

**UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION**

COMMISSIONERS: **Jon Leibowitz, Chairman
Pamela Jones Harbour
William E. Kovacic
J. Thomas Rosch**

In the Matter of

**PANASONIC CORPORATION,
a corporation;**

and

**SANYO ELECTRIC CO., LTD.,
a corporation.**

Docket No. C-

**DECISION AND ORDER
[Public Record Version]**

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition by Respondent Panasonic Corporation (“Panasonic”) of Respondent Sanyo Electric Co., Ltd. (“Sanyo”), and Respondents having been furnished thereafter with a copy of a draft Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and that, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. §18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. §45; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commissions Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having thereupon issued its Complaint and an Order to Maintain Assets, and having accepted the executed Consent Agreement and placed such Consent

Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. §2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order ("Order"):

1. Respondent Panasonic Corporation is a corporation organized, existing and doing business under and by virtue of the laws of Japan, with its head office located at 1006, Oaza Kadoma, Kadoma-shi, Osaka 571-8501, Japan. Panasonic Corporation of North America is a wholly-owned subsidiary of Panasonic Corporation with offices at 1 Panasonic Way, Secaucus, NJ 07094.
2. Respondent Sanyo Electric Co., Ltd. is a corporation organized, existing and doing business under and by virtue of the laws of Japan, with its head office at 5-5, Keihan-Hondori 2-Chome, Moriguchi City, Osaka 570-8677, Japan. Sanyo North America Corporation is a wholly-owned subsidiary of Sanyo Electric Co., Ltd., with its principal place of business at 2055 Sanyo Ave., San Diego, CA 92145.
3. The Commission has jurisdiction over the subject matter of this proceeding and of Respondents, and the proceeding is in the public interest.

ORDER

I.

IT IS ORDERED that, as used in the Order, the following definitions shall apply:

- A. "Panasonic" means Panasonic Corporation, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Panasonic, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. After the Acquisition, Panasonic shall include Sanyo.
- B. "Sanyo" means Sanyo Electric Co., Ltd., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Sanyo, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. "FDK" means FDK Corporation, a corporation organized, existing and doing business under and by virtue of the laws of Japan, with its head office located at Hamagomu Bldg., 5-36-11 Shimbashi, Minato-ku, Tokyo 105-8677. FDK America, Inc., is a wholly owned subsidiary of FDK Corporation, with its principle offices at 250 E. Caribbean Drive, MS200, Sunnyvale, CA 94089.
- D. "Respondents" mean Panasonic and Sanyo, individually and collectively.
- E. "Commission" means the Federal Trade Commission.

- F. “Acquirer” means FDK or any other Person approved by the Commission to acquire the Portable NiMH Battery Business Assets and the Portable NiMH Battery Business License(s) pursuant to this Order.
- G. “Acquisition” means the proposed cash tender offer by Respondent Panasonic to acquire Respondent Sanyo pursuant to the Capital and Business Alliance Agreement, dated December 19, 2008, and all amendments, attachments and exhibits thereto.
- H. “Acquisition Date” means the date the Acquisition is consummated.
- I. “Confidential Business Information” means all information not in the public domain related to the Portable NiMH Battery Business, the Portable NiMH Battery Business Assets, or the Portable NiMH Battery Business License(s) including without limitation, Portable NiMH Battery Business Intellectual Property, Portable NiMH Battery Business Know-How, and Portable NiMH Battery Business Records.
- J. “Divestiture Agreement(s)” means the FDK Acquisition Agreements, the Sintered Cathode Supply Agreement (if any), the Transition Services Agreement, or any other agreement(s) that effectuate the divestiture of the Portable NiMH Battery Business Assets and the conveyance of the Portable NiMH Battery Business License(s).
- K. “Divestiture Date” means the last closing date of a Divestiture Agreement, including without limitation, any FDK Acquisition Agreement.
- L. “Direct Cost” means a cost not to exceed the cost of labor, material, travel and other expenditures to the extent the costs are directly incurred to provide the relevant assistance or service.
- M. “Divestiture Trustee” means the trustee appointed by the Commission pursuant to the relevant provisions of this Order.
- N. “FDK Acquisition Agreements” means the following agreements, including all amendments, exhibits, attachments, agreements, and schedules thereto:
1. Master Agreement between SANYO Electric Co, Ltd. (the “Seller”) and FDK Corporation (the “Buyer”) relating to Buyer’s purchase of the stock of SANYO Energy Twicell Co., Ltd. held by the Seller;
 2. Stock Purchase Agreement between SANYO Electric Co., Ltd. (the “Seller”) and FDK Corporation (the “Buyer”), related to the Buyer’s purchase of the stock of SANYO Energy Twicell Co., Ltd. (“Sanyo-FDK Stock Purchase Agreement”);
 3. Agreement for the Assignment of Trademark Rights between SANYO Electric, Co., Ltd. (the “Assignor”) and FDK Corporation (the “Assignee”) related to the assignment of Trademark Rights by the Assignor; and
 4. Master Transaction Agreement between FDK Corporation (the “Company”) and SANYO Electric Co., Ltd. (the “Supplier”) dated Oct. 1, 2001,
- attached hereto as Confidential Appendix A.

