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UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

AMENDMENT NO. 1 TO
FORM 10-Q

(Mark One)

☒ **QUARTERLY REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934**

For the quarterly period ended June 30, 2001

OR

o **TRANSITION REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934**

For the transition period from _____ to _____

Commission file number 0-22613

AVI BioPharma, Inc.
(Exact name of registrant as specified in its charter)

Oregon	**93-0797222**
(State or other jurisdiction of incorporation or organization)	(I.R.S. Employer Identification No.)
One SW Columbia Street, Suite 1105, Portland, Oregon	**97258**
(Address of principal executive offices)	(Zip Code)

Issuer's telephone number, including area code: **503-227-0554**

Check whether the issuer (1) filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days. Yes ☒ No o

Indicate the number of shares outstanding of each of the issuer's classes of common stock, as of the latest practicable date.

Common Stock with $.0001 par value	**23,114,399**
(Class)	(Outstanding at July 31, 2001)

AVI BioPharma, Inc.
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Item 6. Exhibits and Reports on Form 8-K

(a) Exhibits: The following revised exhibits are filed herewith and this list is intended to constitute the exhibit index:

10.36*	Investment Agreement dated May 22, 2001 between the Company and Medtronic Asset Management, Inc.
10.39*	License and Development Agreement dated June 20, 2001 between the Company and Medtronic, Inc.
10.40*	Supply Agreement dated June 20, 2001 between the Company and Medtronic, Inc.

A Confidential Treatment Request for certain information in this document has been filed with the Securities and Exchange Commission ("SEC"). Based on discussions with the SEC staff, the information for which confidential treatment has been sought has been revised with less information deleted. The exhibit is being refiled and the revised deleted text replaced by an (*).

SIGNATURES

Pursuant to the requirements of the Securities Exchange Act of 1934, the registrant has duly caused this amendment too the report to be signed on its behalf by the undersigned thereunto duly authorized.

Date: April 23, 2002

AVI BIOPHARMA, INC.

By: /s/ DENIS R. BURGER

Denis R. Burger, Ph.D.
Chief Executive Officer
and Chairman (of the Board of Directors)
(Principal Executive Officer)

By: /s/ MARK M. WEBBER

Mark M. Webber
Chief Financial Officer
(Principal Financial and Accounting Officer)

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Exhibit 10.36

[*] Confidential portions omitted and filed separately.

INVESTMENT AGREEMENT

THIS INVESTMENT AGREEMENT (this "Agreement") is made and entered into as of May 22, 2001 between AVI BIOPHARMA, INC. ("AVI"), an Oregon corporation, and MEDTRONIC ASSET MANAGEMENT, INC. ("Investor"), a Minnesota corporation.

RECITALS

WHEREAS, AVI desires to issue and sell to Investor, and Investor desires to purchase on the terms and subject to the conditions set forth in this Agreement, certain shares of AVI Common Stock, $0.0001 par value ("Common Stock") and a warrant to purchase certain shares of Common Stock in the form attached hereto as **Exhibit A** (the "Warrant");

WHEREAS, at the First Closing (as defined below), Medtronic, Inc. ("Medtronic") and AVI are entering into a License and Development Agreement in the form attached hereto as **Exhibit B** (the "License and Development Agreement");

WHEREAS, at the First Closing, Investor and AVI are also entering into a Supply Agreement in the form attached hereto as **Exhibit C** (the "Supply Agreement");

WHEREAS, at the First Closing, Investor and AVI are also entering into a Registration Rights Agreement in the form attached hereto as **Exhibit D** (the "Registration Rights Agreement"); and

AGREEMENT

NOW, THEREFORE, in consideration of the respective representations, warranties, covenants and agreements contained herein, and for other valuable consideration, the receipt and adequacy of which is hereby acknowledged, the parties hereto agree as follows:

ARTICLE 1
DEFINITIONS

1.1 *Specific Definitions.* As used in this Agreement, the following terms shall have the meanings set forth or as referenced below:

"*Affiliate*" of a specified person (natural or juridical) means a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the person specified. "Control" shall mean ownership of more than 50% of the shares of stock entitled to vote for the election of directors in the case of a corporation, and more than 50% of the voting power in the case of a business entity other than a corporation.

"*Agreement*" means this Agreement and all Exhibits and Schedules hereto.

"*AVI Subsidiaries*" means all subsidiaries of AVI, including but not limited to the subsidiaries identified in the Disclosure Schedule.

"*Change of Control*" with respect to AVI means the occurrence of any of the following:

(a) a sale of assets representing fifty percent (50%) or more of the net book value and of the fair market value of AVI's consolidated assets (in a single transaction or in a series of related transactions);

(b) a liquidation or dissolution of AVI;

(c) a merger or consolidation involving AVI or any subsidiary of AVI after the completion of which: (i) in the case of a merger (other than a triangular merger) or a consolidation involving AVI, the shareholders of AVI immediately prior to the completion of such merger or consolidation beneficially own (within the meaning of Rule 13d-3 promulgated under the Exchange Act or comparable successor rules), directly or indirectly, outstanding voting securities representing less than fifty percent (50%) of the combined voting power of the surviving entity in such merger or consolidation, and (ii) in the case of a triangular merger involving AVI or a subsidiary of AVI, the shareholders of AVI immediately prior to the completion of such merger beneficially own (within the meaning of Rule 13d-3 promulgated under the Exchange Act, or comparable successor rules), directly or indirectly, outstanding voting securities representing less than fifty percent (50%) of the combined voting power of the surviving entity in such merger and less than fifty percent (50%) of the combined voting power of the parent of the surviving entity in such merger;

(d) an acquisition by any person, entity or "group" (within the meaning of Section 13(d) or 14(d) of the Exchange Act or any comparable successor provisions), other than any employee benefit plan, or related trust, sponsored or maintained by AVI or an affiliate of AVI and other than in a merger or consolidation of the type referred to in clause "(c)" of this definition of Change of Control, of beneficial ownership (within the meaning of Rule 13d-3 promulgated under the Exchange Act, or comparable successor rules) of outstanding voting securities of AVI representing more than thirty-three and 1/3 percent (33-1/3%) of the combined voting power of AVI (in a single transaction or series of related transactions); or

(e) individuals who, as of the date hereof or replacements therefore who have been initially nominated by the then current members of the AVI Board of Directors, are members of the AVI Board of Directors (the "Incumbent Board"), cease for any reason to constitute at least sixty percent (60%) of the AVI Board of Directors, provided that if election, or nomination for election by AVI's shareholders, of any new member of the AVI Board of Directors

is approved by a vote of at least sixty percent (60%) of the Incumbent Board, such new member of the Board shall be considered as a member of the Incumbent Board.

"*Code*" means the United States Internal Revenue Code of 1986, as amended.

"*Common Stock*" means shares of Common Stock of AVI, par value $0.0001 per share.

"*Confidential Information*" means know-how, trade secrets, unpublished information, scientific and technical information, inventions, methods, plans, processes, characteristics, data, business plans and the like disclosed (whether before or during the term of this Agreement) by one of the parties (the "disclosing party") to the other party (the "receiving party") or generated under this Agreement or the other Transaction Documents, excluding information which:

(a) was already in the possession of receiving party prior to its receipt from the disclosing party (provided that the receiving party is able to provide the disclosing party with reasonable documentary proof thereof and, if received from a third party, that such information was acquired without any party's breach of a confidentiality or non-disclosure obligation to the disclosing party related to such information);

(b) is or becomes part of the public domain by reason of acts not attributable to the receiving party;

(c) is or becomes available to receiving party from a source other than the disclosing party which source, has rightfully obtained such information and has no obligation of non-disclosure or confidentiality to the disclosing party with respect thereto; or

(d) has been independently developed by the receiving party without breach of this Agreement or use of any Confidential Information of the other party.

"*Drug*" has the meaning given such term in the License and Development Agreement.

"*Disclosure Schedule*" has the meaning given in Article 3.

