

1 HELANE L. MORRISON (#127752)  
2 SUSAN F. LA MARCA (#215231)  
3 ELENA RO (#197308)

4 Attorneys for Plaintiff  
5 SECURITIES AND EXCHANGE COMMISSION  
6 44 Montgomery Street, Suite 2600  
7 San Francisco, California 94104  
8 Telephone: (415) 705-2500

9 UNITED STATES DISTRICT COURT  
10 NORTHERN DISTRICT OF CALIFORNIA  
11 SAN FRANCISCO DIVISION

12 SECURITIES AND EXCHANGE COMMISSION,  
13 Plaintiff,  
14 v.  
15 M & A WEST, INC., et al.  
16 Defendants.

Case No. CV 01-3376 VRW

~~PROPOSED~~ ORDER GRANTING  
PLAINTIFF'S MOTION FOR PARTIAL  
SUMMARY JUDGMENT AGAINST  
DEFENDANT F. THOMAS ECK, III;  
ENTERING INJUNCTION; ORDERING  
CIVIL PENALTIES

17  
18 The motion by plaintiff Securities and Exchange Commission ("Commission") for partial  
19 summary judgment against defendant F. Thomas Eck, III, pursuant to Rule 56 of the Federal Rules  
20 of Civil Procedure, supported by the Declaration of Elena Ro and the exhibits thereto, Plaintiff's  
21 Request for Judicial Notice and the exhibits thereto, plaintiff's memorandum, and the papers on  
22 file with the Court, has been submitted to the Court. By its motion, plaintiff seeks partial summary  
23 judgment against defendant Eck regarding his liability for aiding and abetting securities fraud, his  
24 offer and sale of securities without registration, and other related violations of the federal securities  
25 laws set forth in the Commission's complaint. Plaintiff also seeks by its motion adjudication of  
26 certain remedial sanctions, including the entry of an injunction against defendant, and the issuance  
27 of an order requiring defendant to pay civil monetary penalties.

1 The Court, having considered plaintiff's motion and any opposition or response thereto,  
2 and good cause appearing therefrom, hereby finds:

3 1. The Court has jurisdiction over defendant Eck and the subject matter of this  
4 litigation;

5 2. There is no genuine issue as to any material fact;

6 3. Defendant Eck knowingly provided substantial assistance to others who, directly or  
7 indirectly, by use of the means or instrumentalities of interstate commerce, or of the mails, or of a  
8 national securities exchange, in connection with the purchase or sale of securities, employed a  
9 device, scheme or artifice to defraud, and made untrue statements of material fact and omitted to  
10 state material facts necessary to make the statements made true, in light of the circumstances under  
11 which they were made, in violation of Section 10(b) of the Securities Exchange Act of 1934  
12 ("Exchange Act"), 15 U.S.C. § 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5, and is  
13 therefore liable for such violations pursuant to 15 U.S.C. § 78t(e);

14 4. Defendant Eck, directly or indirectly, in the absence of any applicable exemption,  
15 and without any registration statement filed with the Commission or in effect as to the securities,  
16 made use of means or instruments of transportation or communication in interstate commerce or of  
17 the mails to sell securities, and to offer to sell securities, in violation of Sections 5(a) and 5(c) of  
18 the Securities Act, 15 U.S.C. §§ 77e(a) and (c);

19 5. Defendant Eck knowingly provided substantial assistance to M&A West, Inc.  
20 ("M&A West") in its filing with the Commission annual reports on Forms 10-KSB that contained  
21 untrue statements of material fact and omitted to state material information required to be stated  
22 therein or necessary in order to make the statements made, in the light of the circumstances under  
23 which they were made, not misleading, in violation of Section 13(a) of the Exchange Act, 15  
24 U.S.C. § 78m(a), and 17 C.F.R. §§ 240.12b-20 and 240.13a-1, and is therefore liable for such  
25 violations pursuant to 15 U.S.C. § 78t(e);

26 6. Defendant Eck knowingly provided substantial assistance to M&A West in its filing  
27 with the Commission quarterly reports on Forms 10-QSB that contained untrue statements of  
28 material fact and omitted to state material information required to be stated therein or necessary in

1 order to make the statements made, in the light of the circumstances under which they were made,  
2 not misleading, in violation of Section 13(a) of the Exchange Act, 15 U.S.C. § 78m(a), and 17  
3 C.F.R. §§ 240.12b-20 and 240.13a-13, and is therefore liable for such violations pursuant to 15  
4 U.S.C. § 78t(e);

5 7. Defendant Eck knowingly provided substantial assistance to M&A West in its filing  
6 with the Commission a current report on Form 8-K that contained untrue statements of material  
7 fact and omitted to state material information required to be stated therein or necessary in order to  
8 make the statements made, in the light of the circumstances under which they were made, not  
9 misleading, in violation of Section 13(a) of the Exchange Act, 15 U.S.C. § 78m(a), and 17 C.F.R.  
10 §§ 240.12b-20 and 240.13a-11, and is therefore liable for such violations pursuant to 15 U.S.C. §  
11 78t(e);