- O. “Intellectual Property” means any type of intellectual property, including without limitation, patents, copyrights, trademarks, trade dress, trade secrets, techniques, data, inventions, practices, methods and other confidential or proprietary technical, business, research, or development information.
- P. “Interim Monitor” means any monitor appointed pursuant to this Order or the related Order to Maintain Assets.
- Q. “Interim Purchase Agreement” means the Master Purchase Agreement (NiMH Batteries) attached to the Sanyo-FDK Stock Purchase Agreement as Exhibit 9.7, or any other agreement that receives prior approval of the Commission through which Sanyo purchases from the Acquirer Sanyo-Branded Retail Batteries for a period determined by the Acquirer, but in no event longer than two (2) years.
- R. “Law” means all laws, statutes, rules, regulations, ordinances, and other pronouncements by any Government Entity having the effect of law.
- S. “Order to Maintain Assets” means the Order to Maintain Assets incorporated into and made a part of the Consent Agreement.
- T. “Person” means any individual, partnership, joint venture, firm, corporation, association, trust, unincorporated organization, joint venture, or other business or government entity, and any subsidiaries, divisions, groups or affiliates thereof.
- U. “Portable NiMH Battery Business” means the research, development, manufacture, distribution, finishing, packaging, marketing, sale, storage and transport of Portable NiMH Battery Products by Respondent Sanyo before the Acquisition Date, including any contracts, agreements or other arrangements by Sanyo with any Person to provide any such research, development, manufacture, distribution, finishing, packaging, marketing, sale, storage or transport.

provided, however, that Portable NiMH Battery Business shall not include the distribution, marketing, promotion and retail sale of Sanyo-Branded Retail Batteries.

- V. “Portable NiMH Battery Business Assets” means the following assets related to the Portable NiMH Battery Business:
1. SANYO Twicell (Takasaki);
 2. All real and personal property comprising Respondent Sanyo’s business office and factory located at 307-2 Koyagi-machi, Takasaki-shi, Gunma, Japan, and 952 Koyagi-machi, Takasaki-shi, Gunma, Japan, including without limitation, real estate; buildings; warehouses; storage tanks; structures; manufacturing equipment; other equipment; machinery; tools; spare parts; personal property; furniture; fixtures; supplies and other tangible property, owned, leased, or operated on or behalf of Respondent Sanyo;
 3. Suzhou Sub-C and D NiMH Battery Production;
 4. all Portable NiMH Battery Business Intellectual Property used predominantly in the Portable NiMH Battery Business, including, without limitation, all rights to

obtain and file for patents, trademarks, copyrights and registrations of such Intellectual Property and to bring suit against a Third Party for the past, present or future infringement, misappropriation, dilution, misuse or other violations of such Intellectual Property; and

5. all Portable NiMH Battery Business Records used exclusively in the Portable NiMH Battery Business;

provided, however, that the Portable NiMH Battery Business Assets need not include assets needed by Respondents to fulfill their obligations under the Suzhou Sub-C and D NiMH Battery Agreement or the Sintered Cathode Supply Agreement.

W. “Portable NiMH Battery Business Employee(s)” means any employee of Respondent Sanyo whose duties, in whole or part, relate to the Portable NiMH Battery Business.

X. “Portable NiMH Battery Business Key Employees” means employees of Respondent Sanyo identified on Confidential Appendix B.

Y. “Portable NiMH Battery Business Know-How” means all knowledge, information and know-how in the possession of Respondent Sanyo or within the knowledge of any employee or consultant of Respondent Sanyo on or before the Acquisition Date that relates to the Portable NiMH Battery Business.

Z. “Portable NiMH Battery Business Intellectual Property” means all Intellectual Property related to the Portable NiMH Battery Business,

provided, however, Portable NiMH Battery Business Intellectual Property need not include i) the corporate names or corporate trade dress of “Sanyo”, or “Eneloop,” or ii) Intellectual Property licensed from a Third Party to the extent the Acquirer has licensed such Intellectual Property directly from its owner.

AA. “Portable NiMH Battery Business License(s)” means a fully paid-up, perpetual, non-revocable and royalty-free license(s) to all documents, intellectual property and know-how related to the Portable NiMH Battery Business to the extent not included in the Portable NiMH Battery Business Assets, including, without limitation,

1. Portable NiMH Battery Business Intellectual Property;
2. Portable NiMH Battery Business Records; and
3. Portable NiMH Battery Business Know-How.

