

Complaint

127 F.T.C.

IN THE MATTER OF
MEDTRONIC, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT

Docket C-3879. Complaint, June 3, 1999--Decision, June 3, 1999

This consent order, among other things, requires Medtronic, Inc., a Minnesota-based corporation engaged in the research, development, manufacture and sale of medical devices, to divest Avecor's non-occlusive arterial pump assets to Baxter Healthcare Corporation or another Commission-approved buyer. The consent order also requires Medtronic to provide substantial assistance to enable the buyer to obtain FDA approval to manufacture and market Avecor pumps and reservoirs to use with the pump.

Participants

For the Commission: *Stephen Riddell, Mark Menna, Paul Frangie, Phillip Broyles, Kenneth Davidson, Roberta Baruch, William Baer, Louis Silvia, Roy Levy, and Christopher Taylor.*

For the respondent: *Philip Larson, Hogan & Hartson, Washington, D.C.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission ("Commission"), having reason to believe that respondent Medtronic, Inc. ("Medtronic"), a corporation, has entered into an agreement and plan of merger with Avecor Cardiovascular, Inc. ("Avecor"), a corporation, whereby Medtronic proposes to acquire all of the outstanding common stock of Avecor, that such agreement and plan of merger violates Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, as amended, and that such agreement and plan of merger, if consummated would violate Section 7 of the Clayton Act, 15 U.S.C. 18, as amended, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, as amended, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. RESPONDENT

1. Respondent Medtronic, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Minnesota, with its office and principal place of business located at 7000 Central Avenue, Northeast, Minneapolis, Minnesota.

2. Respondent Medtronic is, and at all times relevant herein has been, engaged in the research, development, manufacture and sale of medical devices, including implantable devices, such as pacemakers and defibrillators, that regulate heart rhythm, tissue and mechanical heart valves, coronary stents, and perfusion devices that are used in heart/lung machines. Medtronic's perfusion devices include non-occlusive arterial pumps.

3. Respondent is, and at all times relevant herein has been, engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

II. THE ACQUIRED COMPANY

4. Avecor is a corporation organized, existing and doing business under the laws of the State of Minnesota with its office and principal place of business located at 7611 Northland Drive, Minneapolis, Minnesota.

5. Avecor is, and at all times relevant herein has been, engaged in, the research, development, manufacture and sale of perfusion devices used in heart/lung machines, including non-occlusive arterial pumps.

6. Avecor is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

III. THE PROPOSED ACQUISITION

7. Pursuant to an agreement and plan of merger, dated July 12, 1998, as amended, Medtronic intends to acquire all of the outstanding common voting stock of Avecor in exchange for stock of Medtronic valued at approximately \$106 million.

IV. TRADE AND COMMERCE

8. Perfusion devices are the blood-handling products used in heart/lung machines. These devices circulate and oxygenate the blood and regulate body temperature during heart bypass surgery and other procedures where the heart must be relieved of its pumping function. Arterial pumps are the devices that circulate the blood. Non-occlusive arterial pumps are safer and less damaging than occlusive arterial pumps. There are no close substitutes for non-occlusive arterial pumps.

9. The research, development, manufacture and sale of non-occlusive arterial pumps is a relevant line of commerce in which to evaluate the effects of this proposed acquisition.

10. The United States as a whole is the relevant section of the country in which to evaluate the effects of this proposed acquisition on the research, development, manufacture and sale of non-occlusive arterial pumps.

11. The United States market for research, development, manufacture and sale of non-occlusive arterial pumps is highly concentrated and would become significantly more concentrated as a result of the proposed acquisition. Premerger concentration in the research, development, manufacture and sale of non-occlusive arterial pumps, as measured by the Herfindahl-Hirschman Index, is over 5700, and as a result of the proposed acquisition concentration would increase by more than 340 points to a level of more than 6050.

12. Entry into the United States market for research, development, manufacture and sale of non-occlusive arterial pumps is difficult and would not be timely, likely or sufficient to prevent anticompetitive effects that may result from the proposed acquisition.

V. VIOLATIONS CHARGED

13. Respondent Medtronic and AVecor are actual competitors in the United States market for research, development, manufacture and sale of non-occlusive arterial pumps.

14. The effects of the proposed acquisition, if consummated, may be substantially to lessen competition or to tend to create a monopoly in the United States market for research, development, manufacture and sale of non-occlusive arterial pumps in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45, in the following ways, among others:

a. By eliminating actual, direct, and substantial competition between Medtronic and Avecor in the United States market for research, development, manufacture and sale of non-occlusive arterial pumps;

b. By increasing the likelihood that Medtronic would unilaterally exercise market power in the United States market for research, development, manufacture and sale of non-occlusive arterial pumps;

c. By increasing the likelihood that consumers in the United States will be charged higher prices for non-occlusive arterial pumps; and

d. By reducing the likelihood of innovation in the United States market for the research, development, manufacture and sale of non-occlusive arterial pumps.

VI. STATUTES VIOLATIONS

15. The agreement and plan of merger between Medtronic and Avecor constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

16. The proposed acquisition, if consummated, would constitute a violation 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.

DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of the acquisition of all of the voting stock of Avecor Cardiovascular, Inc. ("Avecor") by Medtronic, Inc. ("Medtronic"), hereinafter sometimes referred to as "respondent," and respondent having been furnished with a copy of a draft complaint that the Bureau of Competition proposed to present to the Commission for its consideration, and which, if issued by the Commission, would charge respondent with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. 18; and

Respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an

admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Medtronic, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of Minnesota, with its principal executive offices located at 7000 Central Avenue, Northeast, Minneapolis, Minnesota.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

I.

It is ordered, That, as used in this order, the following definitions shall apply:

A. "*Medtronic*" or "*respondent*" means Medtronic, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by Medtronic, Inc. and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "*Avecor*" means Avecor Cardiovascular, Inc., a corporation organized, existing and doing business under the laws of Minnesota with its headquarters located at 7611 Northland Drive, Minneapolis, Minnesota, its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by Avecor Cardiovascular, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "*Proposed Acquisition*" means the proposed acquisition by Medtronic of 100% of the voting stock of Avecor pursuant to an Agreement and Plan of Merger, dated July 12, 1998, as amended.

D. "*Acquirer*" means Baxter Healthcare Corporation, a corporation organized, existing and doing business under the laws of Delaware with its principal place of business located at One Baxter Parkway, Deerfield, Illinois, or the entity to whom Medtronic shall divest the Avecor Pump Assets pursuant to paragraph II. of this order, as applicable.

E. "*Associated Reservoirs*" means a family of venous reservoirs for use with the Avecor Blood Pump System that includes both a hard shell and a venous reservoir bag and a reservoir holder.

F. "*Avecor Blood Pump Reservoirs*" means the Associated Reservoirs manufactured and sold by Avecor.

G. "*Avecor Blood Pump System*" means the arterial pump system manufactured and sold by Avecor, used for pumping blood during cardiopulmonary bypass procedures and consisting of a pump console (controller, rotor housing, and flow meter), and associated pump disposables (pump chamber and pump tubing).

