely undercut by law. In *Bodley v. Macayo Rests., LLC*, 546 F. Supp. 2d 696 (D. Ariz. 2008),  
7 for instance, the court dismissed ADA claims requesting preferential treatment. In that case, the  
8 disabled patron and his wife were seated on an outside patio to enjoy happy-hour food and drinks  
9 rather than the first floor’s inside-dining section, which they preferred. The court found no  
10 disability discrimination because “Plaintiff’s request to be seated inside was not a request for a  
11 modification that would enable him to enjoy a good or service on equal terms with those who are  
12 not disabled.” *Id.* at 699. Rather, plaintiff was making “a *request for preferential treatment*—to be  
13 seated inside despite the fact that others receiving happy hour drinks and food on the first floor  
14 must eat outside.” *Id.* (emphasis added). The court held that the “ADA mandates only equal  
15 enjoyment of goods and services offered by a place of public accommodation.” *Id.* (citing 28  
16 C.F.R. § 36.201(a); 28 C.F.R. § 36.202(b)). The same logic controls here.

17 As explained in more detail in the next section, P.F. Chang’s is also not legally required to  
18 offer a gluten-free menu in the first place; it voluntarily decided to do so. As a public  
19 accommodation, P.F. Chang’s must make only “reasonable modifications in policies, practices, or  
20 procedures, when such *modifications are necessary* to afford such goods ... to individuals with  
21 disabilities ...” 42 U.S.C. § 12182(b)(2)(A)(ii) (emphasis added); see also 28 C.F.R. § 36.302.  
22 Here, plaintiff voluntarily chose to dine at P.F. Chang’s and order items off the gluten-free menu.

23 In addition, plaintiff fails to allege that she affirmatively requested a further  
24 accommodation that was tied to her purported disability. See *Bodley*, 546 F. Supp. 2d at 699-700  
25 (dismissing ADA claim in part for this reason). To the extent plaintiff is requesting a modification  
26 to P.F. Chang’s policy of charging everyone the same price for gluten-free menu items (Comp. ¶¶  
27 46-47), plaintiff’s failure to *request* a modification dooms her claim. *Fortyune v. Am. Multi-*  
28 *Cinema, Inc.*, 364 F.3d 1075, 1082 (9th Cir. 2004) (“An individual alleging discrimination under

1 Title III must show that ... the defendant discriminated against the plaintiff based upon the  
 2 plaintiff's disability by (a) failing to make a *requested* reasonable modification that was (b)  
 3 necessary to accommodate the plaintiff's disability") (emphasis added).

4 **VI. THE PRICE P.F. CHANG'S CHARGES FOR ITS GLUTEN-FREE MENU ITEMS DOES NOT**  
 5 **INCLUDE AN UNLAWFUL "SURCHARGE" UNDER THE ADA BECAUSE THE GLUTEN-FREE**  
 6 **MENU ITEM PRICES ARE APPLICABLE TO ALL GUESTS.**

6 In her claim that P.F. Chang's violated the DPA by violating the ADA, plaintiff alleges  
 7 that P.F. Chang's imposed a discriminatory "surcharge" on the gluten-free items in violation of 28  
 8 C.F.R. § 36.301(c). Comp. ¶ 41. ADA regulation 28 C.F.R. § 36.301(c) states, in relevant part,  
 9 that "[a] *public accommodation may not impose a surcharge on a particular individual with a*  
 10 *disability ... to cover the costs of measures ... that are required to provide that individual or group*  
 11 *with the nondiscriminatory treatment required by the Act or this part.*" (Emphasis added.) With  
 12 regard to this section, the ADA Title III Technical Assistance Manual explains that "[a]lthough  
 13 compliance may result in some additional cost, *a public accommodation may not place a*  
 14 *surcharge only on particular individuals with disabilities* or groups of individuals with disabilities  
 15 to cover these expenses." § III-4.1400 (emphasis added), *available at*  
 16 <http://www.ada.gov/taman3.html>. To evaluate whether an added cost constitutes a surcharge that  
 17 violates Title III of the ADA, courts consider whether the added cost (1) is used to cover the costs  
 18 of ADA-mandated measures and (2) is really a surcharge (a charge that nondisabled people would  
 19 not incur). See, e.g., *Dare v. Ca.*, 191 F.3d 1167, 1171 (9th Cir. 1999); *Anderson v. Macy's, Inc.*,  
 20 943 F. Supp. 2d 531, 545 & n.22 (W.D. Pa. 2013) (noting that the same test is used for both public  
 21 and private entities under Title II and III of the ADA, respectively). Plaintiff's claim clearly fails  
 22 on both prongs.