BB. “Portable NiMH Battery Business Records” means all documents and records, including all electronic records and files wherever stored, that are related to or used in the Portable NiMH Battery Business, including without limitation,

1. all documents and information related to employees, contractors, and others employed or contracted by Respondent Sanyo whose duties relate, in whole or part, to the Portable NiMH Battery Business;

2. all customer contracts and other documents, contracts, agreements and information relating to any Person to whom Respondent Sanyo, on or after January 1, 2008, has supplied or made efforts to supply Portable NiMH Battery Products;
 3. all supply agreements and other documents, contracts, agreements and information relating to any Person who, on or after January 1, 2008, has supplied Respondent Sanyo with any raw materials, products, services or other items used by Respondent Sanyo in the Portable NiMH Battery Business;
 4. all documents relating to the manufacturing and production of Portable NiMH Battery Products;
 5. all documents related to the research, development and design of Portable NiMH Battery Products; and
 6. all documents relating to the sales, marketing, distribution and promotion of any Portable NiMH Battery Products.
- CC. “Portable NiMH Battery Products” means rechargeable nickel metal hydride batteries for non-automotive use.
- DD. “Sanyo-Branded Retail Batteries” means Portable NiMH Business Battery Products for retail sale that are produced using Portable NiMH Battery Intellectual Property and sold under the brand names “Sanyo” or “eneloop.”
- EE. “SANYO Twicell (Takasaki)” means SANYO Energy Twicell Co., Ltd. as constituted after execution of the Takasaki Formation Agreements.
- FF. “Suzhou Sub-C and D NiMH Battery Production” means the supply of Portable NiMH Battery Products in size Sub-C and size D produced or capable of being produced (utilizing 100% of current production capacity) at Respondent Sanyo’s production facility in Suzhou, China. Included in “Suzhou Sub-C and D NiMH Battery Production” is the right to determine, upon reasonable notice, up to current capacity limits, the volume and specifications for the production of Portable NiMH Battery Products in size Sub-C and size D at the Suzhou facility, and to acquire, pursuant to the terms of a Suzhou Sub-C and D NiMH Battery Agreement, all such products produced at the facility.
- GG. “Suzhou Sub-C and D NiMH Battery Agreement” means the Sub-C and D Supply Agreement attached to the Sanyo-FDK Stock Purchase Agreement as Exhibit 9.5, or any other Agreement that receives the prior approval of the Commission and through which the Acquirer obtains the Suzhou Sub-C and D NiMH Battery Production.
- HH. “Sintered Cathode Supply Agreement” means the Memorandum between SANYO Energy Twicell Co., Ltd (the “Buyer”) and SANYO Electric Co., Ltd (the “Seller”) under the Master Purchase Agreement dated October 1, 2001, related to the Buyer’s purchase of sintered cathode plates for industrial NiMH batteries from the Seller; or any other Agreement that receives the prior approval of the Commission and through which

Respondents supply the Acquirer with sintered cathodes needed by the Acquirer for use in Portable NiMH Battery Products.

- II. “Takasaki Formation Agreements” means the Absorption-Type Split between SANYO Electric Co., Ltd. and SANYO Energy Twicell Co., Ltd., attached hereto as Appendix C, and the Plan for Incorporation-Type Split for transferring to SANYO Energy Kaizuka Co., Ltd. some of the rights and duties of SANYO Energy Twicell Co., Ltd. relating to the business of developing and manufacturing lithium-ion batteries, attached hereto as Appendix D.
- JJ. “Third Party(ies)” means any Person other than the Respondents or the Acquirer.
- KK. “Transition Services Agreement” means the Transitional Services Agreement attached to the Sanyo-FDK Stock Purchase Agreement at Exhibit 10.5, or any other agreement approved by the Commission between Respondents and an Acquirer through which Respondents provide assistance and advice to enable the Acquirer to operate the Portable NiMH Battery Business in a manner at least consistent with the past practice and expertise of Respondent Sanyo as of the Acquisition Date.

II.

IT IS FURTHER ORDERED that:

- A. Not later than fifteen (15) days after the Acquisition Date, Respondents shall
 1. execute the Takasaki Formation Agreements pursuant to and in accordance with the laws of Japan; and
 2. divest the Portable NiMH Battery Business Assets and grant the Portable NiMH Battery Business License(s), absolutely and in good faith, to FDK in accordance with the FDK Acquisition Agreements,

provided that this period may be extended by up to thirty (30) days if necessary to permit Respondents to obtain prior approval of the FDK Acquisition Agreements from the European Commission, *so long as* Respondents divest the Portable NiMH Battery Business Assets and grant the Portable NiMH Battery Business License(s) as required by this Order within five (5) days of obtaining such approval.

provided further that, if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that FDK is not an acceptable acquirer of the Portable NiMH Battery Business Assets and/or the Portable NiMH Battery Business License(s), or the manner in which either was divested or granted was not acceptable, Respondents shall immediately notify FDK and shall as soon as practicable rescind the FDK Acquisition Agreements, and within six (6) months from the date this Order becomes final, absolutely and in good faith, at no minimum price, divest the Portable NiMH Battery Business Assets and grant the Portable NiMH Battery Business

License(s) to an Acquirer and in a manner that receives the prior approval of the Commission.

