DISTRICT COURT, DENVER COUNTY, COLORADO Court Address: 1437 Bannock Street, Rm 256, Denver, CO, 80202	DATE FILED: March 9, 2016 10:54 AM CASE NUMBER: 2016CV30247
Plaintiff(s) MARGARET DENNY v. **Defendant(s)** C AND C OF DENVER	⚠ **COURT USE ONLY** ⚠ Case Number: 2016CV30247 Division: 203 Courtroom:

Order: [PROPOSED] ORDER GRANTING CERTIFICATION OF A CLASS FOR SETTLEMENT PURPOSES ONLY AND PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT w/attach

The motion/proposed order attached hereto: GRANTED.

Having reviewed the Declarations of the Plaintiff, Margaret Denny, and counsel Timothy Fox of the Civil Rights Education and Enforcement Center and Kevin Williams of the Colorado Cross-Disability Coalition; the Complaint, the proposed Settlement Agreement; the proposed order; the Complaint; and the Answer, the Court finds that the requested relief is appropriate and that the provisions of the proposed order properly set forth the basis and grounds for approval of that relief. Accordingly, the following proposed order is approved, granted and adopted by the Court.

Issue Date: 3/9/2016

JOHN WILLIAM MADDEN IV
District Court Judge

District Court, City and County of Denver, Colorado 1437 Bannock Street Denver, CO 80202 Plaintiff: Margaret Denny, on behalf of herself and a proposed class of similarly situated people defined below v. Defendant: City & County of Denver Attorneys for Plaintiff: Timothy P. Fox (Atty. Reg. No. 25889) Civil Rights Education and Enforcement Center 104 Broadway, Suite 400 Denver, CO 80203 (303) 757-7901 tfox@creeclaw.org Kevin W. Williams (Atty. Reg. No. 28117) Colorado Cross-Disability Coalition Empire Park 1385 S. Colorado Blvd., Suite 610-A Denver, CO 80222 (303) 839-1775 kwilliams@ccdconline.org	▲ COURT USE ONLY ▲ Case Number: 2016CV030247 Div/Ctrm: 203

[PROPOSED] ORDER GRANTING CERTIFICATION OF A CLASS FOR SETTLEMENT PURPOSES ONLY AND PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT

This matter is before this Court on Plaintiff's Unopposed Motion for Certification of a Class for Settlement Purposes Only and Preliminary Approval of Settlement Agreement. For the reasons set forth below, the Court GRANTS the motion.

INTRODUCTION

In this proposed class action, Plaintiff alleges that Defendant City and County of Denver has violated requirements set forth under the Americans with Disabilities Act and Section 504 of the Rehabilitation Act governing installation, maintenance, and design of curb ramps that permit people who use wheelchairs or scooters to access and use the City's pedestrian right of way.

Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12131, *et seq.* ("ADA"), prohibits discrimination on the basis of disability by public entities. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, *et seq.*, ("Section 504") prohibits discrimination on the basis of disability by recipients of federal financial assistance. The ADA, Section 504, and their respective implementing regulations contain broad anti-discrimination mandates as well as specific requirements as to the installation, maintenance, and design of curb ramps. This is because accessible curb ramps are necessary to permit people with mobility disabilities who use mobility aids such as wheelchairs or scooters to access a public entity's pedestrian right of way (its sidewalks, crosswalks, and paved paths).

Specifically, the ADA and Section 504 require a public entity to affirmatively conduct comprehensive accessibility planning and to develop and effectively implement policies to ensure its system of curb ramps, sidewalks, crosswalks, pedestrian crossings and other walkways ("pedestrian rights of way"), *when viewed its entirety*, is readily accessible to, and useable by, persons with mobility disabilities. 42 U.S.C. § 12132; 29 U.S.C. § 794; 28 C.F.R. § 35.150; 28 C.F.R. § 41.57; 45 C.F.R. § 84.22(a); *Barden v. City of Sacramento*, 292 F.3d 1073, 1076-77 (9th Cir. 2002) (sidewalks are a program, service, or activity under Section 504 and Title II of the ADA); *Willits v. City of Los Angeles*, 925 F. Supp. 2d. 1089, 1094 (C.D. Cal. 2013). This is

known as the "program access" obligation, and it requires programmatic access to the entire pedestrian right of way. *Barden*, 292 F.3d. at 1076-77.