23 First, P.F. Chang's is not required to carry gluten-free menu items. The core meaning of  
 24 Title III is that the ADA only requires equal *access* to places of public accommodation. The ADA  
 25 does not regulate what P.F. Chang's decides to put on its menu. As one Court of Appeals has  
 26 explained, directly on this very point:

27 The common sense of the statute is that *the content of the goods or services offered*  
 28 *by a place of public accommodation is not regulated.* A camera store may not  
 refuse to sell cameras to a disabled person, but it is not required to stock cameras

1 specially designed for such persons. Had Congress purposed to impose so  
 2 enormous a burden on the retail sector of the economy and so vast a supervisory  
 3 responsibility on the federal courts, we think it would have made its intention  
 4 clearer and would at least have imposed some standards. It is hardly a feasible  
 5 judicial function to decide whether shoe stores should sell single shoes to one-  
 6 legged persons and *if so at what price*, or how many Braille books the Borders or  
 7 Barnes and Noble bookstore chains should stock in each of their stores.

8 *Doe v. Mut. of Omaha Ins. Co.*, 179 F.3d 557, 560 (7th Cir. 1999) (emphasis added).<sup>15</sup> Since  
 9 providing a gluten-free menu is “not required under the ADA, the inquiry ends” as the regulation  
 10 only forbids surcharges for ADA “required” measures. *Dare*, 191 F.3d at 1171.

11 Second, the higher cost of preparing gluten-free menu items is not a “surcharge” because  
 12 the higher cost is not imposed only on disabled persons. There are no allegations (nor could there  
 13 be) that disabled persons are charged a higher price than non-disabled persons for the same gluten-  
 14 free menu items, or that only disabled persons consume gluten-free items. In truth, and  
 15 indisputably, P.F. Chang’s offers its gluten-free items to all guests at the same prices. RJN Ex. 1-  
 16 2. Plaintiff cannot contest this point, and thus any price difference between the gluten-free items  
 17 and their regular counterparts is not an unlawful “surcharge” under this ADA regulation. See also  
 18 *Dare*, 191 F.3d at 1171 (“If nondisabled people pay the same fee for an equivalent service, the  
 19 charge to disabled people would not constitute a surcharge on a ‘required’ measure.”).

20 Plaintiff’s allegations simply fail to allege that any purported price differential is a  
 21 “surcharge” on only disabled persons to cover the cost of ADA compliance. Because no  
 22

---

23 <sup>15</sup> See also, e.g., *Ariz. ex rel. Goddard v. Harkins Amusement Enters., Inc.*, 603 F.3d 666,  
 24 671 (9th Cir. 2010) (“whatever goods or services the place provides, it cannot discriminate on the  
 25 basis of disability in providing enjoyment of those goods and services. This language does not  
 26 require provision of different goods or services, just nondiscriminatory enjoyment of those that are  
 27 provided.”); *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1115 (9th Cir. 2000)  
 28 (“The ordinary meaning of [Title III] is that whatever goods or services the place provides, it  
 cannot discriminate on the basis of disability in providing enjoyment of those goods and services,  
 just nondiscriminatory enjoyment of those that are provided. Thus, a bookstore cannot  
 discriminate against disabled people in granting access, but need not assure that the books are  
 available in Braille as well as print.”); *Nat’l Fed’n of the Blind v. Target Corp.*, 452 F. Supp. 2d  
 946 (N.D. Cal. 2006) (“The purpose of the ADA’s public accommodations requirements is to  
 ensure accessibility to the goods offered by a public accommodation, not to alter the nature or mix  
 of goods that the public accommodation has typically provided.”).

1 amendment to the pleadings could change the result, this claim should be dismissed with  
2 prejudice. See *Anderson*, 943 F. Supp. 2d at 545 (dismissing similar surcharge claim on motion to  
3 dismiss with prejudice). For these same reasons, plaintiff has not alleged a discriminatory  
4 “surcharge” or “price discrimination” under the Unruh Act, to the extent such a claim even exists.  
5 Comp. ¶ 32.

6 **VII. PLAINTIFF’S CITATION TO AN ADA REGULATION REQUIRING SPECIAL ORDERS OF**  
7 **UNSTOCKED GOODS IS IRRELEVANT TO THIS ACTION.**

8 Plaintiff appears to contend that P.F. Chang’s failed to provide plaintiff a “special order”  
9 of gluten-free menu items for the same price as regular menu items in violation of 28 C.F.R. §  
10 36.307. Comp. ¶ 42. This reading misconstrues the plain meaning of this regulation because §  
11 36.307 is not applicable to the restaurant setting.