H. "*Avecor Pump Assets*" means all Avecor's assets, business, goodwill and rights, other than real property, as of the date this agreement containing consent order is accepted for public comment, relating to the research, development, manufacture, and sale of the Avecor Blood Pump System and the products included therein throughout the world, including, but not limited to:

1. All machinery, fixtures, equipment, and other tangible property, trade names, trademarks, brand names, formulations, inventory, Patents, trade secrets, technology, know-how, specifications, designs, drawings, processes, production information, manufacturing information, testing and quality control data, research materials, technical information, marketing and distribution information, customer lists, software, information stored on management information systems (and specifications sufficient for the Acquirer or New Acquirer to use such information) and all data, contractual rights, materials and information relating to FDA and other governmental or regulatory approvals relating to the Avecor Blood Pump System and the products included therein;

2. The MC3 License Agreement;

3. An exclusive, royalty-free, transferrable, worldwide license, in perpetuity, to Avecor's Patents, trade secrets and know-how in the field of use of making, using, exporting, importing and selling Associated Reservoirs for use in connection with the Avecor Blood Pump System and any improvements thereto, provided however, that the foregoing license shall be non-exclusive as to:

- a. Hard shell reservoirs and venous reservoir bags with an outlet size other than 5/8 inch; and
- b. The reservoir holders;

and all as subject to the applicable provisions of the Divestiture Agreement approved by the Commission.

I. "*Avecor's Costs*" means Avecor's cost of manufacturing such item, as determined by Generally Accepted Accounting Principles, including the actual cost of raw materials, direct labor and reasonable, actual contracted services, but excluding factory overhead used in manufacturing the item. Raw materials and direct labor are the actual cost of materials and labor consumed to manufacture the item.

J. "*Contract Manufacture*" means the manufacture of Avecor Blood Pump Systems and Associated Reservoirs supplied pursuant to a Divestiture Agreement by Medtronic for sale to the Acquirer or New Acquirer, as applicable.

K. "*Divestiture Trustee*" means the trustee(s) appointed pursuant to paragraph IV. of this order, as applicable.

L. "*FDA*" means the United States Food and Drug Administration.

M. "*Interim Trustee*" means the trustee(s) appointed pursuant to paragraph III. of this order, as applicable.

N. "*Commercial Capability to Manufacture*" means the practical ability to manufacture (including by subcontracting other than by respondent or Avecor) the Avecor Blood Pump System and Associated Reservoirs whether or not any have actually been sold.

O. "*MC3 Agreement*" means the license agreement, dated January 16, 1995, as amended between Michigan Critical Care Consultants and Avecor.

P. "*New Acquirer*" means the entity to whom the Divestiture Trustee shall divest the Avecor Pump Assets pursuant to paragraph IV. of this order.

Q. "*Patents*" means any patent and patent right, patent applications, patents of addition, re-examination, reissues, extensions,

granted supplementary protection certificates, substitutions, confirmations, registrations, revalidations, revisions, additions and the like, of or to said patent and patent right and any and all continuations and continuations-in-part and divisionals.

R. "*Reimbursable Costs*" means the reasonable, direct, out-of-pocket expenses incurred by Avecor in providing referenced assistance.

II.

It is further ordered, That:

A. Respondent shall divest, absolutely and in good faith, the Avecor Pump Assets as a competitively viable, on-going product line to: (1) an Acquirer, in accordance with the Asset Purchase Agreement, dated February 5, 1999; or (2) within ninety (90) days of the date on which this order becomes final and at no minimum price, to an Acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission. The purpose of the divestiture of the Avecor Pump Assets is to ensure their continued use in the research, design, development, manufacture, marketing and sale for use in cardiopulmonary bypass procedures and to remedy the lessening of competition resulting from the Proposed Acquisition as alleged in the Commission's complaint.

B. Respondent's agreement with the Acquirer (hereinafter "Divestiture Agreement") shall include the following provisions, and respondent shall commit to satisfy the following:

1. Respondent shall Contract Manufacture and deliver to the Acquirer or the New Acquirer in a timely manner and under reasonable terms and conditions, a supply of the Avecor Blood Pump System and the Avecor Blood Pump Reservoirs, specified in the Divestiture Agreement at Avecor's Cost or such other price specified in the Divestiture Agreement with the approval of the Commission for a period not to exceed one (1) year from the date of the Divestiture; provided, however, that the one (1) year period may be extended by the Acquirer or New Acquirer with respect to the Avecor Blood Pump Reservoirs for a period not to exceed one (1) year at prices that are 15% higher than those in effect during the first year of Contract Manufacture. In the event that the Acquirer does not choose to have all of the Avecor Blood Pump System and the Avecor Blood

Pump Reservoirs Contract Manufactured because the Acquirer does not require such supply in order to manufacture or sell the AVecor Blood Pump System in a competitive manner, respondent shall not be required to Contract Manufacture those AVecor Blood Pump Systems and AVecor Blood Pump Reservoirs the Acquirer does not require.

2. After respondent commences delivery of the AVecor Blood Pump System and the AVecor Blood Pump Reservoirs to the Acquirer or the New Acquirer pursuant to the Divestiture Agreement and for the term of the Contract Manufacturing arrangement for the AVecor Blood Pump System and the AVecor Blood Pump Reservoirs, referred to in paragraph II.B. of this order, respondent will produce the AVecor Blood Pump System and the AVecor Blood Pump Reservoirs only for sale to the Acquirer or the New Acquirer; provided, however respondent is in no way limited in its production of the reservoir holder or of hard shell reservoirs and venous reservoir bags with an outlet size other than 5/8 inch.

3. Respondent shall make representations and warranties that the AVecor Blood Pump System and the AVecor Blood Pump Reservoirs supplied pursuant to the Divestiture Agreement meet the FDA approved specifications. Respondent shall agree to indemnify, defend and hold the Acquirer or the New Acquirer harmless from any and all suits, claims, actions, demands, liabilities, expenses or losses resulting from the failure of the AVecor Blood Pump System and the AVecor Blood Pump Reservoirs supplied to the Acquirer or New Acquirer pursuant to the Divestiture Agreement by respondent to meet FDA specifications. This obligation shall be contingent upon the Acquirer or the New Acquirer giving respondent prompt, adequate notice of such claim, cooperating fully in the defense of such claim, and permitting respondent to assume the sole control of all phases of the defense and/or settlement of such claim, including the selection of counsel; provided, however, any such defense and/or settlement shall be consistent with the obligations assumed by respondent under this order. This obligation shall not require respondent to be liable for any negligent act or omission of the Acquirer or the New Acquirer or for any representations and warranties, express or implied, made by the Acquirer or the New Acquirer that exceed the representations and warranties made by respondent to the Acquirer or the New Acquirer.

4. Respondent shall make representations and warranties that respondent will hold harmless and indemnify the Acquirer or New Acquirer for any liabilities or loss of profits resulting from the failure

by respondent to deliver the Avecor Blood Pump System and the Avecor Blood Pump Reservoirs in a timely manner as required by the Divestiture Agreement unless respondent can demonstrate that its failure was entirely beyond the control of respondent and in no part the result of negligence or willful misconduct on respondent's part.