- B. Each Divestiture Agreement, including without limitation, each FDK Acquisition Agreement, shall be incorporated by reference into this Order and made a part hereof. Further, nothing in any such Divestiture Agreement shall limit or contradict, or be construed to limit or contradict, the terms of this Order, it being understood that nothing in this Order shall be construed to reduce any rights or benefits of the Acquirer or to reduce any obligations of Respondents under such Agreements. Respondents shall comply with the terms of any Divestiture Agreement; a breach by Respondents of any term of a Divestiture Agreement shall constitute a violation of this Order. To the extent that any term of a Divestiture Agreement conflicts with a term of this Order such that Respondents cannot fully comply with both, Respondents shall comply with the term of this Order. It shall be a violation of this Order to, without the prior approval of the Commission, i) make any modification to a Divestiture Agreement prior to the Divestiture Date or ii) fail to meet any material condition precedent to closing (whether waived or not). Further, notwithstanding any paragraph, section, or other provision of a Divestiture Agreement, for a period of five (5) years after the Divestiture Date, it shall be a violation of this Order to make any material modification of a Divestiture Agreement, without the approval of the Commission.
- C. Prior to divesting the Portable NiMH Battery Business Assets and granting the Portable NiMH Battery Business License(s), Respondents shall,
1. secure all consents and waivers from all Third Parties that are necessary to permit Respondents to fully divest the Portable NiMH Battery Business Assets and grant the Portable NiMH Battery Business License(s) and to permit the Acquirer to continue to operate the Portable NiMH Battery Business in a manner consistent with the past practice of Respondent Sanyo,
provided, however, Respondents may satisfy this requirement by certifying that the Acquirer has executed all such agreements directly with each of the relevant Third Parties; and
 2. secure the consent of all Persons whose consent is necessary for the execution, under Japanese law, of the Takasaki Formation Agreements.
- D. Within fifteen (15) days of the Divestiture Date, Respondents shall transfer to the Acquirer a duplicate original or copy of all Portable NiMH Battery Business Records licensed to the Acquirer pursuant to this Order or the Divestiture Agreement. Such copies shall be produced to the location(s) specified by the Acquirer and in the style and format of the original document unless otherwise specified by the Acquirer.
- E. Until the Divestiture Date, Respondents shall provide all Portable NiMH Battery Business Employees with reasonable financial incentives to continue in their positions and continue the research, development, manufacture, distribution, finishing, packaging, marketing, sale, storage and transport of the Portable NiMH Battery Products consistent with past practices and/or as may be necessary to preserve the marketability, viability and

competitiveness of such products pending divestiture. Such incentives shall include a continuation of all employee benefits offered by Respondent Sanyo until the Acquisition Date, including regularly scheduled raises, bonuses, vesting of pension benefits (as permitted by Law), and additional incentives as may be necessary to prevent any diminution of the competitiveness of the Portable NiMH Battery Business.

- F. Until Respondents fully and finally deliver to the Acquirer all of the Portable NiMH Battery Business Assets, all Portable NiMH Battery Business Records licensed to the Acquirer, and all other tangible assets to be transferred to Acquirer pursuant to the Divestiture Agreement(s), Respondents shall maintain the full economic viability, marketability and competitiveness of all portions of such assets and records in their possession or control; shall prevent the destruction, removal, wasting, deterioration, or impairment of such assets and records; and shall maintain such assets and records in the regular and ordinary course of business and in accordance with past practice (including regular repair and maintenance).
- G. On or before the Divestiture Date, Respondents shall enter into a Suzhou Sub-C and D NiMH Battery Agreement, and, at the Acquirer's option, a Sintered Cathode Supply Agreement.
- H. For a period lasting one (1) year after Respondents have fully and finally transferred and delivered to the Acquirer all of the Portable NiMH Battery Business Assets and all the Portable NiMH Battery Business Records licensed to the Acquirer, Respondents shall, pursuant to the Transition Services Agreement, provide in a timely manner, at no greater than Direct Cost, assistance and advice to enable the Acquirer to operate the Portable NiMH Battery Business in a manner at least consistent with the past practice and expertise of Respondent Sanyo,

provided that, the Interim Monitor may authorize up to two (2) extensions of the one (1) year time period, if the Interim Monitor, in consultation with the staff of the Commission, finds that such extension is reasonably necessary and consistent with the terms of this Decision and Order and the Order to Maintain Assets.
- I. At the Acquirer's option, Respondents shall, on or before the Divestiture Date, enter into an Interim Purchase Agreement through which Respondents shall purchase Sanyo-Branded Retail Batteries for a period not longer than two (2) years in duration.
- J. Respondents shall provide financial incentives to Portable NiMH Battery Business Key Employees as needed to facilitate the employment of such employees by the Acquirer, provided that such incentives need not exceed twenty (20) percent of each such Employee's annual salary.
- K. For a period lasting until one (1) year from the Acquisition Date, Respondents shall
 - 1. within 10 days of a request by the Acquirer, provide the following information to the Acquirer (to the extent permitted by applicable law) regarding each Portable NiMH Battery Business Employee not employed by SANYO Twicell (Takasaki) on the Divestiture Date:

- a) the date of hire and effective service date;
 - b) job title or position held;
 - c) a specific description of the employee's responsibilities related to the Portable NiMH Battery Products; *however*, in lieu of this description, Respondents may provide the employee's most recent performance appraisal;
 - d) the base salary or current wages;
 - e) the most recent bonus paid, aggregate annual compensation for Respondent Sanyo's last fiscal year and current target or guaranteed bonus, if any;
 - f) employment status (*i.e.*, active or on leave or disability; full-time or part-time);
 - g) any other material terms and conditions of employment in regard to such employee that are not otherwise generally available to similarly situated employees;
 - h) copies of all employee benefit plans and summary plan descriptions (if any) applicable to the relevant employees;
2. not interfere with the hiring or employing by the Acquirer of any Portable NiMH Battery Business Employee and remove any impediments within the control of Respondents that may deter these employees from accepting employment with the Acquirer, including without limitation, any non-compete or non-disclosure provisions of any employment agreements with respect to Portable NiMH Battery Products or other contracts with Respondents that would affect the ability or incentive of those individuals to be employed by the Acquirer. In addition, Respondents shall not make any counteroffer to a Portable NiMH Battery Business Employee who has received a written offer of employment from the Acquirer; and
- L. For a period lasting until two (2) years from the Divestiture Date, Respondents shall not hire any Portable NiMH Battery Business Employee of the Acquirer or solicit or otherwise attempt to induce such employee to terminate his or her employment relationship with the Acquirer,
- provided, however*, Respondents may i) hire any Portable NiMH Battery Business Employee whose employment has been terminated by the Acquirer or who independently applies for employment with Respondents, as long as such employee was not solicited in violation of the non-solicitation requirements contained herein; ii) advertise for employees in newspapers, trade publications or other media not targeted specifically at Portable NiMH Battery Business Employees; or iii) hire a Portable NiMH Battery Business Employee who contacts Respondents on his or her own initiative without any direct or indirect solicitation or encouragement from Respondents.
- M. Respondents shall not use any Confidential Business Information that is related to the Portable NiMH Battery Business to research, develop, manufacture, market, or sell Portable NiMH Battery Products, except that the Respondents may retain (or be licensed) rights to use Confidential Business Information i) to fulfill the requirements of any Suzhou Sub-C and D NiMH Battery Agreement, ii) to manufacture or have manufactured

sintered cathodes, or iii) to manufacture or have manufactured Sanyo-Branded Retail Batteries,

provided that nothing in this paragraph shall affect the rights of Respondents to use any Confidential Business Information, including without limitation, any Portable NiMH Battery Business Intellectual Property, lawfully in the possession of Respondent Panasonic prior to the Acquisition Date.

- N. Respondents shall not disclose or convey any Confidential Business Information that is exclusively related to the Portable NiMH Battery Business, directly or indirectly, to any Person or Persons except as follows:
1. Respondents may disclose Confidential Business Information to the Acquirer or Persons specifically authorized by the Acquirer to receive such information; and
 2. Respondents may disclose Confidential Business Information as necessary to manufacture or have manufactured sintered cathodes, fulfill the terms of the Suzhou Sub-C and D NiMH Battery Agreement or produce or have produced Sanyo-Branded Retail Batteries pursuant to rights retained or licensed under any Divestiture Agreement *so long as* in doing so, Respondents do not disclose or convey any Confidential Information to any Person involved in the research, development, manufacture, sale, marketing or distribution of any of Respondents' Portable NiMH Battery Products (other than Sanyo-Branded Retail Batteries and products produced pursuant to the Suzhou Sub-C and D NiMH Battery Production Agreement and the Sintered Cathode Supply Agreement).
- provided however*, that the restrictions contained in this paragraph shall not apply to information that i) subsequently falls within the public domain by means other than a violation of this Order or Respondents' breach of a confidentiality or non-disclosure agreement; ii) is required by Law to be publicly disclosed; or iii) is lawfully possessed by Respondent Panasonic as of the Acquisition Date.
- O. Respondents shall prevent the disclosure or use of Confidential Business Information except as permitted or authorized by this Order or the Order to Maintain Assets and shall,
1. require that each Portable NiMH Battery Business Employee retained by Respondents after the Divestiture Date, his or her direct supervisor, and any other employee designated by the Interim Monitor (if one has been appointed) sign a confidentiality agreement that requires such employee to maintain Confidential Business Information as strictly confidential and not use such information or disclose it to any other Person except as authorized by Respondents in accordance with this Order; and
 2. provide, within thirty (30) days of the Divestiture Date, written notice of the restrictions on the disclosure and use of Confidential Business Information contained in this Order to all employees not required to sign a confidentiality

agreement who were involved in the Portable NiMH Battery Business at any time during the twelve (12) months prior to the Divestiture Date, or who otherwise may possess Confidential Business Information. Respondents shall provide such written notice by electronic mail with return receipt requested or similar transmission, and keep a file of such receipts for one (1) year after the Divestiture Date.