12 There are three subsections in 28 C.F.R. § 36.307. According to § 36.307(a), Title III does  
13 not require a place of public accommodation to “*alter its inventory* to include accessible or special  
14 goods that are designed for, or facilitate use by, individuals with disabilities.” (Emphasis added.)  
15 P.F. Chang’s is not required to provide a gluten-free menu. Section 36.307(b) provides that a place  
16 of public accommodation shall “order accessible or *special goods* at the request of an individual  
17 with disabilities, if, in the normal course of its operation, it makes *special orders* on request for  
18 *unstocked goods*, and if the accessible or special goods can be obtained from a supplier with  
19 whom the public accommodation customarily does business.” (Emphasis added.) Section  
20 36.307(c) defines “special goods” to include “special foods to meet particular dietary needs.”

21 An appendix to this regulation explains that “a clothing store would be required to order  
22 specially-sized clothing at the request of an individual with a disability, *if it customarily makes*  
23 *special orders* for clothing that it does not keep in stock, and if the clothing can be obtained from  
24 one of the store’s customary suppliers.” 28 C.F.R. pt. 36, App. C (emphasis added). On the other  
25 hand, “a book and recording store would not have to specially order Braille books if, in the normal  
26 course of its business, it only specially orders recordings and not books.” *Id.*

27 As this language makes clear, § 36.307(b) is not applicable to the restaurant setting. The  
28 regulation only applies to “special orders” for “*unstocked goods*.” (Emphasis added.) The plain

1 meaning of this regulation is that it only applies to special requests by customers to order goods  
2 *currently not available* at the store or business. But P.F. Chang’s gluten-free menu items are  
3 already stocked in the restaurant; they are not unstocked goods that would require a special order.  
4 No “special order” for “unstocked goods” would ever be necessary or placed at P.F. Chang’s.  
5 Further, no reading of § 36.307 supports plaintiff’s suggestion that “special order” means that P.F.  
6 Chang’s is required to provide gluten-free products for the same price as other products. The  
7 ordinary meaning of “special order” is to order goods that are not currently available at the public  
8 accommodation.

9 Plaintiff’s reliance on § 36.307 is misplaced. This regulation does not apply to public  
10 accommodations such as P.F. Chang’s that has stocked the goods a guest is requesting. Because §  
11 36.307 could never apply in this case, this claim should be dismissed with prejudice.

12 **VIII. PLAINTIFF FAILS TO AND IS UNABLE TO ALLEGE THAT P.F. CHANG’S DISCRIMINATES**  
13 **AGAINST THOSE WITH CELIAC DISEASE (INTENTIONALLY OR OTHERWISE) IN**  
14 **VIOLATION OF THE UNRUH ACT.**

15 A required element of an Unruh Act claim is “intentional discrimination.” Plaintiff’s  
16 Unruh Act claim fails for the additional reason that plaintiff was never intentionally discriminated  
17 against (or at all) based on her celiac disease. She could never allege, let alone establish, the  
18 requisite intent. Quite simply, anyone who desires gluten-free menu items is welcome to dine at  
19 P.F. Chang’s, and P.F. Chang’s gluten-free menu item prices are applicable to all guests.

20 The Unruh Act provides that “[a]ll persons within the jurisdiction of this state are free and  
21 equal, and no matter what their ... disability ... are entitled to the full and equal accommodations,  
22 advantages, facilities, privileges, or services in all business establishments of every kind  
23 whatsoever.” Civ. Code § 51(b). To maintain an Unruh Act claim independent of an ADA claim,  
24 plaintiff must allege “*intentional discrimination* in public accommodations in violation of terms of  
25 the Act.” *Munson v. Del Taco, Inc.*, 46 Cal. 4th 661, 668 (2009) (quoting *Harris v. Capital*  
26 *Growth Investors XIV*, 52 Cal. 3d 1142, 1175 (1991)). To state a claim for intentional  
27 discrimination, plaintiff must allege “willful, affirmative misconduct”; this constitutes more than a  
28 disparate impact of a facially neutral policy on a particular group. *Koebke v. Bernardo Heights*  
*Country Club*, 36 Cal. 4th 824, 854 (2005).

1 Plaintiff fails to allege facts showing that P.F. Chang’s intentionally discriminated against  
2 her on the basis of her purported disability. Plaintiff defines “price discrimination” to mean  
3 generally charging more for gluten-free menu items than similar non-gluten-free items. See, e.g.,  
4 Comp. ¶¶ 13-16, 32. But that definition simply does not constitute discrimination on the basis of a  
5 disability. As already made clear, P.F. Chang’s offers gluten-free menu items to all guests at the  
6 same price. Guests who do not have any form of gluten sensitivity are also free to purchase gluten-  
7 free menu items.