"*Exchange Act*" means the Securities Exchange Act of 1934, as amended, and all rules and regulations promulgated thereunder.

"*Environmental Laws or Regulations*" means any one or more of the following: the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA") as amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), 42 U.S.C. § 9601 et seq.; the Federal Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C. § 6921 et seq.; the Clean Water Act, 33 U.S.C. § 1321 et seq.; the Clean Air Act, 42 U.S.C. § 7401 et seq.; any other federal, state, county, municipal, local, foreign or other statute, law, ordinance or regulation which may relate to pesticides, agricultural or industrial chemicals, wastes, Hazardous Substances, or the environment; and all regulations promulgated by a regulatory body pursuant to any of the foregoing statutes, laws, regulations, or ordinances.

"*FDA*" means the U.S. Food and Drug Administration.

"*Financial Statements*" means AVI's financial statements included in SEC Documents.

"*First Closing*" has the meaning given in Section 8.1.

"*First Closing Date*" has the meaning given in Section 8.1

"*Fourth Closing*" has the meaning given in Section 8.4.

"*Fourth Closing Date*" has the meaning given in Section 8.4.

"*Fourth Closing Milestone*" means Medtronic's receipt of a notice [*].

"*Fourth Closing Market Price*" means the average (rounded to the nearest full cent, with the cents rounded up if the third decimal place is 5 or more) of the closing sale prices of a share of Common Stock as reported on the Nasdaq Stock Market as of the end of the regular trading session, as reported in The Wall Street Journal, for the five (5) consecutive Nasdaq trading days ending on and including the Nasdaq trading day immediately preceding the date of the occurrence of the Fourth Closing Milestone.

"*Hazardous Substance*" means asbestos, urea formaldehyde, polychlorinated biphenyls, nuclear fuel or materials, chemical waste, radioactive materials, explosives, known carcinogens, petroleum products, pesticides, fertilizers, or other substance which is dangerous, toxic, or hazardous, or which is a pollutant, contaminant, chemical, material or substance defined as hazardous or as a pollutant or contaminant in, or the use, transportation, storage, release or disposal of which is regulated by, any Environmental Laws or Regulations.

"*HSR Act*" means the Hart-Scott-Rodino Antitrust Improvements Act of 1976 and the regulations thereunder.

"*IND*" means an Investigational New Drug application as defined in 21 CFR Part 312.

"*Initial Market Price*" means the greater of (a) $5.00 per share of Common Stock, or (b) the average (rounded to the nearest full cent, with the cents rounded up if the third decimal place is 5 or more) of the closing sale prices of a share of Common Stock as reported on the Nasdaq Stock Market as of the end of the regular trading session, as reported in The Wall Street Journal, for the five (5) consecutive Nasdaq trading days ending on and including the Nasdaq trading day immediately preceding the date of this Agreement. It is acknowledged and agreed that the Initial Market Price is $7.10 per share.

"*Intellectual Property*" means letters patent and patent applications; trademarks, service marks and registrations thereof and applications therefor; copyrights and copyright registrations and applications;

all discoveries, ideas, technology, know-how, trade secrets, processes, formulas, drawings and designs, computer programs or software; and all amendments, modifications, and improvements to any of the foregoing.

"*Knowledge*" or "*knowledge*" means actual knowledge of a fact or the knowledge which such person could reasonably be expected to have based on reasonable inquiry and consistent with such person's duties and responsibilities. The knowledge of AVI shall include the knowledge of AVI's directors and/or officers.

"*License and Development Agreement*" has the meaning defined in the recitals hereto.

"*Liens*" means liens, mortgages, charges, security interests, claims, voting trusts, pledges, encumbrances, options, assessments, restrictions, or third-party or spousal interests of any nature.

"*Material Adverse Effect*" means a material adverse effect on (a) the business, operations, results of operations, assets (including intangible assets), liabilities, prospects, or condition (financial or otherwise) of AVI and the AVI Subsidiaries, taken as a whole, or (b) the ability of AVI to perform its obligations under this Agreement or any of the Transaction Documents or any other agreement or instrument to be entered into in connection with this Agreement.

"*Medtronic*" has the meaning defined in the recitals hereto.

"*NDA*" means a New Drug Application as defined in 21 CFR Part 314.

"*PMA*" means a Premarket Approval Application as defined in 21 CFR Part 814.

"*Purchased Securities*" means the Purchased Shares, the Warrant and the Warrant Shares.

"*Purchased Shares*" means the Common Stock Shares purchased by Investor pursuant to Article 2.

"*Registration Rights Agreement*" has the meaning defined in the Recitals hereto.

"*SEC*" means the Securities and Exchange Commission or any other federal agency at the time administering the Exchange Act.

"*SEC Documents*" means all documents filed by AVI with the SEC after December 31, 2000.

"*Second Closing*" has the meaning given in Section 8.2.

"*Second Closing Date*" has the meaning given in Section 8.2.

"*Second Closing Milestone*" means [*]

"*Securities Act*" means the Securities Act of 1933, as amended, and all rules and regulations promulgated thereunder.

"*Supply Agreement*" has the meaning defined in the recitals hereto.

"*Third Closing*" has the meaning given in Section 8.3.

"*Third Closing Date*" has the meaning given in Section 8.3.

"*Third Closing Milestone*" means [*]

"*Third Closing Market Price*" means the average (rounded to the nearest full cent, with the cents rounded up if the third decimal place is 5 or more) of the closing sale prices of a share of Common Stock as reported on the Nasdaq Stock Market as of the end of the regular trading session, as reported in The Wall Street Journal, for the five (5) consecutive Nasdaq trading days ending on and including the Nasdaq trading day immediately preceding the date of the occurrence of the Third Closing Milestone.

"*Transaction Documents*" means the Warrant, the License and Development Agreement, the Supply Agreement and the Registration Rights Agreement.

"*Waived Amount*" has the meaning given in Section 2.5.

"*Warrant*" has the meaning defined in the recitals hereto.

"*Warrant Shares*" means the shares of Common Stock issuable upon exercise of the Warrant.

1.2 *Definitional Provisions.*

(a) The words "hereof," "herein," and "hereunder" and words of similar import, when used in this Agreement, shall refer to this Agreement as a whole and not to any particular provisions of this Agreement.

(b) Terms defined in the singular shall have a comparable meaning when used in the plural, and vice-versa.

(c) References to an "Exhibit" or to a "Schedule" are, unless otherwise specified, to one of the Exhibits or Schedules attached to or referenced in this Agreement, and references to an "Article" or a "Section" are, unless otherwise specified, to one of the Articles or Sections of this Agreement.

(d) The term "person" includes any individual, partnership, joint venture, corporation, trust, unincorporated organization or government or any department or agency thereof.

ARTICLE 2
PURCHASE OF COMMON STOCK
AND WARRANT

2.1 *Purchase at First Closing.*

(a) *Purchased Shares*. At the First Closing, AVI shall sell, issue and deliver to Investor, and Investor shall purchase from AVI, such number of shares of Common Stock (rounded to the nearest whole share) which shall equal ten million dollars ($10,000,000) divided by the Initial Market Price. Certificates representing such shares shall be issued at the First Closing in form acceptable to Investor and its counsel. The purchase price for the shares purchased pursuant to this Section shall be payable by wire transfer of funds to AVI's account as designated to Investor in writing prior to or on the First Closing Date.

(b) *Warrant*. At the First Closing, AVI shall issue and deliver to Investor the Warrant to purchase three million (3,000,000) shares of Common Stock at an initial exercise price equal to $10.00.