Additionally, the ADA and Section 504 require public entities to ensure that certain road or sidewalk construction or alterations made after the laws' effective dates are accessible to and usable by people with disabilities in accordance with set technical standards. Specifically, since its passage in 1990, the ADA has required that a public entity install and/or upgrade curb ramps to bring them into access compliance at intersections any time it conducts street construction or alteration such as resurfacing projects. 28 C.F.R. § 35.151(a)(1), (b)(1), (b)(4), (i); 45 C.F.R. § 84.23(b); *Kinney v. Yerusalim*, 9 F.3d 1067, 1073-74 (3d Cir. 1993); *Willits*, 925 F. Supp. 2d. at 1094; *Lonberg v. City of Riverside*, No. 97-CV-0237, 2007 WL 2005177, at *6 (C.D. Cal. May 16, 2007). Similarly, under Section 504, recipients of federal financial assistance must install compliant curb ramps at intersections for any new construction or alteration of streets, roads, and/or highways. 45 C.F.R. § 84.23(a)-(b); *Willits*, 925 F. Supp. 2d. at 1094. This is known as the "new construction and alterations" requirement. Federal law and guidelines set specific technical standards for compliance, such as for cross slope or landing space of a curb ramp. *See, e.g.*, 28 C.F.R. pt. 36, app. D § 4.7; 36 C.F.R. pt. 1191, app. D § 405; Briefing Memo, Department of Justice/Department of Transportation Joint Technical Assistance on Title II of the Americans with Disabilities Act Requirements to Provide Curb Ramps when Streets, Roads, or Highways are Altered through Resurfacing (July 8, 2013), http://www.ada.gov/doj-fhwa-ta.htm ("2013 DOJ/DOT Joint Technical Assistance Memo").

BACKGROUND

I. The Parties and the Investigation.

On January 25, 2016, Plaintiff filed her Class Action Complaint, which details her allegations and claims against the City and County of Denver. The City and County of Denver is a public entity covered by Title II of the ADA and a recipient of federal financial assistance covered by Section 504. Like many cities, it is served by a right of way system that includes pedestrian sidewalks.

Named Plaintiff in this case is Margaret Denny, a long-time Denver resident, who as a result of disability, uses a wheelchair for mobility. Denny Decl.¶¶ 2-3. Ms. Denny requires accessible curb ramps to be able to utilize the City's pedestrian right of way, and thus she has a personal interest in ensuring that the City complies with federal requirements governing accessibility of curb ramps. *Id*. ¶ 5. Ms. Denny also served as a "tester" in this case, a role discussed in more detail below. *Id*. ¶¶ 8-10; Fox Decl. ¶ 10.

Prior to filing this lawsuit, the Civil Rights Education and Enforcement Center ("CREEC") and several people who have mobility disabilities and use wheelchairs investigated Denver's compliance with curb ramp requirements of the ADA and Section 504. Specifically, CREEC submitted an open-records request to the City, which requested the identity of the sections of all streets in Denver that have undergone alterations since January 26, 1992, the effective date of the ADA (and after the 1977 effective date of Section 504). Fox Decl. ¶ 6. In response, the City produced a spreadsheet identifying more than 15,000 sections of city streets that had been altered since that date. *Id*. ¶ 7. CREEC reviewed and analyzed this spreadsheet, and then commissioned a survey of a sampling of the streets identified. *Id*. ¶¶ 8-9. CREEC alleges

that its survey found hundreds of violations of the curb ramp requirements of the ADA and Section 504, including a lack of curb ramps at intersections and curb ramps with excessively steep slope, among others. *Id*. ¶¶ 9, 11.

In addition to this survey, two CREEC members, Named Plaintiff Margaret Denny and another individual who uses a wheelchair for mobility, acted as testers for CREEC. *Id*. ¶ 10; Denny Decl. ¶¶ 8-10. Plaintiff and CREEC allege that, in that capacity, these individuals encountered corners in Denver without curb ramps at intersections that had been altered after the effective date of the ADA and Section 504. Fox Decl. ¶ 10; Denny Decl. ¶¶ 8-10.

In late December 2013, CREEC and co-counsel the Colorado Cross-Disability Coalition ("CCDC") approached the City seeking to remedy the issue of inaccessible curb ramps within the City pedestrian right of way. Fox Decl.¶ 12. Together, CREEC and CCDC presented to the City nearly 500 examples of curb ramps that they alleged did not comply with the ADA and/or Section 504 because, for example, the City had not installed any ramp at all on those corners in violation of those laws, the City had installed only one ramp where two were required, or ramps that were installed did not comply with specifications for features such as slope. *Id.* ¶ 13; Williams Decl. ¶ 8.

CREEC and CCDC proposed entering into a process of Structured Negotiations with the City to resolve this issue, and the City agreed. Fox Decl. ¶ 14. Over the next two years, the parties met face-to-face multiple times, held dozens of phone calls, and negotiated extensively over email, exchanging documents and more than thirty drafts of the settlement agreement, and consulting an independent expert and city architectural employees. *Id*. ¶¶ 15-19. The settlement negotiations included discussions of curb ramp placement prototypes, the parameters and scope

for a survey of curb ramps within the City, and the exclusion from the settlement (primarily because of jurisdictional issues) of (1) components of the City's sidewalk system other than curb ramps, (2) street segments that do not contain sidewalks but do contain bus stops, and (3) curb ramps adjacent to roads that comprise the State Highway System as defined in Colo. Rev. Stat. §§ 43-2-101 and -102. *Id*. ¶ 20.

