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OUR FILE NUMBER

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1097.01

March 24, 1994

CERTIFIED MAIL --
RETURN RECEIPT REQUESTED

Eva Chu
Alameda County Health Department
80 Swan Way, Room 200
Oakland, CA 94621

Re: Montgomery Ward & Co., Inc.: Montgomery Ward Auto Express,
Dublin, CA
Enea Plaza, et al. v. Montgomery Ward, et al.

Dear Ms. Chu:

Enclosed for your file and information is the Settlement Agreement and Mutual Release which I mentioned when you called. Also attached as Exhibit "C" is an Access Agreement providing Montgomery Ward with access to the Enea Plaza facility.

Very truly yours,



ANDREW J. PIUNTI

AJP/tmr

Enclosure

SETTLEMENT AGREEMENT AND MUTUAL RELEASE

This Settlement Agreement and Mutual Release is made and entered into effective the 14th day of February, 1994 (the "Effective Date") by and between Enea Plaza, a California General Partnership, Elizabeth M. Enea, as Trustee of the Enea Family Trust, John G. Enea, and Robert S. Enea and Montgomery Ward & Co., Incorporated.

RECITALS

A. PLAINTIFFS commenced a civil ACTION against MONTGOMERY WARD in the Superior Court of the State of California in and for the County of Alameda on December 10, 1992, bearing case number V-005636-8.

B. PLAINTIFFS' complaint in the ACTION alleges, among other things, that MONTGOMERY WARD caused and permitted the release of petroleum hydrocarbons into the soils and groundwater at the Montgomery Ward Auto Express facility located at 7575 Dublin Blvd. in Dublin, California, and that MONTGOMERY WARD further allowed groundwater contaminated with petroleum hydrocarbons, specifically gasoline and its constituents, to migrate to and damage a portion of PLAINTIFFS' nearby commercial real property development, which real property is located south of the intersection of Dublin Boulevard and Amador Plaza Road in Dublin, California.

C. MONTGOMERY WARD filed an answer in the ACTION on or about January 29, 1993 denying any liability or wrongdoing

D. PLAINTIFFS and MONTGOMERY WARD have reached a settlement of the ACTION and desire to resolve the litigation and all disputes between them without any party admitting or denying any of the allegations in the ACTION.

NOW THEREFORE, in consideration of the mutual promises, covenants, conditions,

and agreements contained below, the Parties hereto agree as follows:

A G R E E M E N T

1. **Definitions.** As used in this AGREEMENT, the following terms have the following meanings unless indicated otherwise:

1A) **ACTION:** Refers to that civil action commenced by PLAINTIFFS against MONTGOMERY WARD in the Superior Court of the State of California in and for the County of Alameda on December 10, 1992, bearing case no. V-005636-8.

1B) **PLAINTIFFS:** Refers collectively to Enea Plaza, a California General Partnership, Elizabeth M. Enea, as Trustee of the Enea Family Trust, John G. Enea, and Robert S. Enea.

1C) **MONTGOMERY WARD:** Refers to Montgomery Ward & Co., Incorporated, an Illinois Corporation.

1D) **PARTIES:** Refers to PLAINTIFFS and MONTGOMERY WARD.

1E) **ENEA PLAZA PROPERTY and/or SITE:** Refers to PLAINTIFFS' commercial real property development south of the intersection of Dublin Boulevard and Amador Plaza Road in Dublin, California, which real property is identified with particularity by the legal descriptions attached hereto and incorporated herein as Exhibit "A", and generally depicted by the Site Plan attached hereto as Exhibit "B". To the extent there is a discrepancy between the legal descriptions attached as Exhibit "A" and the general depiction set forth in Exhibit "B", Exhibit "A" shall control.

1F) **MONTGOMERY WARD PROPERTY:** Refers to the Montgomery Ward Auto Express facility located at 7575 Dublin Boulevard, Dublin, California.

1G) **SUBJECT CONTAMINATION:** Refers to the groundwater contaminated

with petroleum hydrocarbons, specifically gasoline and its constituents, which has migrated, and/or is migrating, from the MONTGOMERY WARD PROPERTY and impacted a portion of the ENEA PLAZA PROPERTY.