- P. Respondents shall not join, file, prosecute or maintain any suit, in law or equity, against the Acquirer or a licensee of such for the research, development, manufacture, distribution, finishing, packaging, marketing, sale, storage and transport of any Portable NiMH Battery Product that was manufactured by Respondent Sanyo on or prior to the Acquisition Date under any Intellectual Property (i) owned or licensed by Respondents as of the day after the Acquisition Date, or (ii) owned or licensed by Respondents that claims any aspect of the Portable NiMH Battery Business divested or licensed to the Acquirer.
- Q. Respondents shall not enforce any agreement against a Third Party or the Acquirer to the extent that such agreement may limit or otherwise impair the ability of the Acquirer to acquire or use the Portable NiMH Battery Business Assets and shall, not later than ten (10) days after the Divestiture Date, grant a release to each Third Party that is subject to such agreement. Within five (5) days of the execution of each such release, Respondents shall provide a copy of the release to the Acquirer for the relevant assets.
- R. Upon reasonable written notice and request from the Acquirer to Respondents, Respondents shall provide, in a timely manner, at no greater than Direct Cost, assistance of knowledgeable employees of Respondents to assist the Acquirer to prosecute, defend against, respond to, or otherwise participate in any litigation related to the Portable NiMH Battery Business Intellectual Property, if such litigation would have the potential to interfere with the Acquirer's freedom to research, develop, or manufacture Portable NiMH Battery Products; to use, supply, distribute, market, sell such products in the United States, or to export such products from or import them into the United States.
- S. For any patent infringement action either i) alleging that, prior to the Divestiture Date, Respondent Sanyo has infringed, or is infringing, a Patent of a Third Party, or ii) in which Respondent Sanyo has prepared or is preparing as of the Divestiture Date to defend against infringement claim(s); and that would have the potential to interfere with the Acquirer's freedom to practice the following: (1) the research, development, or manufacture of a particular Portable NiMH Battery Product; or (2) the use within, import into, export from, or the supply, distribution, or sale within, the United States of the relevant Portable NiMH Battery Products, Respondents shall:
1. cooperate with the Acquirer and provide any and all necessary technical and legal assistance, documentation and witnesses from Respondents in connection with obtaining resolution of any pending patent litigation involving such Portable NiMH Battery Product;

2. waive conflicts of interest, if any, to allow either Respondent's outside legal counsel to represent the Acquirer in any ongoing patent litigation involving such Portable NiMH Battery Product; and
 3. permit the transfer to the Acquirer of all of the litigation files and any related attorney work-product in the possession of Respondents' outside counsel relating to such Portable NiMH Battery Product.
- T. Respondents shall not seek, directly or indirectly, pursuant to any dispute resolution mechanism incorporated in any Divestiture Agreement, or in any agreement related to any Portable NiMH Battery Products, a decision the result of which would be inconsistent with the terms of this Order and/or the remedial purposes thereof.
- U. Respondents shall not, without the prior approval of the Commission, sell or grant to the Acquirer any rights or assets related to Portable NiMH Battery Products in sizes sub-C and D (other than those contained in the Suzhou Sub-C and D NiMH Battery Agreement).
- V. The English-language versions of the Divestiture Agreements, the Suzhou Sub-C and D NiMH Battery Agreement, the Sintered Cathode Supply Agreement (if applicable), the Interim Purchase Agreement and the Transition Services Agreement, as submitted to and approved by the Commission, shall be the versions of such agreements used in interpreting and enforcing this Order.
- W. The purpose of the divestiture of the Portable NiMH Battery Business Assets is:
1. to ensure the continued use of the Portable NiMH Battery Business Assets in the research, development, manufacture, use, import, export, distribution, and sale of Portable NiMH Battery Products;
 2. to provide for the future use of the Portable NiMH Battery Business Assets for the research, development, manufacture, use, import, export, distribution, and sale of Portable NiMH Battery Products;
 3. to create a viable and effective competitor, who is independent of the Respondents in the research, development, manufacture, use, import, export, distribution, or sale of Portable NiMH Battery Products; and
 4. to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint in a timely and sufficient manner.

III.