The City disputes and contests Plaintiff's allegations and claims in the Class Action Complaint and, therefore, a real case or controversy exists between the parties, which they have elected to resolve by agreement. The Settlement Agreement is the culmination of the two years' worth of effort and represents an arm's-length, non-collusive agreement between the opposing parties. *Id*. ¶ 21.

II. Summary of Settlement Agreement Terms.

The Proposed Settlement Agreement was filed with the Court as Exhibit A to the Proposed Preliminary Approval Order and is attached to and hereby incorporated by reference in this Order. Ex. A. The following summarizes its principal terms, though the exact terms and language in the Settlement Agreement control:

Plaintiff and the City have negotiated a comprehensive scheme for injunctive relief, which requires the City to come into compliance with the law and regulations described above. The first step is for the City, at its own expense and using a methodology and collecting a data set that the parties have negotiated, to perform a comprehensive survey of curb ramps, which shall be completed by the end of 2017. Next, as the City started doing in 2014 after the parties' negotiations commenced, the City will install or cause the installation of 1,500 curb ramps per calendar year until compliant curb ramps are in place, with a few limited exceptions, at all

locations within the City and County of Denver where street level pedestrian walkways cross curbs adjacent to City owned right of way. This minimum number does not relieve the City of its obligation under the ADA and Section 504 to install curb ramps when it constructs or alters a curb or street, or causes a curb or street to be altered, even if doing so requires installation of more than 1,500 curb ramps in a given year. A minimum of 400 of the 1,500 ramps installed each year will be installed at locations (1) requested through the City's existing request procedure, which it agrees to maintain, and/or (2) where street level pedestrian walkways cross curbs and no curb ramp currently exists. *See generally* Settlement Agreement, § III. Throughout the term of the Agreement, the City shall maintain curb ramps in operable working condition, and provide yearly training to its employees on curb ramps. *Id.* § III(E)-(F).

The Settlement Agreement provides a monitoring process that involves both a third-party monitor and monitoring by Class Counsel. *Id.* § III(D). First, the City shall annually report to Class Counsel the curb ramps installed and streets altered in the preceding year. Each year, the City shall also retain an Independent Inspector to survey a random 10% sampling of such locations and provide a report of that sampling to both sides. The parties shall report yearly on their progress under the Agreement, to the Court and a Special Master appointed by the Court as called for in the Settlement Agreement. The Special Master will have the power to make decisions in all matters pertaining to administration and enforcement of the Agreement. *Id.* § VIII(B). The parties have also agreed to a multi-stage dispute resolution process in which disputes that the parties cannot resolve themselves will be brought to the Special Master. *Id.* § VIII.

The term of the Settlement Agreement extends until the Independent Inspector submits a final report confirming that the City has modified or installed all compliant ramps required by the Agreement and until any disputes relating to that final report have been resolved. *Id.* § III(G).

The Settlement Agreement also provides for a payment of $5,000 to Named Plaintiff Margaret Denny as consideration for release of her damages claims. CREEC and CCDC also release any damages claims they may have brought on behalf of themselves but not their members. *Id.* § IX(B). Named Plaintiff has not sought, and is not receiving, an incentive award. *Id.* § VI(D). The Settlement Agreement recognizes that Class Counsel are entitled to their reasonable attorneys' fees and costs in negotiating the Settlement, obtaining final approval, and in any monitoring required. *Id.* § VI. Fees at all stages are capped. *Id.* Class Counsel will file a motion seeking an award of fees consistent with the provisions of the Settlement Agreement. *Id.* § IV(D).

The Settlement Agreement releases the injunctive claims of class members, but does not release the damages claims of class members. § IX(A).

DISCUSSION

I. THE PROPOSED CLASS IS CERTIFIED.

A. Definition of the Proposed Class.

Plaintiff seeks to certify the following class of individuals pursuant to Colorado Rule of Civil Procedure ("CRCP") 23(b)(2): "All persons with disabilities who use wheelchairs or scooters for mobility who, through the date of preliminary approval of the Settlement Agreement, use or will use the pedestrian right of way in the City and County of Denver." The

proposed class seeks injunctive and declaratory relief. The proposed class does not seek damages.[1]

B. Legal Standard for Class Certification.

To certify the proposed class in this case, this Court must determine that the Named Plaintiff has standing to assert injunctive claims, and that the proposed class meets the requirements of CRCP 23. *See, e.g., Armstrong v. Davis*, 275 F.3d 849, 860, 868 (9th Cir. 2001).[2] As set forth below, both of these prerequisites are easily met here.

C. The Named Plaintiff Has Standing to Seek Injunctive Relief.

To have standing to seek injunctive relief, a plaintiff must "satisfy the two prongs of Colorado's test for standing: the plaintiff suffered (1) an injury-in-fact, (2) to a legally protected interest." *Ainscough v. Owens*, 90 P.3d 851, 855 (Colo. 2004) (en banc); *see also Bd. of Cnty. Comm'rs, La Plata Cnty. v. Bowen/Edwards Assocs., Inc.*, 830 P.2d 1045, 1052 (Colo. 1992) (citations omitted).[3] The first prong requires "a concrete adverseness which sharpens the

[1] As stated above, Named Plaintiff Margaret Denny does seek individual damages only. *See supra*, Background § II. Damages *on behalf of the class* are neither sought in this case, nor are precluded by this settlement. *See id.*; Settlement Agreement § IX(A)-(B) (expressly stating that class damages claims are not released); *Jahn v. ORCR, Inc.*, 92 P.3d 984, 988 (Colo. 2004) (en banc) ("[C]lass actions for injunctive relief certified under C.R.C.P. 23(b)(2) do not preclude individual actions for damages.").