1H) TO REMEDIATE, REMEDIAL ACTIVITY, and/or REMEDIAL ACTION: Shall include, but not necessarily be limited to, determining the lateral and vertical extent of the SUBJECT CONTAMINATION on the ENEA PLAZA PROPERTY as may be required by the responsible governmental agency; identifying and developing in cooperation with appropriate State and/or local governmental agencies an effective and appropriate remedial response system(s) to clean up the SUBJECT CONTAMINATION; to design, install, maintain, operate, and, if appropriate, modify the remediation system(s); and to pursue SITE closure of the ENEA PLAZA PROPERTY approved by the responsible State and local implementing agencies asserting jurisdiction over REMEDIAL ACTIVITY of the ENEA PLAZA PROPERTY at the time.

1I) MONTGOMERY WARD's COUNSEL: Refers to Stephen Sommerhalter and Buchalter & Nemer, Field & Younger, 333 Market Street, 29th Flr., San Francisco, CA 94105.

1J) PLAINTIFFS' COUNSEL: Refers to Andrew J. Piunti and Keiley, Enea & Piunti, 60 S. Market Street, Suite 730, San Jose, CA 95113.

1K) AGREEMENT: Refers to this Settlement Agreement and Mutual Release document between PLAINTIFFS and MONTGOMERY WARD.

2. Payment to PLAINTIFFS. MONTGOMERY WARD shall pay PLAINTIFFS, and PLAINTIFFS agree to accept, the sum of Two Hundred Fifty Thousand Dollars (\$250,000.00). Payment shall be made by check payable to Enea Plaza delivered to

PLAINTIFFS' COUNSEL within two (2) days of PLAINTIFFS' delivering to MONTGOMERY WARD's COUNSEL the AGREEMENT executed by all PLAINTIFFS.

3. **Release of MONTGOMERY WARD.** Except for the performance by MONTGOMERY WARD of the obligations set forth herein, PLAINTIFFS for themselves, their successors, assigns, heirs, beneficiaries, employees, agents, trustees, contractors, partners, insurers and attorneys, hereby release and forever discharge MONTGOMERY WARD, its affiliates, predecessors, successors, assigns, contractors, agents, subsidiaries, divisions, directors, officers, attorneys, agents, shareholders, and employees, past and present, and each of them, from any and all claims, damages, demands, causes of action, obligations, losses, costs, or expenses of any kind or nature, whether known or unknown, suspected or unsuspected, arising out of or in any way connected with the allegations and subject matter of the ACTION.

4. **Release of PLAINTIFFS.** Except for the performance by PLAINTIFFS of the obligations set forth herein, MONTGOMERY WARD, for itself, its successors, assigns, agents, and contractors, and subsidiaries and related entities, does hereby release and fully discharge PLAINTIFFS, their predecessors, successors, partners, heirs, agents, employees, representatives, attorneys, contractors, trustees, consultants, their attorney's consultants and experts, successors, and assigns, past and present, as well as related entities, respective officers, directors, shareholders or partners, past or present, and each of them, from any and all claims, damages, demands, causes of action, obligations, losses, costs, or expenses of any kind or nature, whether known or unknown, suspected or unsuspected, arising out of or in any way connected with the allegations and subject matter of the ACTION.

5. **Additional Obligations of MONTGOMERY WARD.** As further and additional consideration, the benefit of which is material to PLAINTIFFS and extends to PLAINTIFFS'

successors, assigns, heirs and/or beneficiaries, as well as any future owners of the ENEA PLAZA PROPERTY or any portion thereof, MONTGOMERY WARD hereby promises and covenants as follows: Upon execution of this AGREEMENT by all PARTIES, MONTGOMERY WARD will undertake at its own expense necessary and appropriate action for as long a period of time as may be required: 1) TO REMEDIATE expeditiously the SUBJECT CONTAMINATION; and 2) to use reasonable efforts to prevent the further spread of the SUBJECT CONTAMINATION to portions of the ENEA PLAZA PROPERTY not presently impacted. In this regard:

5A) **REMEDIAL ACTIVITY Objectives.** MONTGOMERY WARD covenants that the objective of the REMEDIAL ACTIVITY at the ENEA PLAZA PROPERTY is to pursue as expeditiously as reasonably possible a No Further Action letter from the State of California (most likely the Regional Water Quality Control Board) or, if appropriate, the responsible local agency asserting jurisdiction over the REMEDIAL ACTIVITY at that time. MONTGOMERY WARD shall work and cooperate with the State of California and all responsible agencies, including, but not limited to, the California Regional Water Quality Control Board and the Alameda County Department of Environmental Health, to identify and define appropriate target cleanup level(s) and action(s) necessary or appropriate.