5. During the term of the Contract Manufacturing between respondent and the Acquirer or the New Acquirer, upon request by the Acquirer, New Acquirer or the Interim Trustee, respondent shall make available to the Interim Trustee all records that relate to the manufacture of the Avecor Blood Pump System and the Avecor Blood Pump Reservoirs.

6. Upon reasonable notice and request from the Acquirer or the New Acquirer to respondent, respondent shall use all commercially reasonable efforts to provide in a timely manner: (a) assistance and advice to enable the Acquirer or the New Acquirer (or the Designees of the Acquirer or New Acquirer) to obtain all necessary FDA approvals to manufacture and sell the Avecor Blood Pump System and the Avecor Blood Pump Reservoirs; (b) assistance to the Acquirer or New Acquirer (or the Designee thereof) as is necessary to enable the Acquirer or New Acquirer (or the Designee thereof) to obtain the Commercial Capability to Manufacture the Avecor Blood Pump System and the Associated Reservoirs; and (c) consultation with knowledgeable employees of respondent and training, at the request of and at the facility of the Acquirer's or the New Acquirer's choosing, until the Acquirer or New Acquirer (or the Designee thereof) receives certification from the FDA or abandons its efforts for certification from the FDA and until the Acquirer or the New Acquirer has the Commercial Capability to Manufacture the Avecor Blood Pump System and the Associated Reservoirs or abandons its efforts to obtain the Commercial Capability to Manufacture such products, reasonably sufficient to satisfy the management of the Acquirer or New Acquirer that its personnel (or the Designee's personnel) are adequately trained in the manufacture of the Avecor Blood Pump System and the Avecor Blood Pump Reservoirs. Such assistance shall include on-site inspections of the Northland Plant (or inspections of whatever facility to which respondent may have transferred the manufacture of the Avecor Blood Pump System or the Avecor Blood Pump Reservoirs), at the Acquirer's or New Acquirer's request, which is the specified source of supply of the Contract

Manufacturing. Respondent may require reimbursement from the Acquirer or New Acquirer for all its Reimbursable Costs incurred in providing the services required by this paragraph II.B.6.

7. The Divestiture Agreement shall require the Acquirer or the New Acquirer to submit to the Commission within 10 days of signing the Divestiture Agreement a certification attesting to the good faith intention of the Acquirer or the New Acquirer, including a plan by the Acquirer or the New Acquirer, to obtain in an expeditious manner all necessary FDA approvals to manufacture and sell the Avecor Blood Pump System and the Associated Reservoirs and to obtain the Commercial Capability to Manufacture such products.

8. The Divestiture Agreement shall require the Acquirer or the New Acquirer to submit to the Commission and Interim Trustee periodic verified written reports, setting forth in detail the efforts of the Acquirer or the New Acquirer to sell the Avecor Blood Pump System and Avecor Blood Pump Reservoirs obtained pursuant to the Divestiture Agreement and to obtain all FDA approvals necessary to manufacture and sell the Avecor Blood Pump System and the Associated Reservoirs and the efforts of the Acquirer or the New Acquirer to obtain the Commercial Capability to Manufacture such products. The Divestiture Agreement shall require the first such report to be submitted 60 days from the date the Divestiture Agreement is accepted for public comment by the Commission and every 60 days thereafter until all necessary FDA approvals are obtained by the Acquirer or the New Acquirer to manufacture and sell the Avecor Blood Pump System and the Associated Reservoirs and until the Acquirer or the New Acquirer has obtained the Commercial Capability to Manufacture such products. The Divestiture Agreement shall also require the Acquirer or the New Acquirer to report to the Commission and the Interim Trustee within ten (10) days of its ceasing the sale in the United States of the Avecor Blood Pump System and the Avecor Blood Pump Reservoirs obtained pursuant to the Divestiture Agreement for any time period exceeding sixty (60) days or abandoning its efforts to obtain all necessary FDA approvals to manufacture and sell the Avecor Blood Pump System and the Associated Reservoirs or to obtain the Commercial Capability to Manufacture such products. The Acquirer or New Acquirer shall provide the Interim Trustee access to all records and all facilities that relate to its efforts, pursuant to the Divestiture Agreement, to sell or

manufacture the Avecor Blood Pump System and the Associated Reservoirs or obtain FDA approvals.

9. The Divestiture Agreement shall provide that the Commission may terminate the Divestiture Agreement if the Acquirer or the New Acquirer: (a) voluntarily ceases for sixty (60) days or more the sale of, or otherwise fails to pursue good faith efforts to sell, the Avecor Blood Pump System in the United States prior to obtaining all necessary FDA approvals to manufacture and sell the Avecor Blood Pump System and the Associated Reservoirs and to obtaining the Commercial Capability to Manufacture such products; (b) fails to pursue good faith efforts to obtain all necessary FDA approvals to manufacture and sell the Avecor Blood Pump System and the Associated Reservoirs in the United States; or (c) fails to obtain all necessary FDA approvals of its own to manufacture and sell the Avecor Blood Pump System and the Associated Reservoirs and to obtain the Commercial Capability to Manufacture such products within one (1) year from the date the Commission approves the Divestiture Agreement between respondent and the Acquirer or the New Acquirer; provided, however, that the one (1) year period may be extended by the Commission in three (3) month increments for a period not to exceed an additional one (1) year if it appears that such FDA approvals are likely to be obtained or the Acquirer or the New Acquirer is likely to obtain the Commercial Capability to Manufacture such products within such extended time period.

10. The Divestiture Agreement shall provide that if it is terminated, the Avecor Blood Pump Assets shall revert back to Medtronic and the Avecor Pump Assets shall be divested by the Divestiture Trustee to a New Acquirer pursuant to the provisions of paragraph IV. of this order.

C. During the pendency of any patent dispute that: (1) challenges or seeks to render invalid any of the patents divested or licensed pursuant to paragraph II.A.; and (2) could affect the manufacture or sale of the Avecor Blood Pump System and Associated Reservoirs, respondent shall cooperate, at its own expense, in the defense of rights it has transferred to the Acquirer or New Acquirer.

D. By the time the Divestiture Agreement between respondent and the Acquirer or New Acquirer of the Avecor Pump Assets is signed, respondent shall provide the Acquirer or New Acquirer with a complete list of all employees who were then engaged (or were

engaged at any time subsequent to July 12, 1998, the date of the Proposed Acquisition agreement) in the research, development, manufacture or marketing of the Avecor Blood Pump System or the Avecor Blood Pump Reservoirs and shall supplement that list on the date this order is accepted for public comment with the names of any additional employees who then meet these definitions. Such list(s) shall state each such individual's name, position, address, business telephone number, or if no business telephone number exists, a home telephone number, if available and with the consent of the employee, and a description of the duties and work performed by the individual in connection with the Avecor Pump Assets. Respondent shall provide the Acquirer or New Acquirer the opportunity to enter into employment contracts with such individuals provided that such contracts are contingent upon the Commission's approval of the Divestiture Agreement.

