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3 UNITED STATES DISTRICT COURT  
4 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
5 OAKLAND DIVISION

6 IVANA KIROLA, et al.,

7 Plaintiffs,

8 vs.

9 THE CITY AND COUNTY OF SAN  
10 FRANCISCO, et al.,

11 Defendants.  
12

Case No: C 07-03685 SBA

**ORDER GRANTING THE CITY'S  
MOTION FOR A MODIFICATION  
OF THE CLASS DEFINITION TO  
EXCLUDE HOWARD CHABNER AS  
A CLASS MEMBER**

Dkt. 506

13 The parties are presently before the Court on Defendant the City and County of San  
14 Francisco's ("the City") Motion for a Modification of the Class Definition to Exclude Howard  
15 Chabner as a Class Member. Dkt. 506. Having read and considered the papers filed in  
16 connection with this matter and being fully informed, the Court hereby GRANTS the motion  
17 for the reasons set forth below. The Court, in its discretion, finds this matter suitable for  
18 resolution without oral argument. See Fed.R.Civ.P. 78(b).

19 **I. BACKGROUND**

20 **A. PROCEDURAL HISTORY**

21 The parties are familiar with the facts of this case, which will not be repeated in detail.  
22 On June 4, 2010, the Court certified the following class of persons in this action:

23 All persons with mobility disabilities who are allegedly being  
24 denied access under Title II of the Americans with Disabilities Act  
25 of 1990, Section 504 of the Rehabilitation Act of 1973, California  
26 Government Code Section 11135, et seq., California Civil Code §  
27 51 et seq., and California Civil Code § 54 et seq. due to disability  
28 access barriers to the following programs, services, activities and  
facilities owned, operated and/or maintained by the City and  
County of San Francisco: parks, libraries, swimming pools, curb  
ramps, sidewalks, cross-walks, and any other outdoor designated  
pedestrian walkways in the City and County of San Francisco.

1 See 6/4/10 Order, Dkt. 285.

2 On March 4, 2011, Joanna Fraguli, the Deputy Director for Programmatic Access of the  
3 Mayor's Office on Disability ("MOD"), filed a motion for modification of the class definition  
4 to exclude her as a class member. Dkt. 495. Ms. Fraguli fell within the class definition  
5 because she uses a wheelchair for mobility. In her motion, Ms. Fraguli argued that the Court  
6 should modify the class to exclude her in order to avoid an irreconcilable conflict of interest  
7 with the class that precludes adequate representation. Specifically, Ms. Fraguli asserted that  
8 she has a conflict with the class because, given her position at MOD, she is responsible for  
9 developing and implementing the very City programs and policies challenged by Plaintiffs in  
10 this action.

11 On March 18, 2011, the Court granted Ms. Fraguli's motion and modified the class  
12 definition to exclude her from the class. See 3/18/11 Order, Dkt. 505. The Court found:

13 Like the supervisory employees in the employment discrimination  
14 actions cited by Ms. Fraguli, here, Ms. Fraguli is responsible, at  
15 least in part, for developing and implementing the very City  
16 programs and policies challenged by Plaintiffs. Given her position  
17 at MOD, she participated in the very behavior that is being  
18 challenged, and is a potential witness against the allegations raised  
19 by other class members. Therefore, Ms. Fraguli has a conflict  
20 with the class that precludes adequate representation, which can be  
21 remedied by excluding her from the class definition.

19 Id. at 10. The Court also directed further briefing as follows:

20 It is unclear whether there are other City officials or employees  
21 that are similarly situated to Ms. Fraguli and for whom the same  
22 rationale would apply for excluding them from the class  
23 definition. Therefore, the City is granted leave to file a  
24 memorandum directed to this issue, as set forth below. If a timely  
25 memorandum on this issue is not filed, it will be presumed that  
26 there are no other such City officials or employees.

