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22 UNITED STATES DISTRICT COURT
23 NORTHERN DISTRICT OF CALIFORNIA

24 ELLEN LIEBER and GLEN VINTON on behalf of *QASE* NO C96-02955 MHP
25 themselves and all others similarly situated,

STIPULATED ORDER

25 Plaintiffs,

26 v.

27 MACY'S WEST, INC., a corporation,

28 Defendant. _____/

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5. Neither the ADA nor its implementing regulations contain any specific spacing requirement for moveable merchandise display racks. Conclusion of Law f 31.
6. Placing 36" between each display rack is not mandated by Title 24. Conclusion of Law f 37.
7. Macy's West was obligated, given the conditions within the merchandise pads, to take steps to maximize access within the merchandise pads to the extent readily achievable, and Macy's West did not satisfy its burden of proof as to the readily achievable standard. Conclusion of Law % 41.
8. Macy's West violated the ADA's requirement that places of public accommodation "take such steps as may be necessary" to provide access, and by failing to consider alternative methods to improve access. Conclusions of Law ff 45 & 47.
9. Macy's West had not adequately provided access to merchandise pads through readily achievable "alternative methods" such as customer service. Conclusion of Law t 50.
10. The trial evidence indicated that while Macy's stated an intention to improve customer assistance to people with disabilities, at the time of trial it had taken insufficient steps to ensure that shoppers with disabilities actually get adequate assistance from sales clerks. Conclusions of Law f 51.

WHEREAS, on July 26, 2001, this Court entered an injunctive order establishing a standard of access to merchandise on moveable display units at the Union Square Stores.

WHEREAS, on September 4, 2001, the parties submitted to the Court a Partial Settlement Agreement and Consent Decree ("Decree"), resolving all issues in this litigation other than the Pad Access Issue and the Perimeter Issue as defined in that Decree as follows:

"Pad Access Issue" refers to the dispute between the Parties regarding Macy's West's obligation to provide an accessible path of travel to and between moveable merchandise display units in the merchandise display areas of the Stores and/or to and between fixed merchandise display units in areas other than areas of new construction or alteration in the Stores. No class or injunctive relief claims concerning the Pad Access Issue are resolved by this Partial Settlement Agreement; however, the Parties do resolve all claims for damages of the Named Plaintiffs concerning this issue.

"Perimeter Issue" refers to the dispute between the Parties regarding whether the ADAAG requires a 36" path of travel to fixed merchandise display units in areas of alteration.

WHEREAS, the Court gave final approval to this Decree on February 25, 2002; and

WHEREAS, Macy's West continues to contend both that the Court's October 28, 1999

1 Findings of Fact and Conclusions of Law are legally erroneous and unsupported by the
2 evidentiary record and that the Court's July 26, 2001 Order is also flawed.

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4 **WHEREAS**, Macy's West has filed a Rule 59 motion and has announced its intention to
5 pursue all appeal rights; and

6 **WHEREAS**, both parties wish to avoid further expense and risk from protracted
7 litigation, the parties have now reached a compromise agreement on the Pad Access and
8 Perimeter Issues and have reduced their compromise agreement to writing as set forth below.

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10 Pursuant to the compromise agreement and with the approval of the Court, it is hereby

11 ORDERED that:

12 A. The portions of the Court's Orders of October 28, 1999 and July 26, 2001 relating
13 to equitable relief on the Pad Access Issue and the Perimeter Issue are superceded
14 by this stipulated Order, which the parties agree is not itself appealable and which
15 the parties agree moots the Rule 59 motion filed by Macy's West on August 9,
16 2001.

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18 B. As noted, this Order represents the compromise of disputed claims which the
19 parties mutually recognize would require protracted and costly litigation to
20 determine. The parties thus agree that Macy's West's agreement to the form and
21 content of this Order is not and may not be used by any person as an admission or
22 evidence that Macy's West has engaged in any practice that violates the ADA or
23 California state law.

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25 C. To settle this action, it is stipulated by the parties that, for the period of this Order,
26 in the Union Square Stores, Macy's West will provide access to substantially all
27 merchandise on merchandise pads from at least one path with a clearance of at
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1 least 32". The applicable path in a particular pad shall have clear sight-lines which
2 would enable wheelchair users and scooter users to determine at each juncture that
3 the path will remain clear for them. At locations within merchandise pads where a
4 path makes a sharply-angled turn around hard-edged merchandise display units,
5 Macy's West shall provide 36" clearance where necessary to make such paths
6 usable by patrons with mobility disabilities. For purposes of this Order,
7 "substantially all" shall mean 85% of merchandise within each Merchandising
8 Grouping Area in the Union Square Stores (as defined below) during the first year
9 after the effective date of this Order, and 90% of merchandise within each
10 Merchandise Grouping Area in the Union Square Stores (as defined below) for the
11 remainder of the period that this Order is in effect.