E. Within no more than five (5) business days after the respondent and the Acquirer or New Acquirer have signed the Divestiture Agreement and subject to the consent of the employees, respondent shall provide the Acquirer or New Acquirer with an opportunity to inspect the personnel files and other documentation relating to the individuals identified in paragraph II.D. of this order to the extent possible under applicable laws. For a period of two (2) months following the divestiture, respondent shall provide the Acquirer or New Acquirer with a further opportunity to interview such individuals and negotiate employment contracts with them.

F. Respondent shall provide all employees identified in paragraph II.D. of this order with reasonable financial incentives to continue in their employment positions pending divestiture of the Avecor Pump Assets in order that such employees may be in a position to accept employment with the Acquirer or New Acquirer at the time of the divestiture. Such incentives shall include continuation of all employee benefits offered by respondent until the date of the divestiture, and vesting of all pension benefits (as permitted by law) for each such employee who accepts an offer of employment from the Acquirer or New Acquirer within one hundred and eighty (180) days after the Divestiture Agreement is accepted for public comment by the Commission. In addition, respondent shall not enforce any confidentiality or non-compete restrictions relating to the Avecor Pump Assets that apply to any employee identified in paragraph II.D. who accepts employment with any Acquirer or New Acquirer, but

respondent may enforce all other rights thereunder relating to any other products or services.

G. For a period of one(1) year commencing on the date of the individual's employment by the Acquirer or New Acquirer, respondent shall not solicit for employment any of the individuals identified in paragraph II.D. of this order who accept employment with the Acquirer or New Acquirer, unless such individual has been separated from employment by the Acquirer or New Acquirer against that individual's wishes.

H. Prior to divestiture, respondent shall not transfer, without consent of the Acquirer or New Acquirer, any of the individuals identified in paragraph II.D. of this order to any other position.

I. Nothing in paragraphs II.D. through II.H. shall apply with respect to Anthony Badolato, William Haworth and Al Seck.

J. While the obligations imposed by paragraphs II., III. or IV. of this order are in effect, respondent shall take such actions as are necessary: (1) to maintain all necessary FDA approvals to manufacture and sell the Avecor Blood Pump System and the Avecor Blood Pump Reservoir; (2) to maintain the viability and marketability of the Avecor Pump Assets consistent with general practices in the medical devices industry, as well as all tangible assets, including respondent's facilities, used to manufacture and sell the Avecor Blood Pump System and the Avecor Blood Pump Reservoir; and (3) to prevent the destruction, removal, wasting, deterioration or impairment of the Avecor Pump Assets and the Northland Plant, except for ordinary wear and tear.

III.

It is further ordered, That:

A. At any time after respondent signs the Agreement Containing Consent Order in this matter, the Commission may appoint an Interim Trustee to ensure that respondent and the Acquirer or New Acquirer expeditiously perform their respective responsibilities as required by this order and the Divestiture Agreement approved by the Commission. Respondent shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Interim Trustee appointed pursuant to this paragraph III.:

1. The Commission shall select the Interim Trustee, subject to the consent of respondent, which consent shall not be unreasonably withheld. If respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to respondent of the identity of any proposed trustee, respondent shall be deemed to have consented to the selection of the proposed trustee.

2. The Interim Trustee shall have the power and authority to monitor respondent's compliance with the terms of this order and with the terms of the Divestiture Agreement with the Acquirer or New Acquirer.

3. Within ten (10) days after appointment of the Interim Trustee, respondent shall execute a trust agreement (in the form attached) that, subject to the prior approval of the Commission, confers on the Interim Trustee all the rights and powers necessary to permit the Interim Trustee to monitor respondent's compliance with the terms of this order and with the Divestiture Agreement with the Acquirer or New Acquirer, and to monitor the compliance of the Acquirer or New Acquirer under the Divestiture Agreement.

4. The Interim Trustee shall serve for two (2) years from the date the respondent and the Acquirer have signed the Divestiture Agreement, or in the event that there is a New Acquirer pursuant to the provisions of paragraph IV. of this order, the Interim Trustee shall serve for two (2) years from date the respondent and the New Acquirer have signed the Divestiture Agreement; provided however, that the term shall end earlier if the Interim Trustee has reported that the Acquirer or New Acquirer has received all necessary FDA approvals and has obtained the Commercial Capability to Manufacture the Avecor Blood Pump System and the Associated Reservoirs and the Commission has accepted that report.

5. The Interim Trustee shall have full and complete access to respondent's personnel, books, records, documents, facilities and technical information relating to the research, design, development, manufacture, importation, marketing, distribution and sale of the Avecor Blood Pump System and the Avecor Blood Pump Reservoir, or to any other relevant information, as the Interim Trustee may reasonably request, including, but not limited to, all documents and records kept in the normal course of business that relate to the manufacture of the Avecor Blood Pump System and the Avecor Blood Pump Reservoir. Respondent shall cooperate with any

reasonable request of the Interim Trustee. Respondent shall take no action to interfere with or impede the Interim Trustee's ability to monitor respondent's compliance with paragraphs II., III. and IV. of this order and the Divestiture Agreement between respondent and the Acquirer or New Acquirer.

6. The Interim Trustee shall serve, without bond or other security, at the expense of respondent, on such reasonable and customary terms and conditions as the Commission may set. The Interim Trustee shall have authority to employ, at the expense of respondent, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Interim Trustee's duties and responsibilities. The Interim Trustee shall account for all expenses incurred, including fees for his or her services, subject to the approval of the Commission.

7. Respondent shall indemnify the Interim Trustee and hold the Interim Trustee harmless against any losses, claims, damages, liabilities or expenses arising out of, or in connection with, the performance of the Interim Trustee's duties, including all reasonable fees of counsel and other 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 liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Interim Trustee.

8. If the Commission determines that the Interim Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute trustee in the same manner as provided in paragraph III.A.1. of this order.

9. The Commission may on its own initiative or at the request of the Interim Trustee issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this order and the Divestiture Agreement with the Acquirer or New Acquirer.

10. The Interim Trustee shall evaluate reports submitted to it by the Acquirer or the New Acquirer with respect to the efforts of the Acquirer or the New Acquirer to obtain all necessary FDA approvals to manufacture and sell the AVECOR Blood Pump System and the Associated Reservoirs and to obtain the Commercial Capability to Manufacture such products. The Interim Trustee shall report in writing, concerning compliance by respondent and the Acquirer or

New Acquirer with the provisions of paragraphs II. and III. to the Commission within ten (10) days from the date the Divestiture Agreement is approved and every sixty (60) days thereafter until the Acquirer or New Acquirer obtains, or abandons efforts to obtain, all necessary FDA approvals to manufacture and sell the Avecor Blood Pump System and the Associated Reservoirs and to obtain the Commercial Capability to Manufacture such products. Such reports shall include at least the following:

- a. Whether respondent has supplied The Avecor Blood Pump System and the Avecor Blood Pump Reservoir in conformity with the requirements of paragraph II.B. of this order;
- b. Whether respondent has given the Interim Trustee access to records pursuant to paragraph II.B.5. of this order;
- c. Whether the Acquirer or New Acquirer has given the Interim Trustee reports and access pursuant to paragraph II.B.8. of this order;
- d. Whether the Acquirer or New Acquirer is making good faith efforts to sell the Avecor Blood Pump System and the Associated Reservoirs, to obtain all necessary FDA approvals to manufacture and sell the Avecor Blood Pump System and the Associated Reservoirs, and to obtain the Commercial Capability to Manufacture such products and whether these actions meet the projections of the business plan of the Acquirer or New Acquirer as required by paragraphs II.B.7. and II.B.8. of this order;
- e. If six (6) months have elapsed from the date of approval of the Divestiture Agreement and the Acquirer or New Acquirer has not obtained all necessary FDA approvals to manufacture and sell the Avecor Blood Pump System the Associated Reservoirs, and the Commercial Capability to Manufacture such products, whether such approvals and such Capability are likely to be obtained if the Commission extends the one (1) year period specified in paragraph II.B.9. of this order; and
- f. Whether respondent has maintained the Avecor Pump Assets as required in paragraph II.J. of this order.