IT IS FURTHER ORDERED that:

- A. The Commission may appoint a Monitor (“Interim Monitor”) to assure that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by this Order and/or the Order to Maintain Assets.
- B. The Commission appoints ING Financial Markets LLC (“ING”), as Interim Monitor and approves the agreement between ING and Respondents, attached hereto as Confidential Appendix E, which agreement, *inter alia*, names Philip Comerford, Jr. as ING designated Project Manager.
- C. Respondents shall facilitate the ability of the Interim Monitor to comply with the duties and obligations set forth in this Order, and shall take no action that interferes with or hinders the Interim Monitor’s authority, rights or responsibilities as set forth in this Order or any agreement between the Interim Monitor and Respondents.
- D. The Interim Monitor’s duties and responsibilities shall include the following:
 - 1. the Interim Monitor shall act in a fiduciary capacity for the benefit of the Commission;
 - 2. the Interim Monitor shall have the power and authority to monitor Respondents’ compliance with the divestiture and asset maintenance obligations and related requirements of the Order, and shall exercise such power and authority and carry out his or her duties and responsibilities in a manner consistent with the purposes of the Order and in consultation with the Commission;
 - 3. the Interim Monitor shall, in his or her sole discretion, consult with Third Parties in the exercise of his or her duties under this Order or any agreement between the Interim Monitor and Respondents; and
 - 4. the Interim Monitor shall evaluate the reports submitted by Respondents pursuant to this Order, and within thirty (30) days from the date the Interim Monitor receives these reports, report in writing to the Commission concerning performance by Respondents of their obligations under the Order.
- E. Respondents shall grant and transfer to the Interim Monitor, and such Monitor shall have, all rights, powers, and authority necessary to carry out the Monitor’s duties and responsibilities, including but not limited to the following:
 - 1. Respondents shall cooperate with any reasonable request of the Interim Monitor and shall take no action to interfere with or impede the Interim Monitor's ability to monitor Respondents’ compliance with the Order and the Order to Maintain Assets;
 - 2. subject to any demonstrated legally recognized privilege, Respondents shall provide the Interim Monitor full and complete access to Respondents’ personnel, books, documents, records kept in the ordinary course of business, facilities and

technical information, and such other relevant information as the Interim Monitor may reasonably request, related to Respondents' compliance with its obligations under the Order, including, but not limited to, its obligations related to the relevant assets;

3. the Interim Monitor shall serve, without bond or other security, at the expense of Respondents, on such reasonable and customary terms and conditions to which the Monitor and Respondents agree and that the Commission approves;
 4. the Interim Monitor shall have authority to employ, at the expense of Respondents, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Interim Monitor's duties and responsibilities;
 5. Respondents shall indemnify the Interim Monitor and hold the Interim Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Interim Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Interim Monitor; and
 6. Respondents may require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; provided, however, that such agreement shall not restrict the Interim Monitor from providing any information to the Commission or require the Interim Monitor to report to Respondents the substance of communications to or from the Commission or the Acquirer.
- F. The Commission may, among other things, require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Interim Monitor's duties.
- G. The Interim Monitor shall serve until the later of i) one (1) year after Respondents have fully and finally transferred and delivered to the Acquirer all of the Portable NiMH Battery Business Assets and all the Portable NiMH Battery Business Records licensed to the Acquirer; or ii) the termination of all Respondents' obligations under the Transition Services Agreement,
- provided, however,* that the Interim Monitor's service shall not exceed five (5) years from the date the Order becomes final;
- provided, further,* that the Commission may extend or modify this period as may be necessary or appropriate to accomplish the purposes of this Decision and Order and the Order to Maintain Assets.

- H. If the Commission determines that an Interim Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Interim Monitor in the same manner as provided for in this Paragraph.
- I. The Commission may on its own initiative, or at the request of an Interim Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Order.
- J. An Interim Monitor appointed pursuant to this Order may be the same Person appointed as a Divestiture Trustee pursuant to the relevant provisions of this Order.

IV.

IT IS FURTHER ORDERED that:

- A. If Respondents have not fully complied with the obligations to assign, grant, license, divest, transfer, deliver or otherwise convey relevant assets as required by such Agreements and this Order, the Commission may appoint a trustee (“Divestiture Trustee”) to assign, grant, license, divest, transfer, deliver or otherwise convey the assets required to be assigned, granted, licensed, divested, transferred, delivered or otherwise conveyed pursuant to each of the relevant Paragraphs in a manner that satisfies the requirements of each such Paragraph. In the event that the Commission or the Attorney General brings an action pursuant to §5(l) of the Federal Trade Commission Act, 15 U.S.C. §45(l), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a Divestiture Trustee in such action to assign, grant, license, divest, transfer, deliver or otherwise convey the relevant assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other available relief, including a court-appointed Divestiture Trustee, pursuant to §5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondents to comply with this Order.
- B. The Commission shall select the Divestiture Trustee, subject to the consent of Respondent Panasonic, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a Person with experience and expertise in acquisitions and divestitures. If Respondent Panasonic has not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondent Panasonic of the identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.
- C. Not later than ten (10) days after the appointment of a Divestiture Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the divestiture required by this Order.

D. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph, Respondents shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:

1. subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to assign, grant, license, divest, transfer, deliver or otherwise convey the assets that are required by this Order to be assigned, granted, licensed, divested, transferred, delivered or otherwise conveyed;
2. the Divestiture Trustee shall have one (1) year from the date the Commission approves the trust agreement described herein to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the one (1) year period, the Divestiture Trustee has submitted a plan of divestiture or believes that the divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission; provided, however, the Commission may extend the divestiture period only two (2) times;
3. subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records and facilities related to the relevant assets that are required to be assigned, granted, licensed, divested, delivered or otherwise conveyed by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondents shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondents shall extend the time for divestiture under this Paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court;
4. the Divestiture Trustee shall use commercially reasonable efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made in the manner and to an Acquirer as required by this Order; *provided, however*, if the Divestiture Trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the Divestiture Trustee shall divest to the acquiring entity selected by Respondents from among those approved by the Commission; and, *provided further, however*, that Respondents shall select such entity within five (5) days after receiving notification of the Commission's approval;
5. the Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants,

accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of Respondents, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order;

6. Respondents shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Divestiture Trustee;
 7. the Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order; provided, however, that the Divestiture Trustee appointed pursuant to this Paragraph may be the same Person appointed as Interim Monitor pursuant to the relevant provisions of this Order and/or the Order to Maintain Assets;
 8. the Divestiture Trustee shall report in writing to Respondents and to the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the divestiture; and
 9. Respondents may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.
- E. If the Commission determines that a Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph.
- F. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this Order.

V.

IT IS FURTHER ORDERED that:

- A. Respondents shall assure that in any instance wherein their counsel (including in-house counsel under appropriate confidentiality arrangements) either retains Confidential Business Information provided to the Acquirer or accesses original documents containing Confidential Business Information (under circumstances where copies of documents are insufficient or otherwise unavailable), that Respondents' counsel does so only in order to do the following:
1. comply with this Order, a Divestiture Agreement, any Law (including, without limitation, any requirement to obtain regulatory licenses or approvals, and rules promulgated by the Commission), any data retention requirement of any applicable Government Entity, or any taxation requirements; or
 2. defend against, respond to, or otherwise participate in any litigation, investigation, audit, process, subpoena or other proceeding relating to the Portable NiMH Battery Products or assets and businesses associated with those products;
provided, that Confidential Business Information may be disclosed to Third Parties as necessary for the purposes authorized by this Paragraph V pursuant to an appropriate confidentiality order, agreement or arrangement with the Acquirer (but Respondents shall not be deemed to have violated this requirement if the Acquirer withholds such agreement unreasonably); and (2) Respondents shall use their best efforts to obtain a protective order to protect the confidentiality of such Confidential Business Information during any adjudication;

provided, further, that nothing in the Paragraph V shall permit Respondents to use or disclose any Confidential Business Information for any purposes not authorized by this Order (including this Paragraph V).

VI.

IT IS FURTHER ORDERED that:

- A. Within five (5) days after the Acquisition Date, Respondents shall submit to the Commission a letter certifying the date on which the Acquisition occurred.
- B. Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with this Order:
1. Within thirty (30) days after the date this Order becomes final,

2. Every sixty (60) days thereafter until Respondents have fully transferred the Portable NiMH Battery Business Assets and Portable NiMH Battery Business License(s) to an Acquirer; and
 3. Every six (6) months thereafter so long as Respondents have a continuing obligation under this Order and/or the Divestiture Agreements to render transitional services to the Acquirer.
- C. One (1) year after the date this Order becomes final, annually for the next nine years on the anniversary of the date this Order becomes final, and at other times as the Commission may require, Respondents shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with the Order.

VII.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least thirty (30) days prior:

- A. any proposed dissolution of Respondents; or
- B. any proposed acquisition, merger or consolidation of Respondents; or
- C. any other change in Respondents, including without limitation, assignment and the creation or dissolution of subsidiaries, if such change may affect compliance obligations arising out of this Order.

VIII.

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days notice to any Respondent made to its principal United States offices, registered office of its United States subsidiary, or its headquarters address, Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

- A. access, during business office hours of such Respondent and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession or under the control of such Respondent related to compliance with this Order, which copying services shall be provided by such Respondent at the request of the authorized representative(s) of the Commission and at the expense of the Respondent; and
- B. to interview officers, directors, or employees of such Respondent, who may have counsel present, regarding such matters.

IX.

IT IS FURTHER ORDERED that this Order shall terminate ten (10) years from the date on which the Order becomes final.

By the Commission.

Donald S. Clark
Secretary

SEAL
ISSUED:

CONFIDENTIAL APPENDIX A

FDK ACQUISITION AGREEMENTS

[Redacted From the Public Record Version, But Incorporated By Reference]

CONFIDENTIAL APPENDIX B

KEY EMPLOYEES

[Redacted From the Public Record Version, But Incorporated By Reference]

CONFIDENTIAL APPENDIX C

Agreement for Absorption-Type Split

[Redacted From the Public Record Version, But Incorporated By Reference]

CONFIDENTIAL APPENDIX D

Plan for Incorporation-Type Split

[Redacted From the Public Record Version, But Incorporated By Reference]

CONFIDENTIAL APPENDIX E

Interim Monitor Agreement

[Redacted From the Public Record Version, But Incorporated By Reference]