24 Id. at 12 n.4.

25 In response, the City filed the instant Motion for a Modification of the Class Definition  
26 to Exclude Howard Chabner as a Class Member on the ground that "Mr. Chabner, who uses a  
27 wheelchair for mobility, is a City official responsible for developing and implementing the  
28 policies challenged by plaintiffs in this lawsuit." City's Mtn. at 1-2. The Court subsequently

1 ordered the City to submit a supplemental memorandum clarifying its assertion that Mr.  
2 Chabner is a “City official” responsible for “developing and implementing” the policies at  
3 issue in this lawsuit. See Dkt. 536. Plaintiffs oppose the City’s motion.

4 **B. MIZNER DECLARATION**

5 In support of its motion, the City submits the declaration of Susan Mizner, the Director  
6 of MOD. Mizner Decl., Dkt. 507. In her declaration, Ms. Mizner describes Mr. Chabner’s role  
7 as chair of the Physical Access Committee of the Mayor’s Disability Council (“MDC”). Id. ¶  
8 3. Specifically, she explains that the mission of the MDC is to “(1) advise the Mayor on  
9 disability issues; (2) work with MOD to ensure ADA compliance throughout the City; and (3)  
10 provide a public forum to discuss disability issues.” Id. Furthermore, Ms. Mizner explains  
11 that, each year, the Physical Access Committee is the first public body to review the status of  
12 the ADA UPHAS plan, which is the City’s ADA transition plan for buildings and facilities, and  
13 MODS’s requests for capital budget funding for that fiscal year, after which “the entire  
14 Mayor’s Disability Council provides review and feedback.” Id. ¶ 5.

15 According to Ms. Mizner, through Mr. Chabner’s service on MDC’s Physical Access  
16 Committee, he “plays a key role in San Francisco’s outreach to the disabled community and in  
17 developing City policies and priorities for physical access improvements.” Id. ¶ 3. Mr.  
18 Chabner “assists and guides many of the City’s policy decisions regarding physical access.”  
19 Id. ¶ 4. For example, “the scoring system currently used to evaluate the condition of curb  
20 ramps in the City’s Curb Ramp Information Systems (CRIS) database arose almost entirely out  
21 of the feedback MOD and DPW received from Mr. Chabner and the Physical Access  
22 Committee members.” Id. Also, Mr. Chabner “has personally submitted requests for  
23 installation of curb ramps at more than 100 locations in San Francisco.” Id.

24 Ms. Mizner further states that “Mr. Chabner takes an active role in reviewing the access  
25 features in most major public construction projects – not at the level of detailed code  
26 compliance, but in terms of broad access approaches.” Id. ¶ 6. Specifically, Mr. Chabner  
27 “chairs the Physical Access Committee discussion” regarding various access features in  
28

1 construction projects, and “documents the discussion in a report he publicly presents” to MOD,  
2 along with “recommendations for the Council’s position.” Id.

3 **C. SCOTT DECLARATION**

4 In response to the Court’s briefing order, the City submits the declaration of John Paul  
5 Scott, employed by the City as the Deputy Director of Physical Access at MOD. Scott Decl. ¶  
6 1, Dkt. 539. Mr. Scott explains that Mr. Chabner is considered a “City official” because, as  
7 member of the MDC, Mr. Chabner is “appointed by the Mayor and sworn in to office as any  
8 other public official is sworn in.” Id. ¶ 2. Mr. Scott further explains that, as chair of the  
9 Physical Access Committee of the MDC, Mr. Chabner “sets the agenda for the meeting, with  
10 staff support, chairs the meeting itself, and develops consensus of the committee for  
11 recommendations to the full Mayor’s Disability Council.” Id. ¶ 3.