B. If the Commission terminates the Divestiture Agreement pursuant to paragraph II.B.9. of this order, the Commission may direct the Divestiture Trustee to seek a New Acquirer, as provided for in paragraph IV. of this order.

IV.

It is further ordered, That:

A. If respondent fails to divest absolutely and in good faith, and with the Commission's prior approval, the Avecor Pump Assets and to comply with the requirements of paragraph II. of this order, or if the Acquirer abandons its efforts or fails to obtain all necessary regulatory approvals and the Commercial Capability to Manufacture the Avecor Blood Pump System and the Associated Reservoirs in the manner set out in paragraph II.B.9., then any executed Divestiture Agreement between respondent and the Acquirer shall be terminated and the Commission may appoint a Divestiture Trustee to divest the Avecor Pump Assets and execute a new Divestiture Agreement that satisfies the requirements of paragraph II. of this order. The Divestiture Trustee may be the same person as the Interim Trustee and will have the authority and responsibility to divest the Avecor Pump Assets absolutely and in good faith, and with the Commission's prior approval. Neither the decision of the Commission to appoint the Divestiture Trustee, nor the decision of the Commission not to appoint the Divestiture Trustee, to divest any of the assets under this paragraph IV.A. shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the respondent to comply with this order.

B. If a Divestiture Trustee is appointed by the Commission or a court pursuant to paragraph IV.A. to divest the Avecor Pump Assets to a New Acquirer, respondent shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:

1. The Commission shall select the Divestiture Trustee, subject to the consent of respondent, which consent shall not be unreasonably withheld. If respondent 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 of the identity of any proposed Divestiture Trustee, respondent shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

2. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to divest the Avecor Pump Assets to a New Acquirer pursuant to the terms of this order and to enter into a Divestiture Agreement with the New Acquirer pursuant to the terms of this order, which Divestiture Agreement shall be subject to the prior approval of the Commission.

3. Within ten (10) days after appointment of the Divestiture Trustee, respondent shall execute a (or amend the existing) trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to divest the Avecor Pump Assets to a New Acquirer and to enter into a Divestiture Agreement with the New Acquirer.

4. The Divestiture Trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph IV.B.3. of this order to divest the Avecor Pump Assets and to enter into a Divestiture Agreement with the New Acquirer that satisfies the requirements of paragraph II. of this order. If, however, at the end of the applicable twelve (12) month period, the Divestiture Trustee has submitted to the Commission a plan of divestiture or believes that divestiture can be achieved within a reasonable time, such divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; provided, however, the Commission may extend such divestiture period only two (2) times.

5. The Divestiture Trustee shall have full and complete access to the personnel, books, records and facilities of respondent related to the manufacture, distribution, or sale of the Avecor Pump Assets or to any other relevant information, as the Divestiture Trustee may request. Respondent shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondent shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of his or her responsibilities.

6. The Divestiture Trustee shall use reasonable efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to respondent's absolute and unconditional obligation to divest at no minimum price and the Divestiture Trustee's obligation to expeditiously accomplish the

remedial purpose of the order; to assure that respondent enters into a Divestiture Agreement that complies with the provisions of paragraph II.B.; to assure that respondent complies with the remaining provisions of paragraph IV. of this order; and to assure that the New Acquirer obtains all necessary FDA approvals to manufacture and sell the Avecor Blood Pump System and the Associated Reservoirs and the Commercial Capability to Manufacture such products. The divestiture shall be made to, and the Divestiture Agreement executed with, the New Acquirer in the manner set forth in paragraph II. of 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 (1) such acquiring entity, the Divestiture Trustee shall divest to the acquiring entity selected by respondent from among those approved by the Commission.

7. The Divestiture Trustee shall serve, without bond or other security, at the expense of respondent, 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 expense of respondent, 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 and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of respondent. The Divestiture Trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the Divestiture Trustee's locating a New Acquirer and assuring compliance with this order.

8. Respondent 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 liabilities, losses, damages, claims, or expenses result from misfeasance, gross

negligence, willful or wanton acts, or bad faith by the Divestiture Trustee.

9. If the Commission determines that the Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute trustee in the same manner as provided in paragraph IV. of this order.

10. The Commission or, in the case of a court-appointed 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 comply with the terms of this order.

11. The Divestiture Trustee shall have no obligation or authority to operate or maintain the Avecor Pump Assets.

12. The Divestiture Trustee shall report in writing to respondent and the Commission every two (2) months concerning his or her efforts to divest the relevant assets and respondent's compliance with the terms of this order.

V.

It is further ordered, That:

A. Within sixty (60) days of the date this order becomes final and every ninety (90) days thereafter until respondent has fully complied with the provisions of paragraphs II. through IV. of this order, respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with these paragraphs of this order; provided, however, that respondent shall not be obligated to continue to submit such reports regarding its compliance with its obligations under paragraphs II.C, II.F. (the last sentence only), II.G. and IV.B.8. of this order once respondent has complied with the other provisions of paragraphs II. through IV. Respondent shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with these paragraphs of this order, including a description of all substantive contacts or negotiations for accomplishing the divestitures and entering into the Divestiture Agreements required by this order, including the identity of all parties contacted. Respondent shall include in its compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning the Divestiture Agreements

required by paragraph II. of this order, subject to any legally recognized privilege.

B. One (1) year from the date this order becomes final and annually thereafter until respondent has complied with all of the terms of this order, and at such other times as the Commission may require, respondent 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 this order.

VI.

It is further ordered, That, for the purpose of determining or securing compliance with this order, and subject to any legally recognized privilege, upon written request and on reasonable notice to respondent, respondent shall permit any duly authorized representatives of the Commission:

A. Access, during office hours and in the presence of counsel, to any facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of respondent, relating to any matters contained in this consent order; and

B. Upon five (5) days' notice to respondent, and without restraint or interference from respondent, to interview officers or employees of respondent, who may have counsel present, regarding such matters.

VII.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any change in respondent such as dissolution, assignment or sale resulting in the emergence of a successor, the creation or dissolution of subsidiaries or any other change that may affect compliance obligations arising out of the order.