8 Nor does plaintiff allege that P.F. Chang’s had any knowledge of plaintiff’s purported  
9 celiac disease at the time of dining, which further undercuts any attempt by plaintiff to establish  
10 intent. Common sense dictates that, without any knowledge of plaintiff’s alleged condition at the  
11 time of dining, P.F. Chang’s could not have intentionally discriminated against plaintiff. Even if  
12 P.F. Chang’s was aware, which it was not, it is ultimately irrelevant—the gluten-free prices that  
13 plaintiff paid are fixed and applicable to all guests.

14 The absence of *any* supporting factual allegations of intentional discrimination is fatal to  
15 plaintiff’s claim. Because plaintiff received the same treatment as every other guest, plaintiff has  
16 failed to allege that P.F. Chang’s intentionally discriminated against her. *Munson*, 46 Cal. 4th at  
17 668; *Harris*, 52 Cal. 3d at 1175. Contrary to plaintiff’s misplaced theories, P.F. Chang’s gluten-  
18 free menu is exactly the sort of “reasonable,” “nonarbitrary” practice proscribed by the Unruh Act.  
19 E.g., *Koire v. Metro Car Wash*, 40 Cal. 3d 24, 30 (1985).

20 To the extent plaintiff is attempting to allege a disparate-impact claim, that theory fails too.  
21 The disparate-impact test does not apply to Unruh Act claims. *Munson*, 46 Cal. 4th at 671; *Harris*,  
22 52 Cal. 3d at 1175.

23 Plaintiff’s “conclusory allegations of law and unwarranted inferences are insufficient to  
24 defeat a motion to dismiss for failure to state a claim.” *Epstein v. Wash. Energy Co.*, 83 F.3d 1136,  
25 1140 (9th Cir. 1996); see also *Iqbal*, 556 U.S. at 677-80. Her first cause of action under the Unruh  
26  
27  
28

1 Act must be dismissed.<sup>16</sup>

2 **IX. PLAINTIFF’S CLAIM THAT P.F. CHANG’S VIOLATED THE UCL UNLAWFUL PRONG FAILS**  
**BECAUSE PLAINTIFF HAS NOT PLEAD A VIOLATION OF THE UNRUH ACT OR DPA.**

3 The UCL unlawful prong “borrows violations of other laws ... and makes those unlawful  
 4 practices actionable under the UCL.” *Klein v. Chevron U.S.A., Inc.*, 202 Cal. App. 4th 1342, 1383  
 5 (2012) (citation omitted). Plaintiff alleges that the predicate violations for her unlawful-prong  
 6 claim are violations of the Unruh Act and DPA. Comp. ¶ 62. Because plaintiff has failed to state a  
 7 claim under these statutes, her fourth cause of action must be dismissed.

8 **X. PLAINTIFF’S CLAIM THAT P.F. CHANG’S VIOLATED THE UCL UNFAIRNESS PRONG**  
 9 **FAILS BECAUSE THERE IS NOTHING FUNDAMENTALLY UNFAIR ABOUT CHARGING ALL**  
 10 **GUESTS THE SAME PRICE FOR GLUTEN-FREE MENU ITEMS.**

11 There is no merit to plaintiff’s claim that P.F. Chang’s gluten-free menu violates the  
 12 unfairness prong of the UCL. Plaintiff claims that P.F. Chang’s violates the unfair prong using the  
 13 “balancing test.” See Comp. ¶ 53. The “balancing test” asks whether the alleged business practice  
 14 is “immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers and  
 15 requires the court to weigh the utility of the defendant’s conduct against the gravity of the harm to  
 16 the alleged victim.” *Drum v. San Fernando Valley Bar Ass’n.*, 182 Cal. App. 4th 247, 257 (2010)  
 (quotations omitted).

17 Contrary to plaintiff’s allegations, and as dictated by common sense, there is nothing  
 18 morally, ethically, or legally wrong with charging all guests the same price for the same item. In  
 19 fact, plaintiff’s proposal to give certain guests a discount would be considered unfair itself and  
 20 violate the fundamental fairness principle of equal treatment. Plaintiff’s theory would turn  
 21 disability-discrimination law on its head too. There would be no limiting principle since any price  
 22 differential could be claimed to be discriminatory. Because the premise of this suit—that P.F.  
 23 Chang’s conduct amounts to unlawful discrimination—is patently without merit, no subsequent  
 24

---

25 <sup>16</sup> See, e.g., *Horizons Unlimited v. Santa Cruz-Monterey-Merced Managed Med. Care*  
 26 *Comm’n*, 2014 U.S. Dist. LEXIS 93330, at \*48-49 (E.D. Cal. July 1, 2014) (dismissing Unruh Act  
 27 claim on motion to dismiss for same reasons as above); *Earll v. Ebay Inc.*, 2012 U.S. Dist. LEXIS  
 180528, at \*6 (N.D. Cal. Dec. 20, 2012) (same).