2.2 *Purchase at Second Closing.* Investor shall give written notice to AVI of the occurrence of the Second Closing Milestone within ten (10) business days thereafter. Such notice shall specify the date of the occurrence thereof. Subject to the terms and conditions hereof, including Section 2.5, and subject to the First Closing having occurred, within thirty (30) days after such written notice Investor shall invest Two Million Five Hundred Thousand Dollars ($2,500,000) in AVI in exchange for, and AVI shall sell, issue and deliver to Investor, such number of shares of Common Stock (rounded to the nearest whole share) which shall equal $2,500,000 divided by the Initial Market Price. Certificates representing any shares purchased under this Section shall be issued at the Second Closing in form acceptable to Investor and its counsel. The purchase price for the shares purchased pursuant to this Section shall be payable by wire transfer of funds to AVI's account as designated to Investor in writing prior to the Second Closing Date. In addition to Investor's rights under Section 2.5(a), Investor may, at Investor's option and by written notice to AVI, elect to pay in cash some or all of the amounts payable under this Section 2.2 as an additional capital contribution for Investor's Purchased Shares previously purchased in lieu of requiring AVI to issue Purchased Shares under this Section 2.2.

2.3 *Purchase at Third Closing.* Investor shall give written notice to AVI of the occurrence of the Third Closing Milestone within ten (10) business days thereafter. Such notice shall specify the date of the occurrence thereof. Subject to the terms and conditions hereof, including Section 2.5, and subject to the First Closing and Second Closing having occurred, within thirty (30) days after such written notice Investor shall invest Two Million Five Hundred Thousand Dollars ($2,500,000) in AVI in exchange for, and AVI shall sell, issue and deliver to Investor, such number of shares of Common Stock (rounded to the nearest whole share) which shall equal $2,500,000 divided by the Third Closing Market Price. Certificates representing any shares purchased under this Section shall be issued at the Third Closing in form acceptable to Investor and its counsel. The purchase price for the shares purchased pursuant to this Section shall be payable by wire transfer of funds to AVI's account as designated to Investor in writing prior to the Third Closing Date. In addition to Investor's rights under Section 2.5(a), Investor may, at Investor's option and by written notice to AVI, elect to pay in cash some or all of the amounts payable under this Section 2.3 as an additional capital contribution for Investor's Purchased Shares previously purchased in lieu of requiring AVI to issue Purchased Shares under this Section 2.3.

2.4 *Purchase at Fourth Closing.* Investor shall give written notice to AVI of the occurrence of the Fourth Closing Milestone within ten (10) business days thereafter. Such notice shall specify the date of the occurrence thereof. Subject to the terms and conditions hereof, including Section 2.5, and subject to the First Closing, Second Closing and Third Closing having occurred, within thirty (30) days after such written notice Investor shall invest Five Million Dollars ($5,000,000) in AVI in exchange for, and AVI shall sell, issue and deliver to Investor, such number of shares of Common Stock (rounded to the nearest whole share) which shall equal $5,000,000 divided by the Fourth Closing Market Price. Certificates representing any shares purchased under this Section shall be issued at the Fourth Closing in form acceptable to Investor and its counsel. The purchase price for the shares purchased pursuant to this Section shall be payable by wire transfer of funds to AVI's account as designated to Investor in writing prior to the Fourth Closing Date. In addition to Investor's rights under Section 2.5(a), Investor may, at Investor's option and by written notice to AVI, elect to pay in cash some or all of the amounts payable under this Section 2.4 as an additional capital contribution for Investor's Purchased Shares previously purchased in lieu of requiring AVI to issue Purchased Shares under this Section 2.4.

2.5 *Certain Limitations.*

(a) Notwithstanding Sections 2.2, 2.3 and 2.4 above, if the number of shares of Common Stock to be purchased by Investor pursuant to Sections 2.2, 2.3. and 2.4, when added to the number of shares of Common Stock previously purchased by Investor or issued to Investor upon previous exercise of the Warrant, would exceed nineteen and nine-tenths percent (19.9%) of the total number of issued and outstanding voting shares of AVI, then Investor may elect in writing to do one of the following:

(i) in lieu of purchasing Purchased Shares at such Second Closing, Third Closing or Fourth Closing, respectively, Investor shall pay the full amount required under Section 2.2, 2.3 or 2.4, as the case may be, but Investor may, at Investor's option, specify a dollar amount of such payment with respect to which Investor is suspending or waiving in writing the requirement that shares of Common Stock under such Section be issued in consideration for such payment (the "Waived Amount"), provided, however, that

(A) Investor, at Investor's option and upon prior written notice to AVI, may credit the Waived Amount against and reduce the exercise price otherwise payable under the Warrant upon exercise thereof; or

(B) Investor, at Investor's option on written notice to AVI, may revoke such suspension or waiver, and within thirty (30) days thereafter, AVI shall issue such number

of shares of Common Stock as is equal to the Waived Amount divided by the per share price payable under Section 2.2, 2.3 or 2.4, as the case may be; or

(ii) purchase the number of shares of Common Stock described in Section 2.2, 2.3 or 2.4, respectively, subject to Investor transferring effective voting control (by irrevocable proxy or other method designated by Investor and reasonably acceptable to AVI) of such shares of Common Stock in excess of 19.9% of the total number of issued and outstanding voting shares of AVI to AVI's Chief Executive Officer for so long as such shares, when added to all other shares of Common Stock of AVI owned by Investor would exceed 19.9% of the total number of issued and outstanding voting shares of AVI.

(b) AVI will not, without Investor's consent, redeem, repurchase or otherwise effect a recapitalization which would result in Investor and its Affiliates owning more than nineteen and nine-tenths percent (19.9%) of the total number of issued and outstanding voting shares of AVI.

(c) Notwithstanding Sections 2.3 and 2.4 above, with respect to the Purchased Shares otherwise to be purchased and sold at the Third Closing and at the Fourth Closing, if the Average Price with respect to the Applicable Shares (determined without reference to the Applicable Limit) is less than the Initial Market Price, then Investor shall not be obligated to purchase, and AVI shall not be obligated to sell, the Excess Shares unless and until Shareholder Approval is obtained with respect to the issuance and sale of the Excess Shares. If the Average Price for the Applicable Shares would equal or exceed the Initial Market Price (determined without reference to the Applicable Limit), then the provisions of this Section 2.5(c) shall not apply. If Shareholder Approval is required under this Section 2.5(c), AVI shall use its best efforts to obtain Shareholder Approval on or before the next annual AVI shareholder meeting occurring after the date of the Third Closing Milestone or Fourth Closing Milestone, as the case may be. If despite such best efforts, Shareholder Approval is not so obtained within fifteen months after the Third Closing Milestone or Fourth Closing Milestone, as the case may be, at all times thereafter Investor shall not be obligated to purchase, and AVI shall not be obligated to sell, the Excess Shares.

(i) "Excess Shares" means such number of Purchased Shares otherwise issuable at the Third Closing or Fourth Closing, as the case may be, that would cause the Applicable Shares to exceed the Applicable Limit.

(ii) "Applicable Shares" means the number of Purchased Shares issued to Investor at all previous Closing under this Agreement plus such additional number of Purchased Shares otherwise issuable at the Third Closing or the Fourth Closing, as the case may be, when added to the number issued at previous Closings, as would equal the Applicable Limit. For avoidance of doubt, Applicable Shares does not include the Warrant or the Warrant Shares issued or issuable upon exercise thereof.

(iii) "Applicable Limit" means 19.9999% times 21,575,267 shares (or if lesser, the actual number of shares of capital stock outstanding as of the date of this Agreement).

(iv) "Average Price" means weighted average purchase price paid by Investor under this Agreement for the Applicable Shares issued at the previous Closings and to be paid by Investor for the Applicable Shares at the Third Closing or Fourth Closing, as the case may be.

(v) "Shareholder Approval" means the vote required for purposes of approving share issuances of the type contemplated hereby under the regulations of the National Association of Securities Dealers ("NASD").

(vi) References in this Section 2.5(c) to specific dollar amounts or specific number of shares shall be equitably adjusted for any stock splits or the like occurring after the date hereof.