VIII.

It is further ordered, That this order shall terminate on June 3, 2009.

Decision and Order

127 F.T.C.

TRUST AGREEMENT

TRUST AGREEMENT

This Trust Agreement (the "Trust Agreement") entered into this _____ day of _____ between _____ and Medtronic, Inc. ("Medtronic"), provides as follows:

WHEREAS, the United States Federal Trade Commission (the "Commission") has accepted or will shortly accept for Public Comment an Agreement containing Consent Order with Medtronic (the "Order"), which provides, among other things, for the appointment of an Interim Trustee to ensure that Medtronic and any acquirer of certain defined assets perform their respective obligations with respect to those assets under the Order, and

WHEREAS, the Commission may appoint _____ as such trustee, (the "Interim Trustee") in connection with the divestiture of certain defined assets (the "Assets") used in the business of producing and selling certain products formerly produced and sold by Avecor Cardiovascular, Inc. ("Avecor") as part of its Blood Pump System Business (the "Business") as defined in the Agreement between Avecor, Medtronic and Baxter Healthcare Corporation ("Baxter") dated February ____, 1999, (the "Divestiture Agreement"), and also including the supply of associated reservoirs with a 5/8 inch outlet and a reservoir holder for use with those products (collectively the "Products") and _____ has consented to that appointment;

WHEREAS, the Order further provides or will provide that Medtronic shall execute a trust agreement, subject to prior approval of the Commission, conferring all the rights and powers necessary to permit the Interim Trustee to monitor Medtronic's compliance with the terms of the Order and with the Divestiture Agreement referenced in the Order and to monitor the compliance of the Acquirer as defined in the Order;

WHEREAS, this Trust Agreement, although executed by the Interim Trustee and Medtronic is not effective for any purpose, including but not limited to imposing rights and responsibilities on Medtronic or the Interim Trustee under the Order, until it has been approved by the Commission;

WHEREAS, the parties to this Trust Agreement intend to be legally bound;

NOW, THEREFORE, the parties agree as follows:

1. Capitalized terms used herein and not specifically defined herein shall have the respective definitions given to them in the Order. The term Medtronic as used herein

TRUST AGREEMENT

shall mean and include all of the parties included within the definition of Respondent in subparagraph A of Paragraph I of the Order. The term "Assets to be Divested" means the Assets to be transferred relating to the Business as provided for in the Divestiture Agreement.

2. The Interim Trustee shall have all of the powers and responsibilities conferred upon the Interim Trustee by the Order.

3. Medtronic hereby agrees that it will fully and promptly comply with all of the terms of the Order conferring any rights, powers or privileges upon the Interim Trustee, or imposing any duties or obligations upon itself with respect to the Interim Trustee or the performance by the Interim Trustee of its responsibilities thereunder. In particular, but without limiting the generality of the foregoing Medtronic agrees that:

(a) it will use its best efforts to ensure that any Acquirer enters into an agreement in the form set out in Attachment 1 with the Interim Trustee prior to the divestiture by Medtronic to the Acquirer of the Assets to be Divested;

(b) it will promptly provide the Interim Trustee with:

(1) a complete inventory of the Assets to be Divested identifying in particular those Assets which require actions to maintain their viability and marketability and who is responsible for taking those actions;

(2) a complete inventory of all existing FDA approvals and pending FDA approvals for the Products identifying actions required to maintain or complete such approvals and identifying who is responsible for taking such actions;

(3) a complete inventory of all activities or operations world-wide which relate to the manufacture of any of the Assets to be Divested and which relate to Medtronic's compliance with the Order including processes and process validations which are under development, identify who is responsible for maintaining or pursuing such activities and giving an inventory of materials and records relating to such manufacture;

(4) full and complete details of all dealings with any future Acquirer (other than Baxter) including copies of all correspondence and written reports of all contacts and discussions with any Acquirer and any draft and complete agreements;

(5) a complete inventory of all Patents related to the manufacture or sale of the Products in the U.S., identifying actions needed to maintain such Patents and who is responsible for such actions;

(c) it will provide a written list of the principal individuals involved in the transitioning of the Assets to be Divested to the Acquirer, together with their location and role; and will provide the Trustee with written notice of any changes in such personnel occurring thereafter.

TRUST AGREEMENT

(d) it will provide the Interim Trustee with copies of all reports submitted to the Commission pursuant to Paragraph V of the Order, simultaneous with the submission of such reports to the Commission;

(e) to the extent not reflected in the reports submitted to the Commission pursuant to Paragraph V of the Order, it will provide every two months commencing 60 days after the Divestiture Agreement is accepted by the Commission for public comment, or as requested by the Interim Trustee full and detailed reports to the Interim Trustee as to all of its activities and obligations under the Order concerning the Business including, without limitation to the extent applicable:

(1) all activities involving the research and development, pre-clinical and clinical studies and the pursuit and maintenance of FDA clearance of any of the Assets to be Divested;

(2) all activities concerned with Contract Manufacture as referenced in Paragraph II of the Order, including, without limitation, negotiation and operation of supply agreements, actual supply and inventory;

(3) all activities concerning the assistance, advice and consultation provided to any Acquirer generally as provided in Paragraph II of the Order;

(4) on request, Medtronic will provide the Interim Trustee with any and all records that relate to the manufacture of the Products or the Acquirer with the right to use them to achieve the purposes of the Order;

(f) it will comply with the Interim Trustee's reasonable requests for follow-up discussions or supplementary information concerning any reports provided to or requested by the Interim Trustee pursuant to this Agreement, including meetings and discussions with the principal staff involved in any activities relating to the research, development, manufacture and/or sale of the Assets to be Divested or any product comprised therein or concerned with the maintenance of the Business and, further including, actions necessary to maintain all necessary FDA approvals to manufacture and sell any of the Assets to be Divested, to maintain the viability and marketability of the Assets to be Divested, as well as the tangible assets of the AVecor facilities used to manufacture and sell all of the Assets to be Divested, and to prevent the destruction, removal, wasting, deterioration or impairment of the Assets to be Divested, and will provide the Interim Trustee with access to and copies of all other data, records or other information that the Trustee reasonably believes are necessary to the proper discharge of his responsibilities under the Order;

(g) it will provide notice of any activities or events affecting or likely to affect the maintenance of the Business;

4. Medtronic shall promptly notify the Interim Trustee of any written or oral communication that occurs after the date of this Trust Agreement between the Commission and

TRUST AGREEMENT

Medtronic related to the Order or this Trust Agreement, together with copies (or, in the case of oral communications, summaries) of such communications.