1 discovery could ever justify allowing this claim to proceed.

2 Even so, in support of her theory, plaintiff alleges that P.F. Chang's "discriminated against  
3 customers with celiac disease and gluten sensitivities by surcharging them for purchasing gluten-  
4 free menu items." Comp. ¶ 55. She alleges that P.F. Chang's "*took advantage* of these disabled  
5 customers, who had *no alternative* but to purchase gluten-free items at the higher price because  
6 they medically are unable to tolerate items that contain or were exposed to gluten." *Id.* (emphasis  
7 added). Plaintiff claims that she "suffered a substantial injury by virtue of buying [P.F. Chang's]  
8 gluten-free menu items at the surcharged prices," and that she would not have incurred these  
9 "additional costs" but for P.F. Chang's conduct. *Id.* ¶ 56. Plaintiff appears to define this  
10 "substantial injury" as having to pay "at least \$4 more than a consumer without celiac disease" to  
11 eat a full gluten-free meal. *Id.* ¶ 15. Even a cursory analysis of these allegations shows that they  
12 are merely "labels and conclusions" and "bare assertions" that cannot survive a challenge. See  
13 *Twombly*, 550 U.S. at 555; *Iqbal*, 129 S. Ct. at 1951.

14 First, there can be no plausible inference from the Complaint that P.F. Chang's "took  
15 advantage" of plaintiff and that plaintiff had "no alternative" except to dine at P.F. Chang's.  
16 Plaintiff dined at P.F. Chang's of her own free will; she was not coerced. She could have  
17 patronized any of the numerous other restaurants or grocery stores that offer gluten-free options.

18 Second, plaintiff cannot plausibly claim that she was "substantially injured" by having to  
19 pay the same price that all other guests have to pay for a gluten-free item. The \$1.00 price  
20 difference for most gluten-free dishes is perfectly reasonable.

21 Requiring all P.F. Chang's guests to pay the same prices for gluten-free menu items is  
22 indisputably a fair practice under law. See, e.g., *Drum*, 182 Cal. App. 4th at 257. It does not offend  
23 any established public policy, is not immoral, unethical, oppressive, unscrupulous, and is not  
24 substantially injurious to guests that must eat gluten free. "[T]he '*unfair*' prong of the *unfair*  
25 *competition law* was not intended to eliminate retailers' profits by requiring them to sell at their  
26 *cost ...*" See *Kunert v. Mission Fin. Servs. Corp.*, 110 Cal. App. 4th 242, 265 (2003) (emphasis  
27 added). Charging more for gluten-free menu items is fair because it costs restaurants more to  
28 prepare gluten-free products.

1 Plaintiff's argument is further undercut by the analogous case, *In re Ins. Installment Fee*  
 2 *Cases*, 211 Cal. App. 4th 1395 (2012). There the California Court of Appeal held that an insurer's  
 3 business practice of charging policyholders a fee for paying premiums via installments "is not an  
 4 unfair practice ... because it does not offend any established public policy, is not immoral,  
 5 unethical, oppressive, unscrupulous, and is not substantially injurious to the policyholders who  
 6 pay premiums in installments." *Id.* at 1419. The Court of Appeal affirmed dismissal of this UCL  
 7 unfair-prong claim at the pleading stage. The same logic controls here. Unlike the *In re Ins.*  
 8 *Installment Fee Cases* and this case, suits that are allowed to proceed with a UCL unfairness claim  
 9 invoke an immediate, visceral sense of punishable unfairness.<sup>17</sup> Quite the opposite is true here.

10 The complaint does not suggest, nor could it, that P.F. Chang's gluten-free menu has  
 11 invoked an immediate, visceral sense of punishable unfairness. It appears that a vast majority of  
 12 consumers upon hearing about this suit are "appalled" or find the suit "ridiculous" and  
 13 "frivolous."<sup>18</sup> One commentator notes that "I am happy to pay the extra dollar, and expect them in  
 14 return to continue their meticulous care of my order."<sup>19</sup> Further, for the last two years in a row,  
 15 P.F. Chang's has been recognized as one of the most allergy-friendly restaurants in the country for  
 16