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14 D. Compliance with the applicable access standard in paragraphs C-M shall be
15 determined solely by the mechanism set out in Paragraph N below and shall be
16 measured by first counting the number of Fixture Elements (as defined below) in
17 each Merchandise Grouping Area (as defined below) being audited at the time of
18 the audits provided for in paragraph N. This number shall serve as the
19 "denominator" for that area. The numerator shall be the number of Fixture
20 Elements on which merchandise is accessible (as defined in paragraphs H-M
21 below) from the applicable 32" or 36" path.

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24 E. For purposes of this Order, Merchandising Grouping Area shall be defined as the
25 following 21 areas of the Union Square Stores:

- 26 1. Cellar, Main Building;
- 27 2. First floor, Main Building and Union Square Building;
- 28 3. Second Floor, Main Building;

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4. Second Floor, Union Square Building;
5. Third Floor, Main Building;
6. Third Floor, Union Square Building;
7. Fourth Floor, Main Building;
8. Fourth Floor, Union Square Building;
9. Fourth Floor, North Building;
10. Fifth Floor, Main Building;
11. Fifth Floor, Union Square Building;
12. Fifth Floor, North Building;
13. Sixth Floor, Main Building;
14. Sixth Floor, Union Square Building;
15. Sixth Floor, North Building;
16. Seventh Floor;
17. LL, Men's Store;
18. First Floor Men' s Store;
19. Second Floor Men's Store;
20. Third Floor Men's Store; and
21. Fourth Floor Men's Store.

F. For purposes of this Order, Fixture Elements shall be defined as follows:

1. each arm of a two-way fixture will count as a Fixture Element;
2. each arm of a standard four-way fixture will count as a Fixture Element;
3. every arm of a high capacity Lingerie four-way fixture will count as half a Fixture Element;
4. for rectangular tables where each of the two long sides adjoins a path, each of the long sides will be considered a Fixture Element;

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5. for rectangular tables where only one long side adjoins a path, the table will count as a Fixture Element;
6. square tables, and round tables up to 48" in diameter, where merchandise is displayed on all four sides, will be divided into two segments, each of which will count as a Fixture Element;
7. round tables greater than 48" in diameter will be divided into six segments, each of which will count as a Fixture Element;
8. each arm or shelf (or combination of arms or shelves) on a wall having merchandise carrying capacity comparable to an arm of a standard four-way fixture will count as a Fixture Element;
9. each rounder shall be divided into six segments, each one of which will count as a Fixture Element;
10. each shelf on a metro will count as a Fixture Element;
11. in the Furniture Department, each Vignette (as defined below) will count as a Fixture Element;
12. in the Furniture Department, every recliner/easy chair will count as half a Fixture Element;
13. in the Rug Department, each palate on which rugs are laid vertically on top of each other will be considered a Fixture Element;
14. in the Rug Department, each collection of swinging rods on which rugs are hanging will be considered a Fixture Element;
15. in the Luggage Department, each display unit or unit cluster that displays a particular type of luggage laid out so as to face in the same direction will be considered a Fixture Element;
16. in the Mattress Department, each bed display will be considered a Fixture Element; and
17. the portion of any other type fixture that has capacity comparable to the arm of a standard four-way or a standard metro shelf will count as a Fixture Element.

G. For purposes of this Order, a Vignette in the Furniture Department is defined as a collection of related merchandise displayed in a group setting so as to depict a particular layout, such as a dining room layout, bedroom layout, kitchen layout,

1 living room layout, etc.

2 H. For purposes of this Order, merchandise will be considered to be accessible where
3 wheelchair and scooter users can travel alongside of or in front of the Fixture
4 Elements on which merchandise is displayed, provided that nothing herein shall
5 be construed to require Macy' West to provide, as specified by this Order, more
6 than one 32" or 36" path to the merchandise with clear sight lines.
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8 1. Certain fixtures, such as many of those currently used in the Lingerie
9 Department of the Union Square Stores, are high-density four-ways that
10 have three columns of merchandise on each of the four sides of the fixture,
11 and each column consists of four "arms" from which the merchandise
12 hangs. In this situation, if there is a 32" or 36" path (whichever applies) on
13 only two sides of the of the four-way fixture, the following arms would be
14 considered accessible:

- 15 a. The arms that directly face the 32" or 36" pathway;
- 16 b. The arms on the outside columns of arms on the sides that do not
17 directly face the 32" or 36" path; and
- 18 c. The middle two arms (height-wise) on the middle column of arms
19 on the sides that do not directly face the 32" or 36" path.