5. The Interim Trustee shall maintain the confidentiality of all information provided to the Interim Trustee by Medtronic. Such information may be disclosed only to:

(a) persons employed by, or working with, the Interim Trustee under this Agreement, or

(b) persons employed at the Commission and working on this matter;

(c) Upon termination of the Interim Trustee's duties under this agreement, the Interim Trustee shall promptly return to Medtronic all material provided to the Interim Trustee by Medtronic and shall destroy any material prepared by the Interim Trustee that contains or reflects any confidential Medtronic information. Nothing herein shall abrogate the Interim Trustee's duty of confidentiality, including the obligation to keep such information confidential after the termination of this agreement;

(d) In addition, the Interim Trustee shall keep confidential all other aspects of the performance of his duties under this agreement and shall not disclose any confidential or proprietary information relating thereto. To the extent that the Interim Trustee wishes to retain any employee, agent, consultant or any other third party to assist the Interim Trustee in accordance with Paragraph III of the Order, the Interim Trustee shall ensure that, prior to being retained, such persons execute a confidentiality agreement in a form agreed upon by the Interim Trustee and Medtronic.

For the purposes of this Section, information shall not be considered confidential or proprietary to the extent that it is or becomes part of the public domain (other than as the result of any action by the Interim Trustee or by any employee, agent, affiliate or consultant of the Interim Trustee), or to the extent that the recipient of such information can demonstrate that such information was already known to the recipient at the time of receipt from a source other than Medtronic or any director, officer, employee, agent, consultant or affiliate of Medtronic when such source is entitled to make such disclosure to such recipient.

6. Nothing in this agreement shall require Medtronic to disclose any material or information that is subject to a legally recognized privilege or that Medtronic is prohibited from disclosing by reason of law or an agreement with a third party.

7. The Interim Trustee shall be reasonably available to Medtronic to discuss any questions or issues that Medtronic may have concerning compliance with the Order as it relates to Medtronic.

8. Medtronic will pay the Interim Trustee \$____ per hour for all reasonable time spent in the performance of the Interim Trustee's duties including all work in connection with the negotiation and preparation of this Trust Agreement. Such hourly rates may be adjusted from time to time by agreement with Medtronic. In addition, Medtronic will pay (i) all out-of-

TRUST AGREEMENT

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T-118 P 32/02 Job-779

pocket expenses reasonably incurred by the Interim Trustee in the performance of the Interim Trustee's duties, including any air travel at business class rates, and (ii) all fees and disbursements reasonably incurred by such consultants, accountants, attorneys, investment bankers, business brokers, appraisers and other representatives and assistants as are reasonably necessary to carry out the Interim Trustee's duties and responsibilities. Medtronic acknowledges that the Interim Trustee may need to travel to and from Baxter's and Avecor's facilities for the purpose of fulfilling these duties. The Interim Trustee shall provide details and an explanation of all matters for which the Interim Trustee submits an invoice to Medtronic. At its own expense, Medtronic may retain an independent auditor to verify such invoices.

9. Medtronic hereby confirms its obligation to indemnify the Interim Trustee and hold the Interim Trustee harmless in accordance with and to the extent required by Paragraph III (and, upon direction by the Commission to the Interim Trustee to divest any Asset to be Divested) of the Order.

10. Upon this Trust Agreement becoming effective, the Interim Trustee shall be permitted, and Medtronic shall be required, to notify Baxter or, if applicable, all potential future Acquirers with respect to his appointment as Interim Trustee.

11. In the event of a disagreement or dispute between Medtronic and the Interim Trustee concerning Medtronic's obligations under the Order, and in the event that such disagreement or dispute cannot be resolved by the parties, either party may seek the assistance of the individual in charge of the Commission's Compliance Division to resolve the issue. In the case of any disagreement or dispute between Medtronic and the Interim Trustee not relating to Medtronic's obligations under the Order, and in the event that such disagreement or dispute cannot be resolved by the parties, the parties shall submit the matter to binding arbitration before the American Arbitration Association.

12. This agreement shall be subject to the substantive law of the State of Minnesota (regardless of any other jurisdiction's choice of law principles).

13. This agreement shall terminate two (2) years from the date Medtronic and Acquirer signed the Divestiture Agreement; provided, however, that the Agreement shall end earlier if the Interim Trustee reports to the Commission that the Acquirer has received all necessary FDA approvals to manufacture and sell the Products and has the Commercial Capability to Manufacture the Products and the Commission has accepted that report, or the Commission has appointed a substitute trustee pursuant to paragraph III. A. 8. of the Order.

14. In the event that, during the term of this agreement, the Interim Trustee becomes aware that he has or may have a conflict of interest that may affect or could have the appearance of affecting the performance by the Interim Trustee of any of his duties under this agreement, the Interim Trustee shall promptly inform both Medtronic and the Commission of such conflict or potential conflict.

TRUST AGREEMENT

15. In the performance of his functions and duties under this agreement, the Interim Trustee shall exercise the standard of care and diligence that would be expected of a reasonable person in the conduct of his own business affairs.

16. Any notices or other communication required to be given hereunder shall be deemed to have been properly given if sent by mail or fax (with acknowledgment of receipt of such fax having been received), to the applicable party at its address below (or to such other address as to which such party shall hereafter notify the other party):

If to the Interim Trustee, to:

If Medtronic, to:

Medtronic, Inc.
Corporate Center
7000 Central Avenue N.E.
Minneapolis, MN 55432
Attention: Vice President and Chief Development Officer
FAX (612) 572-5404

and:

Attention: General Counsel
FAX (612) 572-5459

17. This agreement shall not become binding until it has been approved by the Commission and the Order has been accepted for public comment.

18. As used in this Agreement, "Commercial Capability to Manufacture" is defined in the manner set forth in Paragraph I of the Order.

IN WITNESS WHEREOF, the parties hereto have executed this Trust Agreement as of the date first above written.

Medtronic, Inc.

Interim Trustee

By _____

Its _____

ATTACHMENT 1

Attachment 1

This Agreement entered into this ____ day of _____ between _____ and Baxter Healthcare Corporation (the "Acquirer"), provides as follows:

WHEREAS the Federal Trade Commission (the "Commission") has accepted or will shortly accept for Public Comment an Agreement containing a Consent Order (the "Order") with Medtronic, Inc. ("Medtronic"), which provides, among other things, for the appointment of an Interim Trustee to ensure that Medtronic and any acquirer of certain defined assets (the "Assets") used in the business of producing and selling certain products formerly produced and sold by Avecor Cardiovascular, Inc. ("Avecor") as part of its Blood Pump System Business (the "Business") as defined in the Agreement between Avecor, Medtronic and Acquirer dated February ____, 1999 (the "Divestiture Agreement"), and also including the supply of associated reservoirs with a 5/8 inch outlet for use and a reservoir holder with those products (collectively the "Products") perform their respective obligations with respect to those Assets and the Business under the Order, and

WHEREAS, the Commission may appoint an individual of its own choosing, subject to Medtronic's consent, as such trustee in connection with the divestiture of the Assets (the "Interim Trustee") to Acquirer;

WHEREAS the Order further provides that Medtronic shall execute a trust agreement, subject to prior approval of the Commission, conferring all the rights and powers necessary to permit the Interim Trustee to monitor the Acquirer's compliance with the terms of the Order;

WHEREAS, the parties to this Agreement intend to be legally bound;

NOW, THEREFORE, the parties agree as follows:

Acquirer shall:

1. Provide to the Interim Trustee a copy of the certification of its good faith intention, including a plan, to obtain in an expeditious manner all necessary FDA approvals to manufacture and sell the Products and to obtain the Commercial Capability to Manufacture the Products as submitted to the Commission pursuant to the Order;
2. Submit to the Interim Trustee verified written reports every two (2) months or as directed by the Interim Trustee setting forth in detail the efforts of the Acquirer to sell the Products connected with the Business obtained pursuant to the Divestiture Agreement and to obtain all FDA approvals necessary to manufacture and sell the Products and to obtain the

ATTACHMENT 1

Commercial Capability to Manufacture the Products. The first such report shall be submitted to the Interim Trustee 60 days from the date the Divestiture Agreement is accepted for public comment by the Commission. The Acquirer shall report to the Interim Trustee within ten (10) days of its ceasing the sale in the United States of the Products connected with the Business obtained pursuant to the Divestiture Agreement for any time period exceeding sixty (60) days or abandoning its efforts to obtain any FDA approvals to manufacture and/or sell the Products or to obtain the Commercial Capability to Manufacture the Products;

3. Provide the Interim Trustee with access upon reasonable notice and during regular business hours to all records and all facilities that relate to Acquirer's efforts, pursuant to the Divestiture Agreement, to sell or manufacture the Products, to obtain FDA approvals, or to obtain the Commercial Capability to Manufacture the Products;

4. Submit to the Interim Trustee verified written reports every two (2) months of its effort to prepare for and carry out marketing and sales with respect to the Products commencing 60 days from the date the Divestiture Agreement is accepted for public comment by the Commission;

5. Submit to the Interim Trustee verified written reports every two (2) months of its activities and planned activities relating to manufacture with respect to the Products including any such activities contracted to a third party commencing 60 days from the date the Divestiture Agreement is accepted for public comment by the Commission;

6. Submit to the Interim Trustee verified written reports every two (2) months of the number of staff devoted to the marketing and sale of the Products including any staff recruited from Avecor commencing 60 days from the date the Divestiture Agreement is accepted for public comment by the Commission;

7. Submit to the Interim Trustee verified written reports every two (2) months regarding the Products' market performance against competitive products commencing 60 days from the date the Divestiture Agreement is accepted for public comment by the Commission;

8. Arrange at the Interim Trustee's request, upon reasonable notice, a reasonable number of meetings or discussions, during normal business hours at a reasonable location designated by Acquirer, and provide additional information in response to reasonable requests of the Interim Trustee, relating to the reports and activities set forth in Paragraphs 2-7 above; and allow the Interim Trustee to have sufficient access, during normal business hours and after reasonable notice to Acquirer's senior manager designated for that purpose, to Acquirer's activities and staff to determine whether Acquirer is making appropriate efforts to meet the projections of Acquirer's business plan and to fulfill its responsibilities as contemplated by the Order and the Divestiture Agreement;

9. Cooperate fully in any respect reasonably required by the Interim Trustee to allow him to fulfill his obligations as they relate to Acquirer under the Order;

ATTACHMENT I

10. The Interim Trustee shall maintain the confidentiality of all information provided to the Interim Trustee by Acquirer and shall use such information only for the purpose of discharging his obligations as Interim Trustee and not for any other purpose, including, without limitation, any other business, scientific, technological, or personal purpose. Such information may be disclosed only to:

- (a) persons employed by or working with the Interim Trustee under this Agreement and the Trust Agreement, or
- (b) persons employed at the Commission and working on this matter.

Upon the termination of the Interim Trustee's duties under the Trust Agreement to which this Agreement is an attachment, the Interim Trustee shall promptly return to Acquirer all materials provided to the Interim Trustee by Acquirer and shall destroy any material prepared by the Interim Trustee that contains or reflects any confidential Acquirer information. Nothing herein shall abrogate the Interim Trustee's duty of confidentiality, including the obligation to keep such information confidential after the termination of this Agreement.

In addition, the Interim Trustee shall keep confidential all other aspects of the performance of his duties under this Agreement and shall not disclose any confidential or proprietary information relating thereto. To the extent that the Interim Trustee wishes to retain any employee, agent, consultant or other third party to assist the Interim Trustee in accordance with the Order, the Interim Trustee shall ensure that prior to being retained, such persons execute a confidentiality agreement in a form agreed upon by the Interim Trustee and Acquirer.

For the purposes of this Section, information shall not be considered confidential or proprietary to the extent that it is or becomes part of the public domain (other than as the result of any action by the Interim Trustee or by any employee, agent, affiliate or consultant of the Interim Trustee), or to the extent that the recipient of such information can demonstrate that such information was already known to the recipient at the time of receipt from a source other than Acquirer or any director, officer, employee, agent, consultant or affiliate of Acquirer when such source is entitled to make such disclosure to such recipient.

11. This Agreement and the rights and obligations of the parties hereunder shall in all respects be governed by the substantive Law of the State of Minnesota, including all matters of construction, validity and performance.

12. This agreement shall terminate two (2) years from the date Medtronic and Acquirer signed the Divestiture Agreement; provided, however, that the Agreement shall end earlier if the Interim Trustee reports to the Commission that the Acquirer has received all necessary FDA approvals to manufacture and sell the Products and has obtained the Commercial Capability to Manufacture the Products and the Commission has accepted that report, or the Commission has appointed a substitute trustee pursuant to paragraph III. A. 8. of the Order.

842

Decision and Order

ATTACHMENT 1

13. The Acquirer shall submit copies of all reports submitted to the Interim Trustee pursuant to this Agreement to the Commission simultaneously with the submission of such reports to the Interim Trustee.

14. As used in this Agreement, "Commercial Capability to Manufacture" is defined in the manner set forth in Paragraph I of the Order.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date first above written.

Interim Trustee

Baxter Healthcare Corporation

By

Its

IN THE MATTER OF
ZENECA GROUP PLC

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT

Docket C-3880. Complaint, June 7, 1999--Decision, June 7, 1999

This consent order, among other things, requires Zeneca, a corporation engaged in the research and development of long-acting local anesthetics, to transfer and surrender certain assets in accordance with the Chiroscience/Zeneca Agreement, and to divest the Chiroscience shares.

Participants

For the Commission: *Steven K. Bernstein, David Inglefield, Ann Malester, Joseph Eckhaus, Elizabeth Piotrowski, William Baer, J. Elizabeth Callison, and Christopher Garmon.*

For the respondent: *Ronan Harty, Davis, Polk & Wardwell, New York, N.Y.*

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondent Zeneca Group PLC ("Zeneca"), a corporation subject to the jurisdiction of the Commission, has proposed to merge with Astra AB ("Astra"), a corporation subject to the jurisdiction of the Commission, in violation 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 it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. DEFINITIONS

1. "*Long-Acting Local Anesthetics*" means pharmaceutical products used to relieve pain during the course of surgical or other medical procedures by blocking pain impulses from reaching the central nervous system. Long-Acting Local Anesthetics have an effective duration of up to six to seven hours, and allow patients to remain awake and conscious throughout the medical procedure.

2. "*Zeneca/Chiroscience License Agreement*" means the "Patent and Know-How Licence relating to Levobupivacaine and Trademark Assignment relating to Chirocaine," dated March 30, 1998, between