---

17 <sup>17</sup> See, e.g. *Jolley v. Chase Home Finance, LLC*, 213 Cal. App. 4th 872, 907 (2013)  
 18 (allegation of bank practice of "dual tracking"—agreeing to a loan modification while continuing  
 19 to pursue foreclosure—states an unfair practice); *Rubio v. Capital One Bank*, 613 F.3d 1195,  
 20 1204-05 (9th Cir. 2010) (plaintiff credit card holder successfully stated a claim of "unfair"  
 21 business practice by alleging that credit card issuer's misleading direct mail solicitation that  
 22 offered a "fixed" annual percentage rate on purchases and balance transfers); *In re Acacia Media*  
 23 *Techs. Corp.*, 2005 U.S. Dist. LEXIS 37009, at \*16-18 (N.D. Cal. July 19, 2005) (company  
 24 alleged that patent owner is prosecuting patent infringement actions in bad faith to intimidate  
 25 others into entering into licensing agreements; UCL counterclaim for "unfair" business practice  
 26 survives motion to dismiss); *Blakemore v. Sup. Ct.*, 129 Cal. App. 4th 36, 49 (2005) (cosmetic  
 27 company's practice of representing to sales representatives that it would not charge for returned  
 28 product, when in fact its practice was to ship unordered product and fail to grant credit for returned  
 product, states an "unfair" claim).

<sup>18</sup> See reader comments, often colorful, in Shah, *Woman Sues P.F. Chang's Over*  
 "Discriminatory" Gluten-Free Menu Pricing, *Eater* (Feb. 2, 2015),  
 www.eater.com/2015/2/7967325/woman-sues-p-f-changs-over-discriminatory-gluten-free-  
 menu/.

<sup>19</sup> *Id.*

1 its size by AllergyEats, the leading guide to allergy-friendly restaurants. RJN, Exs. 3-4. Moreover,  
 2 even the national organization that advocates for sufferers of celiac disease does not seem to  
 3 support plaintiff's suit; its CEO expressly acknowledged that the "Celiac Disease Foundation  
 4 recognizes that restaurants bear a financial burden for the employee training and other  
 5 accommodations that are required to serve meals that are safe for those with celiac disease."<sup>20</sup>

6 In any event, neither plaintiff nor the courts may "simply impose their own notions of the  
 7 day as to what is fair or unfair." *Cel-Tech Commc 'ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th  
 8 163, 182 (1999); cf. Civ. Code § 3533 ("The law disregards trifles."). Plaintiff's idiosyncratic  
 9 notion of fairness must be rejected, and this third cause of action should be dismissed with  
 10 prejudice.

11 **XI. PLAINTIFF'S "QUASI-CONTRACT/UNJUST ENRICHMENT" CLAIM(S) FAILS BECAUSE THIS  
 12 IS NOT A VIABLE CAUSE OF ACTION UNDER CALIFORNIA LAW.**

13 Plaintiff alleges that P.F. Chang's "took additional monies" from her by charging her for  
 14 the gluten-free menu items that she ordered. Comp. ¶ 65. Plaintiff alleges that P.F. Chang's was  
 15 unjustly enriched when it accepted the money plaintiff paid P.F. Chang's for dining there, and this  
 16 somehow created a "quasi-contractual obligation ... to restore these ill-gotten gains." *Id.* ¶ 66.  
 17 This fifth cause of action has no merit.

18 "Courts consistently have held that unjust enrichment is not a proper cause of action under  
 19 California law." *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, &  
 20 Prods. Liab. Litig.*, 754 F. Supp. 2d 1145, 1194 (C.D. Cal. 2010). "Unjust enrichment is a general  
 21 principle, underlying various legal doctrines and remedies, rather than a remedy itself." *Melchior  
 22 v. New Line Prods., Inc.*, 106 Cal. App. 4th 779, 793 (2003). "Simply put, 'there is no cause of  
 23 action in California for unjust enrichment.'" *In re Toyota Motor Corp.*, 754 F. Supp. 2d at 1194  
 24 (citing *Melchior*, 106 Cal. App. 4th at 793). Because plaintiff's unjust-enrichment theory is not a

---

25 <sup>20</sup> O'Brien, *Celiac Disease Foundation Doesn't Back Class Action over Gluten-Free Menu*  
 26 *at P.F. Chang's*, Legal Newsline (Feb. 10, 2015), [http://legalnewsline.com/issues/class-](http://legalnewsline.com/issues/class-action/254852-celiac-disease-foundation-doesnt-back-class-action-over-gluten-free-menu-at-p-f-changs)  
 27 [action/254852-celiac-disease-foundation-doesnt-back-class-action-over-gluten-free-menu-at-p-f-](http://legalnewsline.com/issues/class-action/254852-celiac-disease-foundation-doesnt-back-class-action-over-gluten-free-menu-at-p-f-changs)  
 28 [changs](http://legalnewsline.com/issues/class-action/254852-celiac-disease-foundation-doesnt-back-class-action-over-gluten-free-menu-at-p-f-changs).