5B) **Warranty of Non-Reliance.** Within 10 days of delivery to PLAINTIFFS' COUNSEL of the payment required in paragraph 2 above and a fully executed AGREEMENT, PLAINTIFFS' COUNSEL shall transmit to MONTGOMERY WARD's COUNSEL copies of the following documents: the boring logs, field notes, well construction detail, lab reports, and/or the pump test report(s) concerning the SUBJECT CONTAMINATION to the extent that such documents exist and are in the possession, custody, or control of PLAINTIFFS or

PLAINTIFFS' COUNSEL, and have not been previously produced to MONTGOMERY WARD's COUNSEL. MONTGOMERY WARD warrants that, while it will be receiving this material, and while it has obtained through discovery in the ACTION, or otherwise, copies of reports documenting certain remedial investigation and estimates of cure commissioned by PLAINTIFFS, it is not relying on those documents and estimates but on its own independent determination as to how it may best fulfill its obligations under this Paragraph 5 and subsections A through G hereof.

5C) **Liability Insurance.** All contractors and subcontractors hired by MONTGOMERY WARD to perform REMEDIAL ACTIVITIES on the ENEA PLAZA PROPERTY shall have in force and effect for the duration of their performance of REMEDIAL ACTIVITIES on the ENEA PLAZA PROPERTY comprehensive general liability insurance with limits of at least \$1 million, combined single limits, naming PLAINTIFFS as additional insureds.

5D) **Waste Material.** MONTGOMERY WARD agrees to be deemed the owner and generator of all waste product(s), hazardous or otherwise, generated in the course of or in connection with the contemplated REMEDIAL ACTIVITY under this AGREEMENT, and MONTGOMERY WARD shall be expressly so identified in all waste disposal manifests and/or contracts. MONTGOMERY WARD shall be responsible at its own expense for the proper transportation and disposal of all such waste product(s) and covenants that the handling and disposal of the same shall be consistent with all applicable federal, state and local environmental laws, as well as those of any state in which an out-of-state waste management facility is used to dispose of any of the subject waste product(s).

5E) **Off-Site Access.** MONTGOMERY WARD covenants and agrees that in the event access to property other than property owned and controlled by MONTGOMERY

WARD or one or more of the PLAINTIFFS is required to perform REMEDIAL ACTIVITIES, it will obtain, or use its best efforts to obtain, an access agreement from the off-site present owner(s) and/or lessee(s) as the case may be, and that such agreement shall specify that MONTGOMERY WARD is not acting of behalf of any person or entity other than MONTGOMERY WARD.

5F) **Future Off-Site Migration.** MONTGOMERY WARD covenants to take reasonable and appropriate REMEDIAL ACTIVITY for as long as necessary to prevent future offsite migration of contaminated groundwater from the MONTGOMERY WARD PROPERTY to the ENEA PLAZA PROPERTY.

5G) **Business Interruption and Architectural Design.** All REMEDIAL ACTIVITIES at the ENEA PLAZA PROPERTY shall be timed, located and/or performed in such a manner as to minimize business interruption to PLAINTIFFS and/or their tenants, or sub-tenants, including, if necessary, staged trenching. Such conduct shall include, but is not necessarily limited to, any installation and/or operation of any remedial system(s). Further, the installation and location of above ground improvements of any remedial system(s) on the ENEA PLAZA PROPERTY shall be consistent with the architectural design of ENEA PLAZA and shall be installed in compliance and cooperation with all local design review and permitting agencies and the reasonable requests of PLAINTIFFS.

6. **Indemnification of PLAINTIFFS.** MONTGOMERY WARD shall defend, hold harmless, and indemnify PLAINTIFFS, their partners, heirs, successors, beneficiaries, successors-in-interest, and/or assigns from third party suit(s), claim(s), or demands ("Third Party Claims") arising out of the migration of the SUBJECT CONTAMINATION from the MONTGOMERY WARD PROPERTY on to or through the ENEA PLAZA PROPERTY and/or