(d) Promptly after execution of this Agreement (which may be before or after the First Closing), AVI shall request in writing from NASD confirmation that no Shareholder Approval is required in connection with the issuance and sale of Purchased Shares at the Second Closing, Third Closing and Fourth Closing other than that the Shareholder Approval, if any, required under Section 2.5(c) above. For purposes hereof, any Shareholder Approval required for issuance of any Purchased Shares at the Second Closing, Third Closing and Fourth Closing other than as set forth in Section 2.5(c) is referred to herein as the "Other Shareholder Approval." If it is determined, after consultation with NASD, that Other Shareholder Approval is required in connection with the purchase and sale of Purchased Shares otherwise issuable at the Second Closing, Third Closing or Fourth Closing, as the case may be, it shall be a condition to both Investor's obligation to purchase, and AVI's obligation to sell, such Purchase Shares at the Second Closing, Third Closing and Fourth Closing, as the case may be, that such Other Shareholder Approval be obtained (to the extent so required). If such Other Shareholder Approval is so required, AVI shall use its best efforts to obtain such Other Shareholder Approval on or before the next annual AVI shareholder meeting occurring after the date of the Second Closing Milestone, Third Closing Milestone or Fourth Closing Milestone, as the case may be. If despite such best efforts, such Other Shareholder Approval is not so obtained within fifteen months after the Second Closing Milestone, Third Closing Milestone or Fourth Closing Milestone, as the case may be, at all times thereafter Investor shall not be obligated to purchase, and AVI shall not be obligated to sell, any Purchased Shares for which such Other Shareholder Approval is required but not so obtained.

(e) The parties acknowledge and agree that if Investor and AVI are not obligated to purchase or sell Purchased Shares at a Closing as a result of any Shareholder Approval or Other Shareholder Approval requirements under Section 2.5(c) or 2.5(d), (i) Investor shall not be obligated to make any payments under this Agreement or otherwise in lieu thereof, and (ii) the rights and obligations of the parties and their Affiliates under the other terms and conditions of this Agreement and the terms and conditions of the Transaction Documents shall not be impaired or affected as a result thereof, and such Agreement and Transaction Documents shall continue in accordance with their terms and conditions.

2.6 *Waiver of Milestones.* Investor, at its option, upon written notice to AVI may waive the requirement that one or more of the Milestones referenced in Sections 2.2, 2.3 or 2.4 has occurred, in which case, Investor shall purchase, and AVI shall sell, the Purchased Shares pursuant to Section 2.2, 2.3 or 2.4, as the case may be, as though such waived Milestone had occurred. If such a waiver is made with respect to Section 2.3 or 2.4, the Third Closing Market Price and the Fourth Closing Market Price shall be determined with respect the date written notice of such waiver is given rather than the date of the occurrence of the Third Closing Milestone or Fourth Closing Milestone, as the case may be. Further, with respect to each Closing, Investor, at its option, upon written notice to AVI may waive the requirement that prior Closings shall have occurred, as referenced in Sections 2.2, 2.3 and 2.4.

ARTICLE 3
REPRESENTATIONS AND WARRANTIES OF AVI

AVI hereby makes the representations and warranties in this Article 3 to Investor as of the date of this Agreement and as of each Closing Date, as qualified by the disclosure schedule attached hereto, and as updated pursuant to Section 6.1(m) (the "Disclosure Schedule"). The Disclosure Schedule is accurate and complete as of the date hereof. The Disclosure Schedule is arranged in sections corresponding to the sections and subsections of this Article 3.

3.1 *Organization, Qualifications and Corporate Power.*

(a) AVI and each AVI Subsidiary is a corporation duly incorporated, validly existing and, to the extent applicable under the laws of such jurisdiction, is in good standing under the laws of its

respective jurisdiction of incorporation and, to the extent applicable, is duly licensed or qualified to transact business as a foreign corporation and is in good standing in each jurisdiction in which the nature of the business transacted by it or the character of the properties owned or leased by it requires such licensing or qualification and where the failure to be so licensed or qualified would have a Material Adverse Effect upon AVI, such AVI Subsidiary or its respective business. AVI and each AVI Subsidiary has, pursuant to the applicable laws, the corporate power and authority to own and hold its properties and to carry on its business as now conducted and as proposed to be conducted. AVI has the corporate power and authority to execute, deliver and perform this Agreement and the Transaction Documents, and to issue, sell and deliver the Purchased Securities.

(b) AVI does not (i) own of record or beneficially, directly or indirectly, (A) any shares of capital stock or securities convertible into capital stock of any other corporation, or (B) any participating interest in any partnership, joint venture or other non-corporate business enterprise, or (ii) control, directly or indirectly, any other entity.

3.2 *Authorization of Agreements, Etc.*

(a) The execution and delivery by AVI of this Agreement and the Transaction Documents, the performance by AVI of its obligations hereunder and thereunder, and the issuance, sale and delivery of the Purchased Securities have been duly authorized by all requisite corporate action of AVI, its shareholders and directors, and will not violate any provision of law, any order of any court or other agency of government, the Articles of Incorporation or the Bylaws of AVI, as amended, or any provision of any indenture, agreement or other instrument to which AVI or any of its properties or assets is bound, or conflict with, result in a breach of or constitute (with due notice or lapse of time or both) a default under any such indenture, agreement or other instrument, or result in the creation or imposition of any Lien upon any of the properties or assets of AVI.

(b) The Purchased Securities have been duly authorized by all requisite action of AVI, its shareholders and its directors, and the Purchased Shares and Warrant Shares when issued in accordance with this Agreement, will be validly issued, fully paid and nonassessable shares of Common Stock with no personal liability attaching to the ownership thereof and will be free and clear of all Liens. The issuance, sale or delivery of the Purchased Securities is not subject to any preemptive right of stockholders of AVI or to any right of first refusal or other right in favor of any person that has not been complied with or duly waived.

3.3 *Validity.* Each of this Agreement and the Transaction Documents has been duly executed and delivered by AVI and constitutes the legal, valid and binding obligation of AVI enforceable in accordance with its terms except as may be limited by laws affecting creditors' rights generally or by judicial limitations on the right to specific performance.

3.4 *Authorized Capital Stock.* The authorized capital stock of AVI consists of (a) 50,000,000 shares of Common Stock, par value $0.0001, of which 21,575,267shares are issued and outstanding, and (b) 2,000,000 shares of preferred stock, par value $0.0001, none of which are issued and outstanding. There are issued and outstanding options to purchase an aggregate 2,866,335 shares of Common Stock, warrants to purchase an aggregate 7,352,003 shares of Common Stock, and no other outstanding subscriptions, warrants, options, convertible securities, or other rights (contingent or other) to purchase or otherwise acquire Common Stock or other equity securities of AVI. There are no agreements or arrangements under which AVI is obligated to register the sale of any of its securities under the Securities Act. Except for an existing warrant held by SuperGen, Inc. to acquire ten percent of the outstanding securities (as defined therein at the time of exercise), there are no anti-dilution or price adjustment provisions contained in any security issued by AVI (or in any agreement providing rights to security holders) that will be triggered by the issuance of the Purchased Securities. The designations, powers, preferences, rights, qualifications, limitations and restrictions in respect of each class of

authorized equity securities of AVI are as set forth in AVI's Articles of Incorporation, a true and correct copy of which has been provided to Investor, and all such designations, powers, preferences, rights, qualifications, limitations and restrictions are valid, binding and enforceable and in accordance with all applicable laws. Except as provided for in AVI's Articles of Incorporation, AVI has no obligation (contingent or other) to purchase, redeem or otherwise acquire any of the equity securities or any interest therein or rights to acquire such securities or to pay any dividend or make any other distribution in respect thereof. To AVI's knowledge, there are no voting trusts or agreements, stockholders' agreements, pledge agreements, buy-sell agreements, rights of first refusal, preemptive rights or proxies relating to any securities of AVI (whether or not AVI is a party thereto). All of the outstanding securities of AVI were issued in compliance with all applicable federal and state securities laws.