20 2. Merchandise that is placed on rounders which are next to each other in a
21 line will be considered accessible even if there is less than 32" at the point
22 at which they are next to each other as long as there is otherwise a 32" or
23 36" path (whichever applies) running the circumference of such line of
24 rounders. Macy's West shall not place more than three rounders in a row
25 without a 32" path between the next additional rounder, except that
26 Macy's West may place up to five rounders in a row if there is no more
27 than 12" of space between each rounder.

28 3. Merchandise that is placed on round tables which are next to each other in
a line will be considered accessible even if there is less than 32" at the
point at which they are next to each other as long as there is otherwise a
32" or 36" path (whichever applies) running the circumference of such line
of round tables. Macy's West shall not place more than three round tables
in a row without a 32" path between the next additional table, except that
Macy's West may place up to five round tables in a row if there is no more
than 12" of space between each round table.

4. Round tables that are clustered in a group of three to create a triangle
shape layout will be considered accessible even if there is less than 32" at
the points at which they are next to each other as long as there is otherwise

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a 32" or 36" path (whichever applies) running the circumference of the table cluster. It is the expectation of the parties that there will be no paths of travel between these clustered tables.

- I. For purposes of this Order, in the Furniture Department, each Vignette will be considered accessible where wheelchair and scooter users can get directly up to at least one point along the edge of the Vignette from a 32" or 36" path, as applies, so as to be able to observe the merchandise on display within the Vignette.
- J. For purposes of this Order, in the Furniture Department, a recliner/easy chair will be considered accessible where wheelchair and scooter users can get up to or alongside at least one edge of the recliner/easy chair from a 32" or 36" path, as applies.
- K. For purposes of this Order, in the Rug Department, all of the rugs on each palate on which rugs are stacked will be considered accessible where wheelchair and scooter users can get directly up to at least one point along the edge of the palate from a 32" or 36" path, as applies. Each collection of swinging rods on which rugs are hung will be considered accessible where users of standard size wheelchairs and scooters can get up to and travel alongside the edges of the hanging rugs on a 32" or 36" path, as applies.
- L. For purposes of this Order, in the Luggage Department, merchandise will be considered accessible where wheelchair and scooter users can get up to and travel alongside the primary forward facing side of the luggage display unit along a 32" or 36" path, as applies.
- M. For purposes of this Order, in the Mattress Department, each bed display unit will be considered accessible where wheelchair and scooter users can get up to at least one point along the edge of the bed display on a 32" or 36" pathway, as applies.

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- N. The following procedures shall exclusively govern determinations of compliance and enforcement of this Order:
1. • There will be three Audit Periods annually. These Audit Periods shall run from 10/1-1/31; 2/1-5/31 and 6/1-9/30.
 2. A Monitor to be selected by the parties shall conduct 10 audits during each twelve-month period that this Order is in effect. Four of the audits will be conducted at regular intervals dispersed throughout the Audit Period 10/1-1/30, and three audits will be conducted at regular intervals dispersed in each of the remaining two Audit Periods.
 3. At the beginning of the first Audit Period following the entry of this Order, the Monitor will randomly select seven of the twenty-one Merchandise Grouping Areas to be audited during that period. In the second Audit Period, the Monitor will randomly select to be audited seven of the remaining fourteen Merchandising Grouping Areas. Additionally, any Merchandise Grouping Areas that do not meet the applicable access standard from paragraphs C-M during the prior Audit Period shall also be included as additional grouping(s) in the second Audit Period. The seven remaining Merchandise Grouping Areas that were not audited in the first or second Audit Periods shall be audited during the third Audit Period of the year. Additionally, any Merchandise Grouping Areas that do not meet the applicable access standard from paragraphs C-M during the second Audit Period shall also be included as additional groupings in the third Audit Period. This same process will be repeated in each year that this Order is in effect.
 4. In each Audit Period, the results of the inspections for each Merchandise Grouping Area will be averaged so that, for each audit period, there will be a separate average for each Merchandise Grouping Area being audited. If the average for a Merchandise Grouping Area in an Audit Period is below the applicable access standard from paragraphs C-M, the parties will meet and confer to try to reach agreement on steps to ensure that the Merchandise Grouping Area or Areas will not fall below the applicable access standard from paragraphs C-M, on average, in future periods for which this Order is in effect. If the parties are not able to reach agreement on appropriate next steps, Plaintiffs may then present the matter to the Court to seek specific relief aimed only at ensuring that the average for such Merchandise Grouping Area or Areas that did not comply will not fall below the access standard set forth in paragraphs C-M in future periods for which this Order is in effect; a contempt sanction will not be available.
 5. If one or more of the Merchandising Grouping Areas that failed to meet the applicable access standard set forth in paragraphs C-M during an audit

1 again falls below the applicable access standard set forth in paragraphs C-
2 M in any subsequent Audit Periods during the time that this Order is in
3 effect, Plaintiffs may then invoke the following dispute resolution process:

- 4 a. The parties shall meet and confer to try to reach agreement upon
5 appropriate steps to ensure that such non-compliant Merchandise
6 Grouping Area or Areas do not again fall below the applicable
7 access standard set forth in paragraphs C-M. The parties shall
8 negotiate in good faith for up to 45 days in an attempt to resolve
9 their differences.
- 10 b. If the parties are unable to resolve their differences after 45 days,
11 Plaintiffs may file an appropriate motion for enforcement with the
12 Court.
- 13 c. While contempt sanctions may be considered by the Court upon
14 such motion following exhaustion of this dispute resolution
15 process, a contempt sanction will not be imposed unless applicable
16 and controlling legal standards are met, and the Court finds that
17 there has been a material breach of this Order or any subsequently
18 issued Court order providing additional specific relief issued
19 pursuant to subpart 4 above.
- 20 d. hi considering an enforcement motion under subparagraphs
21 N(5)(b) and (c), the Court will be bound by the terms of this Order
22 and will only have jurisdiction to enforce it.
- 23 e. The parties stipulate that the prevailing party in any enforcement
24 motion filed pursuant to this Paragraph N may recover reasonable
25 fees and costs for time spent and costs incurred in pursuing such
26 motions subject to the standards set forth in *Christianberg*
27 *Garment Company v. EEOC*, 434 U.S. 412 (1978).

28 O. Macy's West shall pay the reasonable fees and costs of the Monitor. The parties
agree to retain Margen & Associates as the Monitor, and the proposal that Margen
& Associates has submitted to the parties shall control Macy's West's payment
obligations. In the event that Margen & Associates becomes unavailable, the
parties shall agree upon a mutually agreeable individual to assume the
responsibilities of the Monitor and, if they are unable to agree, may ask the Court
to appoint a suitable and appropriate replacement.

1 P. This Order shall remain in effect for three years from the beginning of the first
2 audit period following the date of entry of this Order. If the Union Square store
3 (Main Store and Men's store) is not fully compliant with the applicable access
4 standards in paragraphs C-M in the final two Audit Periods of the three year term,
5 this Order shall remain in effect until the Union Square Store has been fully
6 compliant for at least two consecutive Audit Periods. The Order may also be
7 extended for good cause shown. Good cause would include any ongoing dispute
8 resolution procedure.
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10 Q. The parties may seek modification of this Order by mutual agreement.
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12 R. In return for Macy's West's agreement to the form and content of this order, the
13 class representatives, on behalf of themselves and the Settlement Class Members
14 (as defined in the Partial Settlement and Consent Decree) are deemed by the Court
15 to have released Macy's West and its officers, directors, parents, subsidiaries,
16 affiliates, successors, insurers, employees, attorneys, and agents ("Released
17 Parties") from any and all past, present and future claims, liabilities, obligations,
18 demands, and actions, whether known or unknown, that were brought, could have
19 been brought, or that could be brought against the Released Parties for injunctive
20 or declaratory relief regarding the Pad Access Issue and the Perimeter Issue for the
21 period that this Order remains in effect. It is the expectation of the parties that this
22 Order provides the exclusive rights and obligations with respect to issues relating
23 to injunctive and/or declaratory relief on the Pad Access Issue and the Perimeter
24 Issue.
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28 S. For purpose of interpreting this Order, individual class members shall have no
right to individually enforce its terms. Only class representatives through class

1 counsel may seek to enforce the terms of this Order through the dispute resolution
2 processes provided for herein or before the Court. To the extent individual class
3 members have complaints regarding Macy's West's implementation of the terms
4 of this Order, they shall bring these complaints to the attention of named plaintiffs
5 and/or class counsel, who will decide whether to pursue them through the dispute
6 resolution process provided for herein.
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8 T. This Order shall not be admissible as evidence against Macy's West in *CDR v.*
9 *Macy's West, Inc.*, Case Number CTV-S-96-1605 LKK/GGH, *Camalo v. Macy's*
10 *West, Inc.*, Case No. C98-2350 MHP, or any other action against Macy's West
11 involving issues of access for customers with mobility disabilities to establish
12 what access Macy's West can provide to merchandise in stores other than the
13 Union Square Stores.
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15 U. The terms of this Order are and shall be binding upon the Parties, upon all of their
16 present and future representatives, heirs, counsel, agents, directors, officers,
17 assigns, and successors, and upon all class members.
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19 V. The parties have resolved all claims for attorneys' fees and costs.

20 W. Following entry of this Order, the parties shall issue a press release in the form
21 attached hereto as Exhibit A.
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23 **APPROVED AS TO FORM AND CONTENT:**

24 IT IS SO ORDERED

25 Dated: August __, 2002 _____

26 MARILYN HALL PATEL
27 Chief Judge
28 United States District Court
Northern District of California