[2] There is not a significant amount of binding authority interpreting CRCP 23. However, because CRCP 23 is "virtually identical" to its federal counterpart, Colorado courts "may look to case law regarding the federal rule for guidance." *LaBerenz v. Am. Family Mut. Ins. Co.*, 181 P.3d 328, 333 (Colo. App. 2007) (citations omitted); *see also Air Commc'n & Satellite Inc. v. EchoStar Satellite Corp.*, 38 P.3d 1246, 1251 (Colo. 2002) (en banc) (citing cases); *Mountain States Tel. & Tel. Co. v. Dist. Court, City & Cnty. of Denver*, 778 P.2d 667, 671 (Colo. 1989) (citation omitted).

[3] This Colorado standard is less stringent than the standard in federal court. *Rector v. City & Cnty. of Denver*, 122 P.3d 1010, 1018 (Colo. App. 2005) (citing *Ainscough*, 90 P.3d at 855). However, "similar considerations" underlie both, and federal cases are persuasive in Colorado

presentation of issues that parties argue to the courts." *Ainscough*, 90 P.3d at 855 (citation omitted). The deprivation of civil liberties, or of a legally created right, "although themselves intangible, are nevertheless injuries-in-fact." *Id.* (citation omitted). The second prong "requires that the plaintiff have a legal interest protecting against the alleged injury." *Id.* (citation omitted). "This is a question of whether the plaintiff has a claim for relief under the constitution, the common law, a statute, or a rule or regulation." *Id.* (citing *Bowen/Edwards Assocs., Inc.*, 830 P.2d at 1053). "Thus, legally protected rights encompass all rights arising from constitutions, statutes, and case law." *Id.*

Named Plaintiff Margaret Denny has standing to pursue injunctive relief because she: (1) uses a motorized wheelchair for mobility and thus requires curb ramps to be able to utilize the City's pedestrian right of way; (2) has experienced inaccessible curb ramps on numerous occasions throughout the City; and (3) has been and is also deterred from using the City's pedestrian right of way because of inaccessible curb ramps. The denial of her civil right, guaranteed by the ADA and Section 504, to access the City's pedestrian right of way is an injury-in-fact that meets the first prong of Colorado's standing test. *See Ainscough*, 90 P.3d at 855. The second prong is met because the statutes that guarantee that civil right provide a claim for relief. 29 U.S.C. §§ 794, 794a; 42 U.S.C. § 12133 (incorporating by reference 29 U.S.C. § 794a); *see Ainscough*, 90 P.3d at 855.[4]

Named Plaintiff Margaret Denny also served, in part, as a "tester" in this case, *i.e.*, a person whose purpose in attempting to utilize a defendant's services is "to determine whether

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state court. *City of Greenwood Vill. v. Petitioners for Proposed City of Centennial*, 3 P.3d 427, 436 n.7 (Colo. 2000) (en banc).

[4] For the same reasons, Named Plaintiff Denny has standing to assert her own individual claim for damages against the City.

defendant engaged in unlawful practices." *Tandy v. City of Wichita*, 380 F.3d 1277, 1285-89 (10th Cir. 2004) (holding that testers have standing under Section 504 and under Title II of the ADA).[5] As such, Ms. Denny's purpose in investigating curb ramps in the City was in part to determine whether those curb ramps comply with ADA and Section 504 requirements. Standing for "testers" also comports with Colorado's "relatively broad definition of standing." *Ainscough*, 90 P.3d at 855. Thus, her testing motive is also sufficient to establish Ms. Denny's standing. *Tandy*, 380 F.3d at 1285-89.

D. The Proposed Class Meets the Requirements of Rule 23.

Although Denver does not oppose Plaintiff's motion, this Court must still determine that the proposed class meets all of the requirements of CRCP 23(a) and at least one of the provisions of Rule 23(b)(2). CRCP 23(a) provides:

> (1) The class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Plaintiff seeks certification under CRCP 23(b)(2), alleging that Defendant "has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." CRCP 23(b)(2).