3.5 *SEC Documents; Financial Statements.* AVI has filed in a timely manner all documents that AVI was required to file with the SEC during the twelve (12) months preceding the date of this Agreement. As of their respective filing dates, all SEC Documents complied in all material respects with the requirements of the Exchange Act or the Securities Act, as applicable. None of the SEC Documents contained, as of their respective dates, any untrue statement of material fact or omitted to state a material fact required to be stated therein or necessary to make the statements made therein, in light of the circumstances under which they were made, not misleading, and such SEC Documents, when read as a whole, do not contain any untrue statements of a material fact and do not omit to state a material fact necessary to make the statements therein, in light of the circumstances under which they were made, not misleading. The Financial Statements comply in all material respects with applicable accounting requirements and with the published rules and regulations of the SEC with respect thereto. The Financial Statements have been prepared in accordance with United States generally accepted accounting principles consistently applied, and fairly present AVI's consolidated financial position as of the dates thereof and the results of AVI's consolidated operations and cash flows for the periods then ended (subject, in the case of unaudited statements, to normal year-end adjustments). Except as set forth in the Financial Statements, neither AVI nor any AVI Subsidiaries has any liabilities, contingent or otherwise, other than liabilities incurred in the ordinary course of business subsequent to December 31, 2000, and liabilities of the type

not required under United States generally accepted accounting principles to be reflected in such Financial Statements. Such liabilities incurred subsequent to December 31, 2000, are not, in the aggregate, material to the financial condition or operating results of AVI.

3.6 *Litigation; Compliance with Law.* There is no: (a) action, suit, claim, proceeding or investigation pending or, to AVI's knowledge, threatened against or affecting AVI or any AVI Subsidiary, at law or in equity, or before or by any federal, state, municipal or other governmental department, commission, board, bureau, agency or instrumentality, domestic or foreign, (b) arbitration proceeding relating to AVI or any AVI Subsidiary pending under collective bargaining agreements or otherwise or (c) governmental inquiry pending or, to AVI's knowledge, threatened against or affecting AVI or any AVI Subsidiary (including without limitation any inquiry as to the qualification of AVI or any AVI Subsidiary to hold or receive any license or permit), and there is no basis for any of the foregoing. AVI has not received any opinion or memorandum or legal advice from legal counsel to the effect that AVI or any AVI Subsidiary is exposed, from a legal standpoint, to any liability or disadvantage which may have a Material Adverse Effect. Neither AVI nor any AVI Subsidiary is in default with respect to any order, writ, injunction or decree of any court or of any federal, state, municipal or other governmental department, commission, board, bureau, agency or instrumentality, domestic or foreign. There is no action, claim, proceeding, investigation or suit by AVI or any AVI Subsidiary pending or threatened against others. AVI and each AVI Subsidiary have complied with all laws, rules, regulations and orders applicable to its business, operations, properties, assets, products and services. AVI and each AVI Subsidiary has or will obtain prior to becoming necessary all necessary permits, licenses and other authorizations required to conduct its business as conducted and as

proposed to be conducted which, if not obtained, would have, either individually or in the aggregate, a Material Adverse Effect. There is no existing law, rule, regulation or order, and AVI is not aware of any proposed law, rule, regulation or order, whether federal or state, which would prohibit or restrict AVI or any AVI Subsidiary from, or otherwise materially adversely affect AVI or any AVI Subsidiary in, conducting its business in any jurisdiction in which it is now conducting business or in which it proposes to conduct business.

3.7 *Proprietary Information of Third Parties.* No third party has claimed or has reason to claim that any person employed by or affiliated with AVI or any AVI Subsidiary has (a) violated or may be violating any of the terms or conditions of his employment, non-competition or nondisclosure agreement with such third party, (b) disclosed or may be disclosing or utilized or may be utilizing any trade secret or proprietary information or documentation of such third party, or (c) interfered or may be interfering in the employment relationship between such third party and any of its present or former employees. To AVI's knowledge, no third party has requested information from or otherwise communicated with AVI or any AVI Subsidiary which suggests that such a claim might be contemplated. To AVI's knowledge, no person employed by or affiliated with AVI or any AVI Subsidiary has employed or proposes to employ any trade secret or any information or documentation proprietary to any former employer, and to AVI's knowledge, no person employed by or affiliated with AVI or any AVI Subsidiary has violated any confidential relationship which such person may have had with any third party, in connection with the development, manufacture or sale of any product or proposed product or the development or sale of any service or proposed service of AVI or any AVI Subsidiary, and AVI has no reason to believe there will be any such employment or violation.

3.8 *Title to Properties.* AVI or the AVI Subsidiaries have good and marketable title to its properties and assets reflected in the most recent Financial Statements (other than properties and assets disposed of in the ordinary course of business since the date thereof), and all such properties and assets are free and clear of all Liens, except for liens for or current taxes not yet due and payable and minor imperfections of title, if any, not material in nature or amount and not materially detracting from the value or impairing the use of the property or asset subject thereto or impairing the business or proposed business of AVI.

3.9 *Leasehold Interests.* Each lease or agreement to which AVI or any AVI Subsidiary is a party under which it is a lessee of any property, real or personal, is a valid and existing agreement without any default of AVI or any AVI Subsidiary thereunder and, to AVI's knowledge, without any default thereunder of any other party thereto. No event has occurred and is continuing which, with due notice or lapse of time or both, would constitute a default or event of default by AVI or any AVI Subsidiary under any such lease or agreement or, to AVI's knowledge, by any other party thereto. The possession of such property by AVI or such AVI Subsidiary has not been disturbed and, to AVI's knowledge, no claim has been asserted or threatened against AVI or such AVI Subsidiary adverse to its rights in such property.

3.10 *Taxes.* AVI and each AVI Subsidiary has timely filed, or caused to be timely filed, all federal, state and local tax returns for income taxes, franchise taxes, sales taxes, withholding taxes, property taxes and, to AVI's knowledge, all other taxes of every kind whatsoever required by law to be filed, and all such tax returns are complete and accurate and in accordance with all requirements applicable thereto. The tax returns of AVI or any AVI Subsidiary have never been audited by appropriate governmental authorities and AVI does not know of any additional tax liabilities for any periods for which such returns have been filed.

3.11 *Patents, Trademarks, Etc.* AVI and each AVI Subsidiary owns or possesses licenses or other rights to use all Intellectual Property necessary to or used in the conduct of its business as conducted and as proposed to be conducted, and no claim is pending or, to AVI's knowledge, threatened to the effect that the operations of AVI or any AVI Subsidiary infringe upon or conflict with the asserted

rights of any other person under any Intellectual Property, and to AVI's knowledge there is no basis for any such claim (whether or not pending or threatened). Except as set forth in the SEC Documents, no claim is pending or threatened to the effect that any such Intellectual Property owned or licensed by AVI or any AVI Subsidiary, or which AVI or any AVI Subsidiary otherwise has the right to use, is invalid or unenforceable by AVI or such AVI Subsidiary, and to AVI's knowledge there is no basis for any such claim (whether or not pending or threatened). To AVI's knowledge, all technical information developed by and belonging to AVI or any AVI Subsidiary which has not been patented has been kept confidential. Neither AVI nor any AVI Subsidiary has granted or assigned to any other person or entity any right to develop, manufacture, have manufactured, assemble or sell the products or proposed products or to provide the services or proposed services of AVI or such AVI Subsidiary. AVI has secured valid written assignments from all consultants and employees who contributed to the creation or development of Intellectual Property or the rights to such contributions that AVI does not already own by operation of law. AVI has taken all necessary and appropriate steps to protect and preserve the confidentiality of all Intellectual Property not otherwise protected by patents, patent applications or copyright. AVI has a policy requiring each of its employees and contractors to execute proprietary information and confidentiality agreements substantially in AVI's standard forms and all current and former employees and contractors of AVI and each AVI Subsidiary have executed such an agreement. AVI has provided a true and correct copy of such form to Investor.