12 According to Mr. Scott, “Mr. Chabner decides what projects will get close review from  
13 the Committee, which projects need to return for further discussion, and which projects have  
14 issues that need to be elevated beyond the MDC.” Id. For example, “Mr. Chabner was part of  
15 establishing the City’s position on the North Beach Library that the library needed to be rebuilt,  
16 rather than renovated, in order to have the best access (and best services) at the site.” Id. Also,  
17 Mr. Chabner “sits on a 30 person committee for the Transbay Joint Powers Authority to  
18 represent the disability interests for the City and County of San Francisco in both the Transbay  
19 terminal temporary design and permanent terminal design.” Id. “With respect to the Van Ness  
20 Bus Rapid Transit project, Mr. Chabner was key in developing the accessibility priorities  
21 matrix that [is] included in the Draft Environmental Impact Report; these priorities evaluate the  
22 impact on people with disabilities of the different design options.” Id. “Finally, Mr. Chabner  
23 also routinely helps in establishing priorities for construction of curb ramps in the public right  
24 of way and the priorities for the City’s UPhAS ADA Transition Plan for Facilities.” Id.

25 Mr. Scott further explains:

26 Mr. Chabner played a key role in developing the scoring systems  
27 for grading the condition of the City’s curb ramps. This involved  
28 looking at each measurement on a ramp – the landings, the slope,  
the wings, the width, the cross-slope, the connection to the  
crosswalk, and the lip. He and other Committee members

1 weighted the degree of importance of each item, and correlated  
2 each item to the City's scoring system. ... This scoring systems is  
3 an integral part of the City's ADA Transition Plan for Curb  
4 Ramps and Sidewalks. Each year, Mr. Chabner and the other  
5 Physical Access Committee members prioritize the remaining  
6 itmes [sic] in the UPhAS ADA Transition Plan for Facilities, and  
7 report their findings to the Mayor's Disability Council with MOD  
8 staff, for MDS comment and approval.

6 Id. ¶ 4.

7 Moreover, Mr. Scott states that "Mr. Chabner communicates with other city officials as  
8 chair of the MDC's Physical Access Committee, explaining and advocating for the access  
9 policies and approaches that the Committee and the MDS have agreed upon." Id. ¶ 6. For  
10 example, "while the applicable state and federal disability requirements do not require two  
11 elevators at all underground transit stops, the Physical Access Committee has clearly found that  
12 two elevators are necessary for reasonable and consistent access to public transportation." Id.  
13 As a result, the new Central Subway project constructed in the City will have two elevators for  
14 each stop. Id. Also, "he negotiates consensus among the Committee members, who represent  
15 different disability interests and various disability groups, to shape MDC and MOD policies as  
16 they relate to the ADA Transition Plan for Curb Ramps and Sidewalks as well as the UPhAS  
17 ADA Transition Plan for Facilities." Id.

18 Finally, Mr. Scott explains that "Mr. Chabner does not have the power to hire or fire  
19 city staff, nor does the have the ability to unilaterally stop a project. He, like most people in  
20 the Mayor's Office on Disability, operates with persuasive power, referring to both legal  
21 requirements and best practices." Id. ¶ 7. Mr. Scott states that "there has been only one  
22 instance" in his memory "in which City policy and practice did not follow [Mr. Chabner's]  
23 recommendation." Id. Mr. Scott explains "that was a situation in which both staff and the  
24 Physical Access Committee members were divided as to the best approach to proceed (this  
25 involved where accessible bathrooms would be located at San Francisco General Hospital as  
26 part of the design and construction of those facilities under the UPhAS ADA Transition Plan)."

27 Id.

1 **II. LEGAL STANDARD**

2 Federal Rule of Civil Procedure 23(c)(1)(C) provides that “[a]n order that grants or  
3 denies class certification may be altered or amended before final judgment.” See also General  
4 Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 160 (1982) (“Even after a certification  
5 order is entered, the judge remains free to modify it in the light of subsequent developments in  
6 the litigation.”); Andrews Farms v. Calcot, LTD., 2010 WL 3341963, \*3 (E.D. Cal. Aug. 23,  
7 2010) (a court “retains broad authority to modify or withdraw certification at any time where it  
8 appears the class definition is inappropriate or inadequate”) (citing Armstrong v. Davis, 275  
9 F.3d 849, 871 (9th Cir. 2001), abrogated on other grounds by Johnson v. California, 543 U.S.  
10 499, 504-05 (2005)).