[5] The Tenth Circuit's opinion is persuasive authority here. *See City of Greenwood Vill*, 3 P.3d at 436 n.7. Additionally, the Tenth Circuit and other courts have reached the same conclusion as to tester standing under Title III of the ADA. *See Colo. Cross Disability Coal. v. Abercrombie & Fitch Co.*, 765 F.3d 1205, 1211-12 (10th Cir. 2014); *Houston v. Marod Supermarkets, Inc.*, 733 F.3d 1323 (11th Cir. 2013); *Klaus v. Jonestown Bank & Trust Co. of Jonestown, PA*, No. 1:12-CV-2488, 2013 WL 4079946, at *7 (M.D. Pa. Aug. 13, 2013); *Betancourt v. Federated Dep't Stores*, 732 F. Supp. 2d 693 (W.D. Tex. 2010); *Molski v. Arby's Huntington Beach*, 359 F. Supp. 2d 938, 947-48 (C.D. Cal. 2005); *Molski v. Price*, 224 F.R.D. 479, 484 (C.D. Cal. 2004) (holding that plaintiff whose motive for visiting a service station was in part "to check on the station's ADA compliance" had standing under title III).

These rules reflect the fact that "[c]lass actions serve an important function in our system of civil justice, and a trial court has considerable discretion to manage them." *Air Commc'n*, 38 P.3d at 1251; *accord Jackson v. Unocal Corp.*, 262 P.3d 874, 880 (Colo. 2011) (en banc) (citing cases). Two principles guide that discretion. First, given the important purposes underlying Rule 23, "Colorado has a policy of favoring the maintenance of class actions," which also means that Rule 23 is liberally constructed. *Jackson*, 262 P.3d at 880-81 (citations and internal quotations omitted). Second, Plaintiff bears the burden of proof on class certification, but "so long as the trial court rigorously analyzes the evidence, it retains discretion to find to its satisfaction whether the evidence supports each C.R.C.P. 23 requirement." *Id.* at 884.

1. The Proposed Class Meets the Requirements of CRCP 23(a).

a. The Proposed Class is so Numerous that Joinder is Impracticable.

Rule 23(a)(1) requires "[a] party seeking class certification to establish by competent evidence that the class is sufficiently large to render joinder impracticable." *LaBerenz,* 181 P.3d at 334 (citation omitted). Actual size is a significant factor, but ultimately, the numerosity requirement "imposes no absolute limitations." *Id.* (citation omitted). Thus, "the numerosity requirement is satisfied where the exact size of the class is unknown but general knowledge and common sense indicate that it is large." *Id.* at 334-35 (citations omitted). Courts have routinely found the numerosity requirement established where the proposed class contains 40 or more members. *See, e.g.*, Newberg on Class Actions § 3:12 (5th ed.). Additionally, courts may consider census data in determining whether numerosity is met. *Californians for Disability Rights, Inc. v. Cal. Dep't of Transp. ["Caltrans"]*, 249 F.R.D. 334, 347 (N.D. Cal. 2008).

Here, U.S. Census data indicates that there are currently approximately 33,000 individuals with ambulatory disabilities residing in the City and County of Denver. Thousands more individuals with mobility disabilities likely travel through Denver each year due to its thriving tourism industry, and certainly individuals with mobility disabilities are among the many people moving to Denver as part of its current population boom. Accordingly, the Proposed Class likely numbers in at least the thousands, making joinder highly impracticable and class treatment appropriate. *See Caltrans*, 249 F.R.D. at 347 ("extrapolating from the statistical data presented by plaintiffs" and using "common sense" to determine the class of individuals with mobility disabilities was sufficiently numerous); *see also LaBerenz*, 181 P.3d at 334-38.

b. There are Questions of Law and Fact Common to the Proposed Class.

Rule 23(a)(2) requires that there be "questions of law or fact common to the class." CRCP 23(a)(2). "This does not mean, however, that every issue must be common to the class . . . as long as the claims of the plaintiffs and other class members are based on the same legal or remedial theory." *LaBerenz*, 181 P.3d at 338 (citing *Joseph v. Gen. Motors Corp.*, 109 F.R.D. 635, 639 (D. Colo. 1986)). "In regard to civil rights suits, 'commonality is satisfied where the lawsuit challenges a system-wide practice or policy that affects all of the putative class members.'" *Willits*, 2011 WL 7767305, at *3 (quoting *Armstrong*, 275 F.3d at 868).

There are numerous questions of law and fact common to the Class here, such as:

- Whether Defendant has violated Title II and Section 504 by failing to comply with the programmatic access requirement.

- Whether Defendant has violated the new construction and alteration requirements of these statutes and their regulations.
- Whether Defendant has violated the design requirement provisions of these statutes and their regulations.
- What types of roadwork has Defendant performed since the effective dates of Title II and Section 504.
- Whether this roadwork constituted "alterations" for purposes of Title II and Section 504.
- Whether Defendant has performed "new construction" within the meaning of Title II and Section 504.
- Whether Defendant has failed to make reasonable modifications in policies, procedures, and practices that are necessary to provide persons with mobility disabilities with meaningful, equal, and safe access to Defendant's pedestrian right of way.
- Whether Defendant's violations result from deficient policies and practices.