3.12 *Loans and Advances.* Except as disclosed in the SEC Documents or Disclosure Schedule, AVI and the AVI Subsidiaries do not have any outstanding loans or advances to any person and are not obligated to make any such loans or advances, except, in each case, for advances to employees of AVI or such AVI Subsidiary in respect of reimbursable business expenses anticipated to be incurred by them in connection with their performance of services for AVI or such AVI Subsidiary.

3.13 *Assumptions, Guaranties, Etc. of Indebtedness of Other Persons.* Except as disclosed in the Financial Statements, neither AVI nor any AVI Subsidiary has assumed, guaranteed, endorsed or otherwise become directly or contingently liable on any indebtedness of any other person (including, without limitation, liability by way of agreement, contingent or otherwise, to purchase, to provide funds for payment, to supply funds to or otherwise invest in the debtor, or otherwise to assure the creditor against loss), except for guaranties by endorsement of negotiable instruments for deposit or collection in the ordinary course of business.

3.14 *Governmental Approvals.* Subject to the accuracy of the representations and warranties of Investor set forth in Article 4, no registration or filing with, or consent or approval of or other action by, any federal, state or other governmental agency or instrumentality is or will be necessary for the valid execution, delivery and performance by AVI of this Agreement, the Transaction Documents, or for the issuance, sale and delivery of the Purchased Securities, other than filings pursuant to state securities laws (all of which filings have been made or will be timely made by AVI) in connection with the sale of the Purchased Securities.

3.15 *Brokers.* AVI has no contract, arrangement or understanding with any broker, finder or similar agent with respect to the transactions contemplated by this Agreement.

3.16 *Transactions With Affiliates.* Except as disclosed in the SEC Documents, no director, officer, employee or stockholder of AVI or any AVI Subsidiary, or member of the family of any such person, or any corporation, partnership, trust or other entity in which any such person, or any member of the family of any such person, has a substantial interest or is an officer, director, trustee, partner or holder of more than 5% of the outstanding capital stock thereof, is a party to any transaction with AVI or any AVI Subsidiary, including any contract, agreement or other arrangement providing for the employment of, furnishing of services by, rental of real or personal property from or otherwise requiring payments to any such person or firm.

3.17 *Environmental Matters.* AVI and each AVI Subsidiary has obtained, and is in full compliance with, all permits, licenses or other approvals necessary under the Environmental Laws or Regulations with respect to its business or assets, and is in compliance with all Environmental Laws or Regulations. Neither AVI nor any AVI Subsidiary has taken any action or failed to take any action with respect to its business, assets or the real property presently or formerly used in connection therewith that might result in, nor has AVI, any AVI Subsidiary or their businesses or assets ever been subject to any investigations, administrative proceedings, litigation, regulatory hearings, or other action threatened, proposed or pending that alleged or alleges: (i) actual or threatened violation of or noncompliance with any Environmental Law or Regulation; or (ii) actual or threatened personal injury or property damage or contamination of any kind resulting from a release or threatened release of a Hazardous Substance.

3.18 *Employees.* To AVI's knowledge, no employee of AVI or any AVI Subsidiary is in violation of any term of any employment contract, patent disclosure agreement or any other contract or agreement with any third party, the terms of which would restrict the right of any such employee to be employed by AVI or any AVI Subsidiary because of the nature of the business conducted or to be conducted by AVI or any AVI Subsidiary or for any other reason or would conflict with such employee's obligation to use his best efforts to promote the interests of AVI, and the continued employment by AVI and the AVI Subsidiaries of their present employees will not result in any such violations. There are no strikes or other labor disputes against AVI or any AVI Subsidiary pending or, to the knowledge of AVI, threatened which could have a Material Adverse Effect. Neither AVI nor any AVI Subsidiary is a party to or bound by any collective bargaining agreement or other labor agreement with any bargaining agent (exclusive or otherwise) of any of its employees.

3.19 *Insurance.* AVI and each AVI Subsidiary maintains (a) insurance on all material assets of a type customarily insured, covering property damage by fire or other casualty; and (b) adequate insurance protection against all liabilities, claims, and risks against which it is customary to insure.

3.20 *Absence of Certain Changes.* Since December 31, 2000, no event has occurred which could have a Material Adverse Effect.

3.21 *Investment Company Status.* AVI is not and upon consummation of the sale of the Purchased Securities will not be an "investment company," a company controlled by an "investment company" or an "affiliated person" of, or "promoter" or "principal underwriter" for, an "investment company" as such terms are defined in the Investment Company Act of 1940, as amended.

3.22 *Regulatory Filings.* All documentation, correspondence, reports, data, analysis and certifications relating to or regarding any drugs of AVI, filed or delivered by or on behalf of AVI with any governmental authority, agency or body was true and accurate when so filed or delivered and, to the knowledge of AVI, remains true and accurate except where any changes would not have a Material Adverse Effect. AVI is not aware of any rule making or similar proceedings before the FDA or comparable federal, state, local or foreign government bodies which involve or affect AVI or any AVI Subsidiary which could have a Material Adverse Effect. The descriptions of the results of tests or evaluations contained in SEC Documents or delivered to the Investor are accurate and complete in all material respects, and AVI has no knowledge of any other tests or evaluations, the results of which reasonably call into question descriptions of the results of tests or evaluations referred to in SEC Documents or delivered to the Investor. Neither AVI nor any AVI Subsidiary has received any notices or correspondence from the FDA or any other governmental agency requiring the termination, suspension or modification of any tests or evaluations conducted by or on behalf of AVI or any AVI Subsidiary that are described in SEC Documents or as delivered to the Investor.

3.23 *State Takeover Laws.* The Board of the Company has approved the transactions contemplated by this Agreement and the Transaction Documents such that the provisions of Section 60.835 of the Oregon Business Corporations Act will not apply to this Agreement, the Transaction Documents or any of the transactions contemplated hereby or thereby.

3.24 *Nasdaq; Etc.* AVI is in compliance with all applicable Nasdaq continued listing requirements for the Nasdaq Stock Market and is listed in good standing on the Nasdaq Stock Market. There are no proceedings pending or, to AVI's knowledge, threatened against AVI relating to the continued listing of AVI's

Common Stock on the Nasdaq National Market and AVI has not received any notice of, nor to the knowledge of AVI is there any basis for, the delisting of the Common Stock from the Nasdaq National Market. AVI has not engaged in the past three (3) months in any discussion with any representative of any corporation or corporations regarding a proposed Change of Control of the Company.

3.25 *Disclosure.* Neither this Agreement, nor any Schedule or Exhibit to this Agreement, contains an untrue statement of a material fact or omits a material fact necessary to make the statements contained herein or therein not misleading. None of the statements, documents, certificates or other items prepared or supplied by AVI with respect to the transactions contemplated hereby, including, without limitation, reports, data, analyses and correspondence relating to the Drug, contains an untrue statement of a material fact or omits a material fact necessary to make the statements contained therein not misleading. There is no fact which AVI has not disclosed to Investor and its counsel in writing and of which AVI is aware which could have a Material Adverse Effect.

ARTICLE 4
REPRESENTATIONS AND WARRANTIES OF INVESTOR

Investor makes the following representations and warranties to AVI:

4.1 *Purchase of Purchased Securities.* Investor is an "accredited investor" within the meaning of Rule 501 under the Securities Act and was not organized for the specific purpose of acquiring the Purchased Securities. Investor has sufficient knowledge and experience in investing in companies similar to AVI in terms of AVI's stage of development so as to be able to evaluate the risks and merits of Investor's investment in AVI and Investor is able financially to bear the risks thereof. Investor has had an opportunity to discuss AVI's business, management and financial affairs with AVI's management. The Purchased Securities are being acquired for Investor's own account for the purpose of investment and not with a present view toward their public sale or distribution; provided, however, that by making the representation herein, Investor does not agree to hold any of the Purchased Securities for any minimum or other specific term, except as set forth in Article 2 of this Agreement or pursuant to the terms of the Registration Rights Agreement, and reserves the right to dispose of the Purchased Securities at any time in accordance with or pursuant to a registration statement or an exemption under the Securities Act. Investor understands that (i) the Purchased Securities have not been registered under the Securities Act by reason of their issuance in a transaction exempt from the registration requirements of the Securities Act pursuant to Section 4(2) thereof or Rule 505 or 506 promulgated thereunder, (ii) the Purchased Securities must be held indefinitely unless a subsequent disposition thereof is registered under the Securities Act or is exempt from such registration, (iii) the Purchased Securities will bear a legend to such effect and (iv) AVI will make a notation on its transfer books to such effect.