11 Moreover, Federal Rule of Civil Procedure 23(a)(4) imposes on the trial court “a  
12 continuing duty to undertake a stringent examination of the adequacy of representation by the  
13 named class representatives and their counsel at all stages of the litigation.” In re General  
14 Motors Corp. Engine Interchange Litig., 594 F.2d 1106, 1124 (7th Cir. 1979). “Resolution of  
15 two questions determines legal adequacy: (1) do the named plaintiffs and their counsel have  
16 any conflicts of interest with other class members and (2) will the named plaintiffs and their  
17 counsel prosecute the action vigorously on behalf of the class?” Hanlon v. Chrysler Corp., 150  
18 F.3d 1011, 1020 (9th Cir. 1998); see also Andrews Farms, 2010 WL 3341963, \*4 (citing  
19 Amchen Products, Inc. v. Windsor, 521 U.S. 591, 626 (1997)) (to satisfy the adequate  
20 representation requirement, a named “class representative must not be antagonistic or have  
21 conflicts of interest with other potential class members”).

22 **III. ANALYSIS**

23 In support of its motion, the City argues that Mr. Chabner, like Ms. Fraguli, “is  
24 responsible for developing and implementing the very City policies and programs challenged  
25 by plaintiffs.” City’s Mtn. at 2. On that basis, the City moves to exclude Mr. Chabner from  
26 the class definition.

27 In response, Plaintiffs argue Mr. Chabner is not a City employee, official, or director  
28 whose decisions and/or actions create liability for the City or are being challenged in this

1 lawsuit; rather, Mr. Chabner provides input and feedback to the City regarding disability access  
2 issues like any other member of the general public. Therefore, according to Plaintiffs, the  
3 reasoning underlying the Court’s decision to exclude Ms. Fraguli does not apply to Mr.  
4 Chabner. The Court disagrees. At the outset, Mr. Chabner, as a City official appointed by the  
5 Mayor, has a more significant role in developing and shaping City policy with respect to  
6 physical access issues than a general member of the public commenting on such issues. In  
7 addition, based on the evidence provided by the City, it is apparent that Mr. Chabner plays a  
8 significant role in San Francisco’s outreach to the disabled community and in developing City  
9 policies and priorities for physical access improvements, including polices challenged by  
10 Plaintiffs in this suit. For instance, Mr. Chabner played a role in developing the scoring system  
11 currently used to evaluate the condition of curb ramps, which is part of the City’s ADA  
12 Transition Plan for Curb Ramps and Sidewalks. Scott Decl. ¶ 4. Plaintiffs directly challenge  
13 the City’s curb ramp program and transition plan in this suit. See Plfs.’ Trial Brief at 22-23,  
14 Dkt. 306 (Citing the CRIS database, asserting that “[t]he City’s own documents show that it  
15 has failed to meet its obligations to provide access curb ramps so that persons with mobility  
16 disabilities can use the City’s right-of-way safely.”); First Amended Complaint (“FAC”) ¶ 60,  
17 Dkt. 294 (the City has “fail[ed] to develop and implement an adequate self-evaluation and  
18 transition plan that sets forth the steps necessary to achieve full and equally effective access for  
19 persons with mobility disabilities ....”).

20           Moreover, based on the information submitted, Mr. Chabner provides annual feedback  
21 on the status of the City’s ADA transition plan for buildings and facilities, including  
22 commenting on MOD’s capital budget requests for the plan and setting priorities for funding of  
23 projects. See Mizner Decl., ¶ 5, Ex. B. He also negotiates consensus among the Committee  
24 members to shape MDC and MOD policies as they relate to the ADA Transition Plan for Curb  
25 Ramps and Sidewalks and the UPhAS ADA Transition Plan for Facilities. Scott Decl. ¶ 6. As  
26 indicated, Plaintiffs directly challenge the sufficiency of the City’s ADA transition plan.  
27 Finally, while Mr. Chabner’s actions and recommendations are not binding on the City, it  
28 appears from the Scott and Mizner declarations that Mr. Chabner holds significant persuasive

1 power in shaping and developing City policy with respect to physical access. This is in  
2 accordance with the overall role of the Physical Access Committee to “advise the Mayor on  
3 disability issues” and “work with MOD to ensure ADA compliance throughout the City.”  
4 Mizner Decl. ¶ 3.