Plaintiff's and the Proposed Class's claims are based on the same legal theory, *i.e.*, that the City violated ADA and Section 504. This establishes the commonality requirement. *See LaBerenz*, 181 P.3d at 338 (citing *Joseph*, 109 F.R.D. at 639). The commonality requirement is further established because this "lawsuit challenges a system-wide practice or policy that affects all of the putative class members," namely, the City's denial to the class of an accessible pedestrian right of way. *See Willits*, 2011 WL 7767305, at *3 (quoting *Armstrong*, 275 F.3d at 868). Thus the Proposed Class meets the requirements of CRCP 23(a)(2).

c. The Claims of the Named Plaintiff are Typical of the Claims of the Proposed Class.

Rule 23(a)(3) requires that the claims asserted by the representative plaintiff be typical of the claims of the class. "This requirement is usually met '[w]hen it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented . . . irrespective of varying fact patterns which underlie individual claims.'" *LaBerenz*, 181 P.3d at 338 (quoting *Ammons v. Am. Family Mut. Ins. Co.*, 897 P.2d 860, 863 (Colo. App. 1995)) (alterations in original). That is the allegation underlying the class action here—that Defendant's unlawful conduct vis-à-vis curb ramps was directed at or affected the named plaintiff and class. The typicality requirement is therefore met here. *See LaBerenz*, 181 P.3d at 338. In addition, "[a] finding of commonality frequently supports a finding of typicality." *Willits*, 2011 WL 7767305, at *3 (citing *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 n.13 (1982)). Because, as described above, commonality is met, so too is typicality. *Id.*

d. Named Plaintiff and Class Counsel Will Fairly and Adequately Protect the Interests of the Proposed Class.

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." CRCP 23(a)(4). This requirement inquires into the adequacy of the named plaintiff and of class counsel. *Kuhn v. State Dep't of Revenue of State of Colo.*, 817 P.2d 101, 106 (Colo. 1991) (en banc) (citations omitted). Specifically, "[c]riteria for assessing adequacy of representation include whether the plaintiff has common interests with the class members and whether the representative will vigorously prosecute the interests of the class through qualified counsel." *Cook v. Rockwell Int'l Corp.*, 151 F.R.D. 378, 386 (D. Colo. 1993). Adequate representation is usually presumed in the absence of contrary evidence. *Id.* (quoting 2

Robert Newberg, Newberg on Class Actions, § 7.24 at 7–80 to –81 (3d ed. 1992)); *see also Caltrans*, 249 F.R.D. at 349 (citations omitted).

The Named Plaintiff in this case has common interests with the class members. Named Plaintiff Margaret Denny is a long-time Denver resident, a member of the proposed class, and seeks to remedy the deficient curb cuts throughout Denver that she and other class members have encountered.[6] These interests are shared with the class and consistent with remedying the violations that this class action seeks to address.

Furthermore, the Named Plaintiff will vigorously prosecute the interests of the class through qualified counsel. Proposed class counsel Timothy Fox of CREEC and Kevin Williams of CCDC have all successfully represented numerous plaintiff classes of individuals with disabilities in prior class actions lawsuits, in Colorado state and federal court and across the country, having been found by the relevant courts to meet the adequate representation requirements under Rule 23. *See generally* Fox Decl. ¶ 24; Williams Decl. ¶ 9. Class counsel are thoroughly familiar with the ADA and with issues concerning, and the protection of the rights of,

[6] The fact that Named Plaintiff Denny also seeks individual damages as part of this settlement does not create a conflict between her and the proposed class. First, as explained above, class damages are neither sought nor precluded by this settlement. *See supra* n.1. Class members will therefore suffer no prejudice with regard to damages as a result of this case. *See, e.g.*, *Ochoa v. City of Long Beach*, No. CV 14-4307 DSF, at 5 (C.D. Cal. Sept. 15, 2015). Second, Ms. Denny served an integral part in the development of this case, in her role as a tester for CREEC. She does not seek an incentive award, just simply a modest, reasonable amount in exchange for release of her individual claim for damages against Defendant. This is proper. *See Rhodes v. Lauderdale Cnty., Tenn.*, No. 2:10-CV-02068-JPM, 2012 WL 4434722, at *1 (W.D. Tenn. Sept. 24, 2012) (adjudicating individual damages claims for named plaintiffs after certifying Rule 23(b)(2) class); *Satchell v. FedEx Exp.*, No. C03-2659 SI, 2006 WL 3507913, at *1 (N.D. Cal. Dec. 5, 2006) ("Defendant does not cite any authority for the proposition that a named plaintiff may not assert additional, non-class claims."); *cf. Williams v. Nat. Sec. Ins. Co.*, 237 F.R.D. 685, 696 (M.D. Ala. 2006) (approving incentive award of $5,000 each in Rule 23(b)(2) for two named plaintiffs).

people with disabilities. They have thoroughly investigated this case, revealing the hundreds of curb ramp violations originally presented to the City, and have negotiated the settlement for which approval is sought for over two intensive years. Class counsel also have the resources to litigate this case, as demonstrated by the settlement achieved in this case, which provides a substantial and important injunctive relief to the class.

Thus, Plaintiff has met the adequacy requirement of Rule 23(a)(4).