the REMEDIAL ACTIVITY of MONTGOMERY WARD, its agents, contractors or subcontractors. MONTGOMERY WARD shall not be liable for economic damages in connection with claims by PLAINTIFFS' tenants arising out of REMEDIAL ACTIVITY except for any such damages based on intentional wrongdoing or negligent acts of MONTGOMERY WARD, its contractors, subcontractors, agents, and/or employees. In connection with Third Party Claims arising out of REMEDIAL ACTIVITY, MONTGOMERY WARD shall not be required to defend PLAINTIFFS against Third Party Claims proximately caused by the sole negligence or intentional wrongdoing of PLAINTIFFS. With regard to all claims and suits involving REMEDIAL ACTIVITY, liability and indemnity to third parties shall be prorated based on comparative fault. MONTGOMERY WARD further covenants to indemnify, hold harmless, and defend PLAINTIFFS, their partners, shareholders, officers, heirs, successors, beneficiaries, successors-in-interest, and/or assigns from future investigative, monitoring, and/or remedial response costs arising out of, in connection with, or in response to future demands or requests of any governmental agency in connection with the SUBJECT CONTAMINATION from the MONTGOMERY WARD PROPERTY notwithstanding that any such demands or requests arise after SITE closure or issuance of a No Further Action letter, or upon an agency's reopening of its file(s) after SITE closure, or after MONTGOMERY WARD's abandonment of or departure from the MONTGOMERY WARD PROPERTY.

6A) Defense of Third-Party Claims. With respect to any claims, suits, or demands by third parties, within 10 days of whenever one or more PLAINTIFFS first has notice that such a Third Party Claim has been asserted or threatened which, if true, would trigger MONTGOMERY WARD's duty to defend under paragraph 6 above, PLAINTIFFS' Project Coordinator shall notify MONTGOMERY WARD's Project Coordinator in writing of such

Third Party Claim and of the facts within PLAINTIFFS' knowledge which relate thereto. PLAINTIFFS shall cooperate with MONTGOMERY WARD's investigation of any such Third Party Claims. MONTGOMERY WARD shall then have the right to contest, defend, negotiate, or settle any such Third Party Claim through competent counsel of its own selection, and solely at MONTGOMERY WARD's own cost, risk, and expense. PLAINTIFFS shall cooperate with MONTGOMERY WARD's reasonable handling of any such Third Party Claims. MONTGOMERY WARD shall not, without the prior written consent of PLAINTIFFS, settle, compromise, or offer to settle or compromise any such Third Party Claim on a basis which would or could result in the imposition of a consent order, injunction, or decree which would or could obligate PLAINTIFFS to pay damages, or would or could restrict the future activity or conduct of PLAINTIFFS or PLAINTIFFS' tenants. PLAINTIFFS' consent to settle or compromise any such Third Party Claim shall not be unreasonably withheld. In the event that (i) MONTGOMERY WARD shall fail to give written notice to PLAINTIFFS of its intention to contest, negotiate, or settle any such Third Party Claim within twenty (20) days after its receipt from PLAINTIFFS of written notice that any such Third Party Claim has been asserted or threatened, or (ii) in the event such notice is given but any such Third Party Claim is not reasonably promptly settled, negotiated, or diligently defended or contested by MONTGOMERY WARD, PLAINTIFFS shall have the right to satisfy and discharge the same by payment, compromise, or otherwise, and MONTGOMERY WARD shall be liable to indemnify PLAINTIFFS therefor to the extent it is obligated under Paragraph 6, above. PLAINTIFFS may also, if it so elects, and entirely within its own discretion, defend any such Third Party Claim in the event MONTGOMERY WARD fails to give timely written notice of its intention to contest, defend, negotiate, or settle any such Third Party Claim in which event

MONTGOMERY WARD shall be required to indemnify PLAINTIFFS for any and all reasonable costs of defense (including reasonable attorney's fees) which PLAINTIFFS, or one of them, have sustained or incurred as a result of the decision of PLAINTIFFS to defend any such claim, suit, or demand.

7. **Communications.** Within ten (10) days of the execution of this AGREEMENT by all PARTIES, MONTGOMERY WARD and PLAINTIFFS shall each designate a Project Coordinator. To the maximum extent possible, communications between MONTGOMERY WARD and PLAINTIFFS shall be between their respective Project Coordinators. Each of the PARTIES shall have the right to change its respective Project Coordinator upon ten days prior written notice of the change. MONTGOMERY WARD shall provide PLAINTIFFS' Project Coordinator with copies of all final reports, work plans, and/or analytical results developed in the course of its REMEDIAL ACTIVITIES and/or supplied to the California Regional Water Quality Control Board and/or any local agency pursuant to this AGREEMENT. MONTGOMERY WARD and PLAINTIFFS shall each bear their own costs associated with the performance of duties by their respective Project Coordinators.

8. **Dismissal of Action.** PLAINTIFFS shall dismiss the ACTION with prejudice within ten (10) days of receipt of the payment specified in paragraph 2 herein and a fully executed copy of the AGREEMENT.