12 8. Defendant Eck knowingly provided substantial assistance to M&A West's failure to  
13 make and keep books, records, and accounts which, in reasonable detail, accurately and fairly  
14 reflected the transactions and dispositions of the assets of the Company, in violation of Section  
15 13(b)(2)(A) of the Exchange Act, 15 U.S.C. § 78m(b)(2)(A), and is therefore liable for such  
16 violations pursuant to 15 U.S.C. § 78t(e);

17 9. Defendant Eck knowingly provided substantial assistance to M&A West's failure to  
18 devise and maintain a system of internal accounting controls sufficient to provide reasonable  
19 reassurances that transactions were recorded as necessary to maintain accountability for assets, in  
20 violation of Section 13(b)(2)(B)(ii)(II) of the Exchange Act, 15 U.S.C. § 78m(b)(2)(B)(ii)(II), and  
21 is therefore liable for such violations pursuant to 15 U.S.C. § 78t(e);

22 10. Defendant Eck knowingly falsified M&A West's books, records and accounts in  
23 violation of Section 13(b)(5) of the Exchange Act, 15 U.S.C. § 78m(b)(5), and falsified M&A  
24 West's books, records and accounts, in violation of 17 C.F.R. § 13b2-1;

25 11. Defendant Eck knowingly provided substantial assistance to defendant Scott Kelly,  
26 an officer and director of M&A West, who made or caused to be made a materially false or  
27 misleading statement to accountants and omitted to state, or caused another person to omit to state  
28 to accountants material facts necessary in order to make statements made to the accountants, in

1 light of the circumstances under which such statements were made, not misleading, in violation 17  
2 C.F.R. § 240.13b2-2, and is therefore liable for such violations pursuant to 15 U.S.C. § 78t(e);

3 12. Unless restrained or enjoined, Defendant Eck is likely to again violate the securities  
4 laws described above;

5 13. The deterrent purposes of the federal securities laws would be served by the  
6 imposition of civil penalties against Defendant Eck.

7 I.

8 IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendant Eck, his  
9 agents, servants, employees, attorneys, and all persons in active concert or participation with them  
10 who receive actual notice of this Order by personal service or otherwise are permanently restrained  
11 and enjoined from violating, directly or indirectly, Section 10(b) of the Exchange Act, 15 U.S.C. §  
12 78j(b) and Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5, by using any means or instrumentality of  
13 interstate commerce, or of the mails, or of any facility of any national securities exchange, in  
14 connection with the purchase or sale of any security:

- 15 (a) to employ any device, scheme, or artifice to defraud;
- 16 (b) to make any untrue statement of a material fact or to omit to state a material  
17 fact necessary in order to make the statements made, in the light of the  
18 circumstances under which they were made, not misleading; or
- 19 (c) to engage in any act, practice, or course of business which operates or would  
20 operate as a fraud or deceit upon any person.

21 II.

22 IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant  
23 Eck, his agents, servants, employees, attorneys, and all persons in active concert or participation  
24 with them who receive actual notice of this Order by personal service or otherwise are permanently  
25 restrained and enjoined from violating Sections 5(a) and 5(c) of the Securities Act, 15 U.S.C. §§  
26 77e(a) and (c), by, directly or indirectly, in the absence of any applicable exemption and unless a  
27 registration statement is filed and is in effect as to a security, making use of any means or  
28

1 instruments of transportation or communication in interstate commerce or of the mails to offer or  
2 to sell such security through the use or medium of any prospectus or otherwise.

3 III.

4 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant Eck, his  
5 agents, servants, employees, attorneys, assigns, and all persons in active concert or participation  
6 with him who receive actual notice of this order by personal service or otherwise are permanently  
7 restrained and enjoined from violating, directly or indirectly, Section 13(a) of the Exchange Act,  
8 15 U.S.C. § 78m(a), and 17 C.F.R. §§ 240.12b-20 and 240.13a-1, by causing any issuer that has  
9 securities registered as described in those sections, to file with the Commission an annual report on  
10 Form 10-K that contains an untrue statement of material fact or omits to state material information  
11 required to be stated therein or necessary in order to make the statements made, in light of the  
12 circumstances under which they were made not misleading.

13 IV.

14 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant Eck, his  
15 agents, servants, employees, attorneys, assigns, and all persons in active concert or participation  
16 with him who receive actual notice of this order by personal service or otherwise are permanently  
17 restrained and enjoined from violating, directly or indirectly, Section 13(a) of the Exchange Act,  
18 15 U.S.C. § 78m(a), and 17 C.F.R. §§ 240.12b-20 and 240.13a-13, by causing any issuer that has  
19 securities registered as described in those sections, to file with the Commission a quarterly report  
20 on Form 10-Q that contains an untrue statement of material fact or omits to state material  
21 information required to be stated therein or necessary in order to make the statements made, in  
22 light of the circumstances under which they were made not misleading.