2. The Proposed Class Meets the Requirements of CRCP 23(b)(2).

A class is proper under Rule 23(b)(2) if "[t]he party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." CRCP 23(b)(2). "Civil rights cases against parties charged with unlawful, class-based discrimination are prime examples" of appropriate Rule 23(b)(2) class actions. *Amchem Prods. v. Windsor*, 521 U.S. 591, 614 (1997) (citations omitted). The requirements of Rule 23(b)(2) are "almost automatically satisfied in actions primarily seeking injunctive relief." *Kanter v. Casey*, 43 F.3d 48, 58 (3d Cir. 1994). Accordingly, numerous courts have certified classes consisting of individuals with mobility disabilities who use or will use a defendant's pedestrian right of way. *See, e.g.*, *Ochoa*, No. CV 14-4307 DSF (C.D. Cal. Sept. 15, 2015); *Willits*, 2011 WL 7767305; *Caltrans*, 249 F.R.D. 334; *Barden*, 292 F.3d 1073.

The claims brought in this case are within the type of claims that Rule 23(b)(2) was intended to cover. Here, Plaintiff seeks broad declaratory and injunctive relief – system wide improvements in Denver's pedestrian rights of way program – on behalf of a large and amorphous class of all Denver residents and visitors who use wheelchairs or scooters who are

being denied access to that program due to alleged deficiencies in the City's policies and practices. Additionally, the Proposed Class seeks only class-wide declaratory and injunctive relief to address the alleged deficiencies and does not seek any class damages. Therefore, certification of the proposed class under Rule 23(b)(2) is proper.

II. THE SETTLEMENT AGREEMENT IS PRELIMINARILY APPROVED.

The terms of the Settlement Agreement are summarized in Background Section II above.

Under CRCP 23(e), "[a] class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." CRCP 23(e). "In evaluating a proposed settlement under C.R.C.P. 23(e), the trial court must determine whether the settlement is fundamentally fair, adequate, and reasonable." *Bruce W. Higley, D.D.S., M.S., P.A. Defined Ben. Annuity Plan v. Kidder, Peabody & Co.*, 920 P.2d 884, 891 (Colo. App. 1996); *Thomas v. Rahmani-Azar*, 217 P.3d 945, 947 (Colo. App. 2009) (citing cases). At final approval, this involves an analysis of a number of different factors. *See Higley*, 920 P.2d at 891 (citing *Helen G. Bonfils Found. v. Denver Post Emps. Stock Trust*, 674 P.2d 997, 999 (Colo. App. 1983)). Preliminary approval, however, is an initial assessment of the fairness of the proposed settlement made by a court on the basis of written submissions and presentations from the settling parties. Preliminary approval of a settlement and notice to the proposed class is appropriate "where it appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, and does not improperly grant preferential treatment to class representatives." *In re Crocs, Inc. Sec. Litig.*, No. 07-CV-02351-PAB-KLM, 2013 WL 4547404, at *3 (D. Colo. Aug. 28, 2013) (citation omitted); *see also* Newberg on Class Actions § 13:13 (5th ed.).

Here, the proposed Settlement Agreement satisfies the standard for preliminary approval. It was "was negotiated by competent counsel during arms-length negotiations," and serious questions of law exist as to the City's compliance with important civil rights laws. *Tuten v. United Airlines, Inc.*, No. 12-CV-1561-WJM-MEH, 2013 WL 8480458, at *3 (D. Colo. Oct. 31, 2013). "As with any class action, litigation in this case would likely be expensive and time-consuming." *Id.* The monetary terms are fair and adequate, in that class members are not releasing their right to individual damages claims, and Ms. Denny, who is, is receiving $5,000 for doing so. This small sum is not significant enough to be considered preferential treatment, and is fair and adequate consideration, as agreed to by the parties, for her release of her individual damages claims. Class Counsel's fees are also fair and adequate—they total well below six figures for the two years of work leading up to this agreement, are capped at $35,000 for work performed in connection with this settlement, and are further capped at no more than $100,000 per year in monitoring. Finally, the parties "represent[] that they believe that the settlement is fair and adequate." *Id.* Because these facts establish that the Settlement Agreement is fundamentally fair, adequate, and reasonable, preliminary approval is granted.

III. THE NOTICE, NOTICE DISSEMINATION PLAN, AND OBJECTION PROCEDURES ARE APPROVED.

As part of the settlement of a class action, the parties must give notice "to all members of the class in such manner as the court directs." CRCP 23(e). This Court is also specifically authorized to

> make appropriate orders . . . [*inter alia*] [r]equiring, for the protection of the members of the class or otherwise for the fair conduct of the action, the notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity

> of members to signify whether they consider the representation fair and adequate
> . . . .

CRCP 23(d)(2). Yet, in cases seeking certification under CRCP 23(b)(2), as here, notice may not be required. *See* CRCP 23(c)(2)-(3); *Jahn*, 92 P.3d at 988-91. This is because "Rule 23(b)(2), which authorizes class claims for injunctive relief and lacks notice and other procedural requirements, reflects that due process may only require adequate representation to bind class members to judgments for injunctive relief." *Jahn*, 92 P.3d at 989.