4.2 *Corporate Authority.* The execution, delivery and performance by Investor and Medtronic, as applicable, of this Agreement, the Transaction Documents, and the transactions contemplated hereby and thereby have been duly and validly authorized and approved by all requisite corporate action on the part of Investor and Medtronic, and the execution and the delivery of this Agreement, the Transaction Documents, and consummation of the transactions contemplated hereby and thereby and compliance with and fulfillment of the terms and provisions hereof and thereof will not (i) conflict with or result in a breach of the terms, conditions or provisions of or constitute a default under the Articles of Incorporation or Bylaws of Investor or Medtronic, or (ii) require any affirmative approval, consent, authorization or other order or action of any court, governmental authority, regulatory body, creditor or any other person. Investor and Medtronic have all requisite power and authority to do and perform

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all acts and things required to be done by it under this Agreement, the Transaction Documents and the agreements contemplated hereby and thereby. Each of this Agreement and the Transaction Documents has been duly executed and delivered by Investor and Medtronic and constitutes the legal, valid and binding obligation of those entities enforceable in accordance with its terms except as may be limited by laws affecting creditors' rights generally or by judicial limitations on the right to specific performance.

ARTICLE 5
COVENANTS

5.1 *Best Efforts.* AVI will use its best efforts to satisfy in a timely fashion each of the conditions to be satisfied under Article 6 of this Agreement.

5.2 *Reporting Status; Eligibility to Use Form S-3.* AVI's Common Stock is registered under Section 12 of the Exchange Act. Throughout the Registration Period (as defined in the Registration Rights Agreement), AVI will timely file all reports, schedules, forms, statements and other documents required to be filed by it with the SEC under the reporting requirements of the Exchange Act, and AVI will not terminate its status as an issuer required to file reports under the Exchange Act even if the Exchange Act or the rules and regulations thereunder would permit such termination. AVI currently meets, and will take all reasonably necessary action to continue to meet, the "registrant eligibility" requirements set forth in the general instructions to Form S-3 (or any successor registration form thereto) to enable the registration of the Registrable Shares (as defined in the Registration Rights Agreement).

5.3 *Listing of Additional Shares.* AVI will file with the NASDAQ National Market a Notification Form for Listing of Additional Shares for an amount of shares of Common Stock equal to at least the amount of the Purchased Shares as required by the NASDAQ National Market regulatory requirements. AVI will also comply with all applicable Nasdaq continued listing requirements for the Nasdaq Stock Market and shall remain in good standing on the Nasdaq Stock Market.

5.4 *No Integration.* AVI will not make any offers or sales of any security (other than the Purchased Securities) under circumstances that would cause the offering of the Purchased Securities to be integrated with any other offering of securities by AVI (a) for the purpose of any stockholder approval provision applicable to AVI or its securities or (b) for purposes of any registration requirement under the Securities Act.

5.5 *Regulatory Approvals.*

(a) AVI and Investor shall each use commercially reasonable efforts to take, or cause to be taken, all appropriate action, and do, or cause to be done, all things as may be necessary or applicable under the HSR Act, and will file and, if appropriate, use commercially reasonable efforts to have declared effective or approved all documents and notifications with the U.S. Federal Trade Commission and Department of Justice and other governmental or regulatory bodies that they deem necessary or appropriate for, the issuance of the Purchased Securities or the Transaction Documents, and each party shall give the other information reasonably requested by such other party pertaining to it and its subsidiaries and affiliates to enable such other party to take such actions. The parties agree to make any such required filing a reasonable period of time prior to the anticipated date of the occurrence of any closing hereunder or exercise of the Warrant that gives rise to such required filing. It shall be a condition to the occurrence of any closing hereunder and to

exercise of the Warrant that any such actions or approvals required under the HSR Act be declared effective or approved, or that any waiting periods (or extensions thereof) under the HSR Act expire or terminate. Notwithstanding the foregoing or anything herein to the contrary, Medtronic and its Affiliates shall not be required to make arrangements for or to effect

the cessation, sale, or other disposition of particular assets or categories of assets or businesses of Medtronic, AVI, or any of their Affiliates.

(b) Although the parties do not anticipate any legislative, administrative or judicial objection to the consummation of the transactions contemplated by this Agreement, AVI and Investor agree to each use commercially reasonable efforts to contest and resist any action, including legislative, administrative or judicial action, and to have vacated, lifted, reversed or overturned any decree, judgment, injunction or other order (whether temporary, preliminary or permanent) (an "Order") that is in effect and that restricts, prevents or prohibits the consummation of the transactions contemplated by this Agreement, including, without limitation, by vigorously pursuing available avenues of administrative and judicial appeal. Notwithstanding the foregoing provisions of this Section or anything in this Agreement to the contrary, nothing shall require Investor to make or agree to make, any divestiture of any portion of any business or assets of Investor or its Affiliates in order to obtain any waiver, consent or approval, and neither Investor nor its Affiliate shall be required to take or commit to take any action that limits its freedom of action or rights with respect to AVI or the Purchased Securities.

5.6 *Exclusivity.* AVI agrees that for a period commencing upon execution of this Agreement until the earlier of the First Closing or termination of this Agreement in accordance with Article 9, AVI will not directly or indirectly encourage or solicit the submission of, or entertain inquiries, proposals or offers from any person or entity (other than Medtronic or its Affiliates), or otherwise provide information to or engage in discussions with any other person or entity, in any way relating to the sale, licensing, distribution or other disposition of the Drug.

5.7 *Reserve for Shares; Authorized Shares.* AVI shall at all times reserve and keep available out of its authorized but unissued shares of Common Stock such number of its duly authorized shares of Common Stock to comply with the terms of this Agreement and the Warrant. If at any time the number of shares of authorized but unissued Common Stock shall not be sufficient to comply with the terms of this Agreement and the Warrant, AVI will promptly take such corporate action as may be necessary to increase its authorized but unissued shares of Common Stock to such number of shares of Common Stock as shall be sufficient for such purpose. AVI will obtain any authorization, consent, approval or other action by or make any filing with any court or administrative body that may be required under applicable securities laws in connection with the issuance of any shares issued by it in order to comply with the terms of this Agreement and the Warrant.

5.8 *Corporate Existence.* So long as Investor beneficially owns any of the Purchased Securities, AVI shall maintain its corporate existence, except in the event of a merger, consolidation or sale of all or substantially all of AVI's assets, as long as the surviving or successor entity in such transaction (a) assumes AVI's obligations hereunder and under the other Transaction Documents; (b) has no legal, contractual or other restrictions on its ability to perform the obligations of AVI hereunder and under the Transaction Documents; and (c) is a publicly traded corporation whose common stock and the shares of capital stock issuable upon exercise of the Warrants are (or would be upon issuance thereof) listed for trading on the Nasdaq Stock Market, New York Stock Exchange or American Stock Exchange.

ARTICLE 6
CONDITIONS TO CLOSING

6.1 *Conditions to Investor's Obligations.* The obligations of Investor to purchase and pay for the Purchased Shares and to accept the Warrant pursuant to Section 2.1 at the First Closing, and, subject to further compliance with the provisions of subsections (m) and (n) below, to purchase and pay for the Purchased Shares being purchased by Investor pursuant to Section 2.2 at the Second Closing Date, pursuant to Section 2.3 at the Third Closing Date, and pursuant to Section 2.4 at the Fourth Closing

Date, are subject to the satisfaction or waiver, on each such respective Closing Date, of the conditions set forth below:

(a) *Representations and Warranties to be True and Correct.* The representations and warranties contained in Article 3 shall be true, complete and correct on and as of such Closing Date with the same effect as though such representations and warranties had been made on and as of such date, and the President and Chief Financial Officer of AVI shall have certified to such effect to Investor in writing.