1 valid claim, it must be dismissed without leave. See, e.g., *Williamson v. McAfee, Inc.*, 2014 U.S.  
2 Dist. LEXIS 117565, at \*14 (N.D. Cal. Aug. 22, 2014) (dismissing unjust enrichment claim  
3 without leave); *Dunkel v. eBay Inc.*, 2013 U.S. Dist. LEXIS 13866, at \*31 (N.D. Cal. Jan. 31,  
4 2013) (same).

5 California courts turn to the legal fiction of “quasi-contract” to prevent unjust enrichment.  
6 *Earhart v. William Low Co.*, 25 Cal. 3d 503, 515 n.10 (1979). “[I]t is well settled that an action  
7 based on an implied-in-fact or quasi-contract cannot lie where there exists between the parties a  
8 valid express contract covering the same subject matter.” E.g. *Lance Camper Mfg. Corp. v.*  
9 *Republic Indem. Co.*, 44 Cal. App. 4th 194, 203 (1996); see also *Eisenberg v. Alameda*  
10 *Newspapers, Inc.*, 74 Cal. App. 4th 1359, 1387 (1999). Here, plaintiff entered into a contractual  
11 transaction with P.F. Chang’s when she dined there. In exchange for monetary payment, plaintiff  
12 received the gluten-free menu items she ordered. Because an express contract already existed  
13 between the parties, plaintiff’s quasi-contract claim must be dismissed. E.g., *Raisin Bargaining*  
14 *Ass’n v. Hartford Cas. Ins. Co.*, 715 F. Supp. 2d 1079, 1089-90 (E.D. Cal. 2010) (dismissing  
15 quasi-contract claim for a similar reason).

## 16 XII. RULE 12(B)(1) STANDARD

17 “[T]o invoke the jurisdiction of the federal courts, a disabled individual claiming  
18 discrimination must satisfy the case or controversy requirement of Article III by demonstrating his  
19 standing to sue at each stage of the litigation.” *Chapman v. Pier 1 Imports*, 631 F.3d 939, 946 (9th  
20 Cir. 2011). To satisfy Article III, a plaintiff must allege (1) an injury in fact that is “concrete and  
21 particularized” and “actual or imminent,” (2) a causal connection between the injury and the  
22 conduct complained about; and (3) “it must be likely, as opposed to merely speculative, that the  
23 injury will be redressed by a favorable decision.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555,  
24 560-61 (1992). The Ninth Circuit has “found actual or imminent injury sufficient to establish  
25 standing where a plaintiff demonstrates an intent to return to the geographic area where the  
26 accommodation is located and a desire to visit the accommodation if it were made accessible.”  
27 *D’Lil v. Best W. Encina Lodge & Suites*, 538 F.3d 1031, 1036-37 (9th Cir. 2008).

1 **XIII. PLAINTIFF LACKS STANDING TO ENJOIN P.F. CHANG’S BECAUSE SHE HAS FAILED TO**  
 2 **ALLEGE FACTS DEMONSTRATING AN IMMINENT THREAT OF FUTURE INJURY.**

3 Plaintiff seeks to enjoin all P.F. Chang’s restaurants in California from charging its current  
 4 gluten-free pricing beyond the price of its “regular” non-gluten-free menu. Comp. ¶ 49. Plaintiff  
 5 seeks this injunction under the DPA based solely on a violation of the ADA.<sup>21</sup> But plaintiff’s  
 6 request for an injunction fails on the merits because plaintiff has no disability claim, nor would an  
 7 injunction be an appropriate remedy here. Plaintiff’s request fails for the additional reason that she  
 8 has not alleged any desire or likelihood that she will ever return to P.F. Chang’s, and thus she has  
 9 no imminent threat of future injury.

10 Even if she did allege she will return to P.F. Chang’s, “[i]n determining whether the  
 11 plaintiff’s likelihood of return is sufficient to confer standing, courts have closely examined  
 12 factors such as: (1) the proximity of defendant’s business to plaintiff’s residence, (2) the plaintiff’s  
 13 past patronage of defendant’s business, (3) the definitiveness of plaintiff’s plans to return, and (4)  
 14 the plaintiff’s frequency of travel near defendant.” *Harris v. Del Taco, Inc.*, 396 F. Supp. 2d 1107,  
 15 1113 (C.D. Cal. 2005) (internal quotation omitted). Courts frequently dismiss cases for failing to  
 16 demonstrate standing under this test.<sup>22</sup> The bare-bones complaint here gives no reason to infer  
 17 plaintiff’s intent to return.