23 V.

24 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant Eck, his  
25 agents, servants, employees, attorneys, assigns, and all persons in active concert or participation  
26 with him who receive actual notice of this order by personal service or otherwise are permanently  
27 restrained and enjoined from violating, directly or indirectly, Section 13(a) of the Exchange Act,  
28 15 U.S.C. § 78m(a), and 17 C.F.R. §§ 240.12b-20 and 240.13a-11, by causing any issuer that has

1 securities registered as described in those sections, to file with the Commission a current report on  
2 Form 8-K that contains an untrue statement of material fact or omits to state material information  
3 required to be stated therein or necessary in order to make the statements made, in light of the  
4 circumstances under which they were made not misleading.

5 VI.

6 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant Eck, his  
7 agents, servants, employees, attorneys, assigns, and all persons in active concert or participation  
8 with him who receive actual notice of this order by personal service or otherwise are permanently  
9 restrained and enjoined from violating, directly or indirectly, Section 13(b)(2)(A) of the Exchange  
10 Act, 15 U.S.C. § 78m(b)(2)(A), by causing any issuer which has a class of securities registered as  
11 described in this section to fail to make and keep books, records, or accounts, which, in reasonable  
12 detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer.

13 VII.

14 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant Eck, his  
15 agents, servants, employees, attorneys, assigns, and all persons in active concert or participation  
16 with him who receive actual notice of this order by personal service or otherwise are permanently  
17 restrained and enjoined from violating, directly or indirectly, Section 13(b)(2)(B) of the Exchange  
18 Act, 15 U.S.C. § 78m(b)(2)(B), by causing any issuer which has a class of securities registered as  
19 described in this section to fail to devise or maintain a system of internal accounting controls  
20 sufficient to provide reasonable assurances that transactions are executed in accordance with  
21 management's general or specific authorization; or to fail to record transactions as necessary to  
22 permit preparation of financial statements in conformity with generally accepted accounting  
23 principles or any other criteria applicable to such statements, and to maintain accountability for  
24 assets.

25 VIII.

26 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant Eck, his  
27 agents, servants, employees, attorneys, assigns, and all persons in active concert or participation  
28 with him who receive actual notice of this order by personal service or otherwise are permanently

1 restrained and enjoined from violating Section 13(b)(5) of the Exchange Act, 15 U.S.C. §  
2 78m(b)(5), by knowingly circumventing or failing to implement a system of internal accounting  
3 controls or knowingly falsifying any book, record, or account of described in this section.

4 IX.

5 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant Eck, his  
6 agents, servants, employees, attorneys, assigns, and all persons in active concert or participation  
7 with him who receive actual notice of this order by personal service or otherwise are permanently  
8 restrained and enjoined from violating 17 C.F.R. § 240.13b2-1, by falsifying or causing to be  
9 falsified any book, record or account described in this section.

10 X.

11 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant Eck, his  
12 agents, servants, employees, attorneys, assigns, and all persons in active concert or participation  
13 with him who receive actual notice of this order by personal service or otherwise permanently  
14 restrained and enjoined from violating 17 C.F.R. § 240.13b2-2, by, as a director or officer of an  
15 issuer, directly or indirectly making or causing to be made a materially false or misleading  
16 statement to an accountant in connection with an audit, review or examination of the financial  
17 statements of the issuer required to be made pursuant to statute or to the Commission's rules as  
18 described in this section.

19 XI.

20 IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant Eck shall  
21 pay civil penalties in the amount of \$550,000.00 pursuant to the Securities Act and the Exchange  
22 Act, 15 U.S.C. §§ 77t(d) & 78u(d)(3). Defendant shall make this payment within ten (10) business  
23 days after entry of this Order by certified check, bank cashier's check, or United States postal  
24 money order payable to the Securities and Exchange Commission. The payment shall be delivered  
25 or mailed to the Office of Financial Management, Securities and Exchange Commission,  
26 Operations Center, 6432 General Green Way, Mail Stop 0-3, Alexandria, Virginia 22312; and shall  
27 be accompanied by a letter identifying F. Thomas Eck as a defendant in this action; setting forth  
28

1 the title and civil action number of this action and the name of this Court; and specifying that  
2 payment is made pursuant to this Order.

3 XII.

4 IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that this Court shall retain  
5 jurisdiction of this matter for the purpose of enforcing the terms of this Order and for all other  
6 purposes.

7 XIII.

8 There being no just reason for delay, the Clerk is hereby ordered to enter this judgment  
9 against Defendant Eck forthwith and without delay, which represents a final judgment of the  
10 Commission's claims for an injunction and a civil penalty.

11  
12  
13 DATED:

\_\_\_\_\_/s/\_\_\_\_\_  
14 United States District Judge

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