9. **AGREEMENT Specifically Enforceable.** This AGREEMENT shall constitute a stipulation by PARTIES to pending litigation before the Court for settlement in accordance with the provisions of this AGREEMENT, pursuant to the provisions of California's Code of Civil Procedure, Section 664.6. Each Party to this AGREEMENT specifically authorizes the Honorable Mark Eaton of the Superior Court of California, in and for the County of Alameda,

or, in his absence or unavailability, the Presiding Judge of the Alameda County Superior Court, or if he is unavailable, a judge assigned by the Presiding Judge of the Alameda County Superior Court to retain jurisdiction over the PARTIES to enforce this Agreement until performance in full.

10. **Warranty of Authority.** Each person signing this AGREEMENT represents and warrants that he or she has the authority to execute this AGREEMENT and to give the releases contained herein, and is acting with the scope of such authority. PLAINTIFFS further warrant that Enea Plaza, a California General Partnership, is legal title owner of the real property described in the property descriptions attached hereto and incorporated herein as Exhibit "A".

11. **No Admissions.** This AGREEMENT is part of a compromise and settlement of contested claims. No statement made or action taken by the PARTIES hereto, either previously or in connection with this AGREEMENT, shall be deemed or construed to be an admission of liability or responsibility for any matter pertaining to the ACTION.

12. **Failure or Delay Not a Waiver.** No failure or delay on the part of any Party to exercise any right hereunder, nor any other indulgence of such Party, shall operate as a waiver of any rights hereunder, nor shall any single exercise by any Party of any right hereunder preclude any other or further exercise hereof. The rights and remedies herein provided are cumulative and not exclusive of any rights or remedies provided by law.

13. **Integration.** This AGREEMENT constitutes the entire understanding between the PARTIES hereto pertaining to the subject matter hereof and fully supersedes any and all prior and contemporaneous agreements and understandings, whether written or oral, between the PARTIES hereto pertaining to the subject matter hereof.

14. **Amendments.** No changes in, additions to, modifications of, or waivers of any

provision of this AGREEMENT shall be valid unless set forth in a writing executed by all PARTIES hereto.

15. **Successors and Assigns.** The provisions of this AGREEMENT shall be binding upon and inure to the benefit of the respective PARTIES and their respective heirs, executors, administrators, agents, representatives, successors, and assigns. In this regard, and without limitation to the generality of the foregoing, it is expressly intended that the benefits of MONTGOMERY WARD's covenants set forth in this AGREEMENT are intended to run with the land and are intended to be fully enforceable by any successor owner(s) of the ENEA PLAZA PROPERTY or any portion thereof, including a secured lender should any take title to the ENEA PLAZA PROPERTY, or a portion thereof, in the future.

16. **Additional Documents.** Each of the PARTIES agrees to execute such additional documents and perform such further acts as may be reasonably necessary to effectuate the purposes of this AGREEMENT, including but not limited to executing the Agreement for Right of Entry attached hereto as Exhibit "C".

17. **Counter-Parts.** This AGREEMENT may be executed in two or more counter-parts, each of which shall be deemed an original, all of which together shall constitute one and the same instrument.

18. **Headings.** The headings in this AGREEMENT are for convenience of reference only and shall not limit or otherwise affect the meaning hereof.

19. **Ambiguity Not to be Construed Against Any Party.** For the purpose of construing or interpreting this AGREEMENT, this AGREEMENT shall be deemed to have been drafted equally by all PARTIES hereto. All PARTIES agree that this AGREEMENT shall remain in full force and effect, notwithstanding any claim of mistake.

the claims released herein. In furtherance of such intention, the releases herein given in paragraphs 3 and 4 shall be and remain in effect as a full and complete release of such matters notwithstanding the discovery or existence of any such additional or different claims or facts relative thereto.

Dated: March 18, 1994

MONTGOMERY WARD & CO.,
INCORPORATED

By: *Philip R. Holt*
Its: Vice President

Dated: March 16, 1994

ENEAL PLAZA, a California General
Partnership

By: *Robert S. Enea*
Its: General Partner

Dated: March 16, 1994

Robert S. Enea
ROBERT S. ENEA

Dated: March 16, 1994

Elizabeth M. Enea, Trustee
ELIZABETH M. ENEA, as Trustee for the
Enea Family Trust

Dated: March 16, 1994

John G. Enea
JOHN G. ENEA