18 *The proximity of a P.F. Chang’s location to plaintiff’s residence.* Plaintiff has not alleged  
 19 her current residence, so there is no way to tell how close she is to a P.F. Chang’s location.  
 20 Plaintiff alleges that she is a California resident (Comp. ¶ 17) and that she has dined at the “P.F.  
 21 Chang’s in Santa Clara County during the past four years before filing this action” (*Id.* ¶ 9). But  
 22 without more, there is no reason to infer that plaintiff resides close to P.F. Chang’s, and thus no

23 \_\_\_\_\_  
 24 <sup>21</sup> For an explanation of plaintiff’s DPA claim, see note 10, *supra*.

25 <sup>22</sup> See, e.g., *O’Campo v. Ghoman*, 2013 U.S. Dist. LEXIS 106016, at \*11-12 (E.D. Cal.  
 26 July 26, 2013) (finding sua sponte that plaintiff did not sufficiently show a “likelihood [that he]  
 27 will be wronged again[.]”); *Johnson v. MP Quail Chase LLC*, 2013 U.S. Dist. LEXIS 2986, at \*16  
 (E.D. Cal. Jan. 7, 2013) (dismissing ADA and Unruh Act claims for lack of standing); *Harris v.*  
*Del Taco, Inc.*, 396 F. Supp. 2d 1107, 1113-16 (C.D. Cal. 2005) (same); *Molski v. Mandarin*  
*Touch Rest.*, 385 F. Supp. 2d 1042, 1048 (C.D. Cal. 2005) (same).

1 way to infer she will ever return. If the distance between the public accommodation and plaintiff's  
2 residence is significant, especially if it is in excess of 100 miles, courts often find that such a  
3 distance weighs against finding a reasonable likelihood of future harm. E.g., *DeLil v. El Torito*  
4 *Rest.*, 1997 WL 714866, at \*3 (N.D. Cal. 1997) (plaintiff failed to establish likelihood of future  
5 harm in part because she lived over 100 miles from restaurant).

6 *Plaintiff's past patronage of P.F. Chang's.* Plaintiff has not alleged how often she has  
7 dined at P.F. Chang's. Plaintiff has not stated a particular preference for P.F. Chang's gluten-free  
8 menu items. *Molski v. Kahn Winery*, 405 F. Supp. 2d 1160, 1164 (C.D. Cal. 2005) (lack of past  
9 patronage at winery and demonstrated lack of preference for its goods weigh against the likelihood  
10 of future harm). This factor also does not support standing.

11 *The definitiveness of plaintiff's plans to return.* Nowhere in the complaint does plaintiff  
12 allege she intends to return to P.F. Chang's. Even if she did, "[s]tanding cannot be established 'by  
13 respondents' mere profession of an intent, some say, to return.'" *Molski v. Mandarin Touch Rest.*,  
14 385 F. Supp. 2d 1042, 1046 (C.D. Cal. 2005) (quoting *Lujan*, 504 U.S. at 564 n.2)). "Where a  
15 plaintiff lacks 'concrete plans to return, the Court must satisfy itself that a plaintiff's professed  
16 intent to return is sincere and supported by the facts.'" *Kahn Winery*, 2005 U.S. Dist. LEXIS  
17 41768, at \*9 (citation omitted). Here, plaintiff has not stated any plans to return. She does not  
18 allege whether the "surcharge" makes the gluten-free menu unaffordable for her. Nor does she  
19 indicate any desire to visit P.F. Chang's if the "surcharge" was removed. This factor does not  
20 support standing.

21 *Plaintiff's frequency of travel near P.F. Chang's.* Plaintiff alleged no facts showing that  
22 she travels near a P.F. Chang's restaurant.

23 In short, the complaint does not give any basis to infer that plaintiff ever intends to return  
24 to P.F. Chang's. She thus has no standing to enjoin P.F. Chang's. In any event, an injunction is not  
25 warranted since plaintiff could never state a claim.

1 **XIV. CONCLUSION**

2 For the foregoing reasons, P.F. Chang’s respectfully requests that plaintiff’s Complaint be  
3 dismissed in total with prejudice. This lawsuit is meritless, has no basis or support in law, defies  
4 common sense and logic, flies in the face of fundamental economic and commercial principles,  
5 and would impact an entire industry. Further, the futility of allowing plaintiff to attempt to cure  
6 her fatal deficiencies through amendment is patently obvious.

7

8 DATED: February 27, 2015

LEWIS BRISBOIS BISGAARD & SMITH LLP

9

10

11

By: \_\_\_\_\_

Jon P. Kardassakis  
Michael K. Grimaldi  
Attorneys for Defendant P.F. CHANG’S CHINA  
BISTRO, INC.

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28