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26 **UNITED STATES DISTRICT COURT**
 27 **NORTHERN DISTRICT OF CALIFORNIA**

28 IVANA KIROLA, MICHAEL KWOK, AND
 ELIZABETH ELFTMAN, on behalf of
 themselves and all others similarly situated;

Plaintiffs,

v.

THE CITY AND COUNTY OF SAN
 FRANCISCO (“the CITY”); *et al.*,

Defendants.

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 CITY AND COUNTY OF SAN FRANCISCO, ET AL.

Case No.: **C07-3685 SBA**

CLASS ACTION

**ORDER DENYING DEFENDANTS’ MOTION
 FOR SEPARATE TRIALS**

DATE: May 18, 2010
 TIME: 1:00 p.m.
 PLACE: Courtroom 1, 4th Floor
 JUDGE: Hon. Sandra B. Armstrong

Trial Date: July 12, 2010

1 This matter came on for hearing on Defendants’ Motion for Separate Trials on May 18, 2010.
2 Guy B. Wallace, Mark T. Johnson and Amanda Hugh of Schneider Wallace Cottrell Brayton Konecky
3 appeared for plaintiffs. Deputy City Attorneys James M. Emery and Elaine O’Neil appeared for
4 Defendant City San Francisco (“City”). The Court having considered the papers filed by the parties, and
5 having heard argument from the parties on the motion, IT IS HEREBY ORDERED that Defendants’
6 Motion for Separate Trials is DENIED.

7 Defendant asserts that the Court should order a separate and later trial on the issue of curb ramps
8 because the state court action in *King et al. v. City and County of San Francisco*, San Francisco Superior
9 Court Case No. 07-459278, in which a proposed settlement has been reached, may result in a final
10 judgment having a res judicata effect over the claims of Plaintiffs in this action regarding curb ramps.
11 The Court is concerned, however, that there is currently no final judgment in the *King* case and no clear
12 indication as to whether and when a final judgment based upon the settlement of that action might be
13 entered. The rules of res judicata only apply when a final judgment is rendered. *Restatement (Second)*
14 *of Judgments* § 13 (1982); *Nat’l Union Fire Ins. Co. v. Stites Prof. Law Corp.*, 235 Cal. App. 3d 1718,
15 1726, 1 Cal. Rptr. 2d 570 (1991). Under California law, which governs the res judicata effect of a state
16 court proceeding in an ongoing federal action (*Marrese v. Am. Academy of Orthopedic Surgeons*, 470
17 U.S. 373, 380 (1985).), a judgment is final for res judicata purposes only after an appeal has been has
18 been exhausted or the time for filing an appeal has expired. *Nat’l Union Fire Ins. Co.*, 235 Cal. App. 3d
19 at 1726; *Franklin & Franklin v. 7-Eleven Owners for Fair Franchising*, 85 Cal. App. 4th 1168, 1174,
20 102 Cal. Rptr. 2d 770 (2000).

21 The Court is not in a position to know when a judgment based upon the settlement in the *King*
22 case might become final. Plaintiffs’ counsel here represent class members who have objected to the
23 settlement in *King* and have stated that their clients will appeal any final approval of that settlement. An
24 appeal in the state Court of Appeal may not be resolved for as long as two years. The Court is not
25 prepared to bifurcate and stay the curb ramp portion of this case for an indefinite period until the
26 resolution of the appellate proceedings in state court.

27 The Court is also concerned that the proposed class in this case is broader than the provisionally
28 certified settlement class in *King* because it is not limited to persons with mobility disabilities who use


1 wheelchairs or scooters for mobility. Even if a res judicata defense based upon the settlement in *King*
2 were available, it would not apply to those members of the proposed class who do not use wheelchairs
3 or scooters, including, for example, users of canes, walkers and other assistive devices. Accordingly,
4 litigation of the same curb ramp issues on behalf of that subset of the class may still be necessary despite
5 a final judgment in *King*.

6 The Court also finds that abstention under the *Colorado River* doctrine is not warranted.

7 For the foregoing reasons, and in the exercise of its discretion under Rule 42(b), the Court
8 DENIES Defendant's motion for a separate trial on the issue of curb ramps.

9 IT IS SO ORDERED.

10 Dated: 6/1/10

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13 HONORABLE SAUNDRA B. ARMS TRONG
14 United States District Judge
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