This Court nevertheless holds that notice of this settlement is appropriate here, for, among other reasons, "the fair conduct of the action." CRCP 23(d)(2). The notice, which was filed with the Court as Exhibits 5 and 6 to the Settlement Agreement attached to the Proposed Preliminary Approval Order, describes the Settlement Class, summarizes the proposed settlement, and explains to class members their right to object and be heard in open court. The parties propose dissemination of a short-form notice through publication in the Denver Post and a long-form through known disability groups throughout the state. Class counsel also proposes to post the notice and settlement agreement on the websites of CREEC and CCDC.

The Court holds that notice is appropriate here, and authorizes the notice dissemination plan. The notice and plan are the most reasonable manner to ensure class members receive word of the settlement. This is not a case like many other class actions when there is a list of shareholders of a company, employees, or purchasers of a product that can be obtained through reasonable efforts. Publication of a short-form notice in the newspaper and a long-form notice to disability groups around the state and posting the notice and settlement agreement on the websites of CREEC and CCDC will establish the fair conduct of this action and also satisfies the requirements of due process and CRCP 23.

IV. CLASS MEMBERS ARE ENJOINED FROM ASSERTING RELEASED CLAIMS.

Pursuant to CRCP 23(d), "the court may make appropriate orders: (1) Determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; . . . (3) Imposing conditions on the representative parties or on intervenors; . . . (5) Dealing with similar procedural matters . . . ." CRCP 23(d). Rule 23 in general "is a case management tool," vesting the trial court with significant discretion to manage the class actions that it certifies. *See generally Jackson*, 262 P.3d at 880-84. Courts presiding over class actions frequently enjoin class members from bringing related litigation in other state or federal courts. *See, e.g.*, *Liles v. Del Campo*, 350 F.3d 742, 746 (8th Cir. 2003); *see also* 7B Fed. Prac. & Proc. Civ. § 1798.1 (3d ed.).[7] This can be done in connection with preliminary approval of a proposed class action settlement. *See, e.g.*, *In re Mexico Money Transfer Litig.*, No. 98 C 2407, 98 C 2408, 1999 WL 1011788, at *3 (N.D. Ill. Oct. 19, 1999); *In re WorldCom Inc. Sec. Litig.*, No. 02 Civ. 3288 (DLC), 03 Civ. 9490 (DLC), 2005 WL 78807, at *3 (S.D.N.Y. Jan. 11, 2005).

In this case, pursuant to the Court's case management powers under Rule 23, the Court grants Plaintiff's request that this Court enjoin – pending an entry of a Final Order and Judgment – class members from initiating or prosecuting any claims against the City seeking declaratory or injunctive relief arising from inaccessibility of curb ramps on City street segments with sidewalks brought under Title II of the ADA or Section 504. This injunction does not apply to

[7] Federal courts have done so under the federal All Writs Act, 28 U.S.C. § 1651(a), which provides that federal courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." Colorado's broadly written, case-management-centric Rule 23 provides a similar power with regard to enjoining competing claims from class members here. *See generally Jackson*, 262 P.3d at 880-84.

elements excluded from the settlement: (1) components of the City's sidewalk system other than curb ramps, (2) street segments that do not contain sidewalks but do contain bus stops, (3) curb ramps adjacent to roads that comprise the State Highway System as defined in Colo. Rev. Stat. §§ 43-2-101 and -102, or (4) individual claims for damages.

CONCLUSION

Based on the above, the Court GRANTS Plaintiff's Unopposed Motion for Certification of a Class For Settlement Purposes Only and Preliminary Approval of Settlement Agreement and ORDERS:

1. The following class is certified for settlement purposes only: "All persons with disabilities who use wheelchairs or scooters for mobility who, through the date of preliminary approval of the Settlement Agreement, use or will use the pedestrian right of way in the City and County of Denver";

2. Margaret Denny is appointed as a representative of the class;

3. Timothy Fox of CREEC and Kevin Williams of CCDC are appointed as Class Counsel;

4. The proposed Settlement Agreement is preliminarily approved;

5. The form of the proposed Notice and the Notice Dissemination Plan, attached as Exhibits 5 and 6 to the Settlement Agreement, are approved;

6. Class members are enjoined from initiating or prosecuting any litigation related to the claims resolved by the Settlement Agreement against the City pending this Court's entry of Final Order and Judgment; and

7. The Court sets the following deadlines:

Notice Deadline: Notice to the class will issue within 10 business days after today's date.

Objection Deadline: Two months after the Notice Deadline.

Deadline for Class Counsel to File Fee Petition: Seven days prior to the Objection Deadline.

Deadline for Motion for Final Approval: Two weeks prior to the Final Approval Hearing.

Final Approval Hearing: Three months after the Notice Deadline, or as soon thereafter as the Court may set the hearing.

IT IS SO ORDERED.

DATED: _____

_____

District Judge