5 At bottom, Mr. Chabner, like Ms. Fraguli, is responsible, at least in part, for developing  
6 and implementing the very City programs and policies challenged by Plaintiffs. Given his  
7 position as chair of the Physical Access Committee, he participated in the very behavior that is  
8 being challenged. See e.g. Donaldson v. Microsoft Corp., 205 F.R.D. 558, 568 (W.D. Wash.  
9 2001) (denying certification of a class that included, in an employment discrimination action,  
10 both supervisory and non-supervisory employees, finding: “[s]ince plaintiffs[’] allegations  
11 about disparate treatment and disparate impact arise directly from the evaluation system at  
12 Microsoft, the Court is unable to envision a class which would include both those who  
13 implemented the ratings system and those who allegedly suffered under it.”); Bacon v. Honda  
14 of America Mfg., Inc., 205 F.R.D. 466, 481-82 (S.D. Ohio 2001) (denying class certification  
15 on the ground that the adequate representation requirement has not been satisfied, in view of  
16 the inclusion of both supervisory and non-supervisory employees in the proposed class,  
17 finding: “[a]t Honda, exempt level employees and even team leaders participate in employment  
18 decisions touching upon production associates in matters of promotion, associate evaluations  
19 and discipline which would place them in the conflicting position of having to defend their  
20 actions against a discrimination challenge.”). Therefore, Mr. Chabner has a conflict with the  
21 class that precludes adequate representation, which can be remedied by excluding him from the  
22 class definition.<sup>1</sup>

23  
24  
25  
26 <sup>1</sup> Plaintiffs also oppose the City’s motion on the ground that the Court previously  
27 granted Plaintiffs’ Motion in Limine No. 3 to exclude Mr. Chabner from testifying at trial  
28 because he was not timely disclosed. See 3/18/11 Order at 5-6, Dkt. 389. However, Mr.  
Chabner’s inability to testify at trial does not change the fact that he has irreconcilable conflict  
with the class precluding adequate representation. Moreover, this Order does not change the  
Court’s in limine ruling.



1 **IV. CONCLUSION**

2 For the reasons stated above,

3 IT IS HEREBY ORDERED THAT:


4 1. The City's Motion for a Modification of the Class Definition to Exclude Howard  
5 Chabner as a Class Member is GRANTED; the class definition as set forth in the Court's June  
6 4, 2010 Order (Dkt. 285), and as modified in the Court's March 18, 2011 Order (Dkt. 505), is  
7 further modified as follows (modification underlined):

8 All persons with mobility disabilities who are allegedly being  
9 denied access under Title II of the Americans with Disabilities Act  
10 of 1990, Section 504 of the Rehabilitation Act of 1973, California  
11 Government Code Section 11135, et seq., California Civil Code §  
12 51 et seq., and California Civil Code § 54 et seq. due to disability  
13 access barriers to the following programs, services, activities and  
14 facilities owned, operated and/or maintained by the City and  
15 County of San Francisco: parks, libraries, swimming pools, curb  
16 ramps, sidewalks, cross-walks, and any other outdoor designated  
17 pedestrian walkways in the City and County of San Francisco.  
18 Excluded from the class are Joanna Fraguli, Deputy Director for  
19 Programmatic Access of the City and County of San Francisco's  
20 Mayor's Office on Disability, and Howard Chabner, Chair of the  
21 Physical Access Committee of the City and County of San  
22 Francisco's Mayor's Disability Council.

17 2. This Order terminates Docket 506.

18 IT IS SO ORDERED.

19 Dated: April 3, 2011

20   
21 SAUNDRA BROWN ARMSTRONG  
22 United States District Judge