(b) *Performance.* AVI shall have performed and complied with all terms and conditions contained in this Agreement and the Transaction Documents which are required to be performed or complied with by AVI prior to or at such Closing Date, and the President and Chief Financial Officer of AVI shall have certified to Investor in writing to such effect and to the further effect that all of the conditions set forth in this Section 6.1 have been satisfied.

(c) *Execution and Delivery of Transaction Documents.* AVI shall have executed and delivered the Transaction Documents.

(d) *All Proceedings to be Satisfactory.* All corporate and other proceedings to be taken by AVI in connection with the transactions contemplated hereby and all documents incident thereto shall be satisfactory in form and substance to Investor and its counsel, and Investor and its counsel shall have received all such counterpart originals or certified or other copies of such documents as they reasonably may request.

(e) *Supporting Documents.* Investor and their counsel shall have received copies of the following documents:

(i) a certificate of the Secretary of State of the State of Oregon dated as of a date within five days prior to such Closing Date as to the corporate existence of AVI and listing all documents of AVI on file with said Secretary of State;

(ii) a certificate of the Secretary of AVI dated such Closing Date and certifying: (A) AVI's then current Articles of Incorporation and Bylaws; (B) that attached thereto is a true and complete copy of all resolutions adopted by the Board of Directors of AVI authorizing the execution, delivery and performance of this Agreement, the Transaction Documents, the issuance, sale and delivery of the Purchased Securities, and that all such resolutions are in full force and effect and are all the resolutions adopted in connection with the transactions contemplated by this Agreement and the Transaction Documents; and (C) to the incumbency and specimen signature of each officer of AVI executing this Agreement, the

Transaction Documents, the stock certificates representing the Purchased Shares, the Warrant, and any certificate or instrument furnished pursuant hereto, and a certification by another officer of AVI as to the incumbency and signature of the officer signing the certificate referred to in this subsection (ii); and

(iii) such additional supporting documents and other information with respect to the operations and affairs of AVI as Investor or its counsel reasonably may request.

(f) *Required Consents.* AVI shall have obtained the written consent or approval of each person whose consent or approval Investor reasonably believes is required in connection with this Agreement and the Transaction Documents, including but not limited to expiration or termination of any waiting periods (and any extension thereof) under the HSR Act and all applicable consents and approvals, in form and content satisfactory to Investor, from the National Institute of Health with respect to the assignment of the PHS License (as defined in the License and Development Agreement) to AVI and the grant of a sublicense by AVI to Medtronic, Inc. with respect thereto.

(g) *Litigation Affecting Closing.* No suit, action or other proceeding shall be pending or threatened by any third party or by or before any court or governmental agency in which it is sought to restrain or prohibit or to obtain damages or other relief in connection with this Agreement or the Transaction Documents, or the consummation of the transactions contemplated hereby or thereby, and no investigation that might result in any such suit, action or other proceeding shall be pending or threatened.

(h) *Legislation.* No statute, rule, regulation, order, or interpretation shall have been proposed, enacted, entered or deemed applicable by any domestic or foreign government or governmental or administrative agency or court which would make the transactions contemplated by this Agreement or the Transaction Documents illegal.

(i) *Opinion of Company's Counsel.* Investor shall have received from Hurley, Lynch & Re, P.C., counsel for AVI, an opinion dated as of such Closing Date in form and scope satisfactory to Investor and their counsel, substantially as follows:

(i) AVI and each AVI Subsidiary is a corporation duly incorporated, validly existing and, to the extent applicable under the laws of such jurisdiction, is in good standing under the laws of its respective jurisdiction of incorporation and, to the extent applicable, is duly licensed or qualified to transact business as a foreign corporation and is in good standing in each jurisdiction in which the nature of the business transacted by it or the character of the properties owned or leased by it requires such licensing or qualification and where the failure to be so licensed or qualified would have Material Adverse Effect. AVI and each AVI Subsidiary has, pursuant to the applicable laws, the corporate power and authority to own and hold its properties and to carry on its business as now conducted and as proposed to be conducted. AVI has the corporate power and authority to execute, deliver and perform this Agreement and the Transaction Documents and to issue, sell and deliver the Purchased Securities.

(ii) The authorized and outstanding capital stock of AVI consists of that described in Section 3.4 of this Agreement. All such issued and outstanding shares, options and warrants were duly authorized and validly issued, fully paid and nonassessable and free and clear of any Liens, except as to restrictions on transfer imposed by AVI to comply with federal and applicable state securities laws. To such counsel's knowledge after investigation, and except as disclosed to Investor, after reasonable investigation, there are no other options, warrants, conversion privileges, preemptive rights, rights of first refusal or other rights (or agreements with respect to the issuance thereof) presently in existence to purchase or acquire any of the authorized but unissued capital stock of AVI.

(iii) All necessary corporate action on the part of AVI and of its officers, directors and shareholders has been taken for the valid execution and delivery of this Agreement, the Transaction Documents, and the performance of the obligations of AVI hereunder and thereunder. The Board of the Company has approved the transactions contemplated by this Agreement and the Transaction Documents such that the provisions of Section 60.835 of the Oregon Business Corporations Act will not apply to this Agreement, the Transaction Documents or any of the transactions contemplated hereby or thereby. This Agreement and the Transaction Documents have been validly executed and delivered and are legal, valid and binding obligations of AVI, enforceable against AVI in accordance with their respective terms. The execution and delivery of this Agreement and the Transaction Documents and the performance by AVI of its obligation hereunder and thereunder do not conflict with or result in the violation of AVI's Articles of Incorporation or Bylaws; or any material written agreement, instrument, order, writ, judgment or decree known to such counsel to which AVI is

a party or by which it is bound; or to such counsel's knowledge, violate any existing law or regulation.

(iv) The Purchased Securities have been duly authorized by all necessary corporate action on the part of AVI and, upon delivery by AVI in accordance with the terms of this Agreement, will be duly and validly issued, fully paid and nonassessable and free and clear of any Liens, except that such Purchased Securities will be subject to restrictions on transfer imposed by AVI to comply with federal and applicable state securities laws as described in Article 4 hereof.

(v) To such counsel's knowledge after investigation, except as disclosed in the Disclosure Schedule, there are no actions, proceedings or investigations which are pending or threatened against or affecting AVI, that, either in any case or in the aggregate, might result in a Material Adverse Effect.

(vi) All consents, approvals, orders, authorizations or registrations, qualifications, designations, declarations or filings of or with any federal or state governmental authority on the part of AVI required in connection with the consummation of the transactions contemplated by this Agreement and the Transaction Documents have been made, obtained or effected (provided, however, that filings under applicable state securities laws may be made promptly after the Closing to the extent such filings are permitted to be made after the sale of the Purchased Securities). Based in part on the representations of Investor in Article 4 of this Agreement, the offer, sale and issuance by AVI of the Purchased Securities, all in conformity with the terms of this Agreement, do not require registration under Section 5 of the Securities Act of 1933, as amended.

In rendering such opinions, said counsel may rely on such certificates of public officials and, with respect to factual matters, of officers of AVI as such counsel deems necessary or appropriate, and such opinions may be limited in scope and be subject to such qualifications as is customary under the circumstances and as may be reasonably acceptable to counsel to Investor.

(j) *No Change of Control.* Since the date hereof, there shall not have been any Change of Control.

(k) *No Material Adverse Changes.* Since the date hereof, no event shall have occurred which may result in a Material Adverse Effect.

(l) *No Default.* Since the date hereof, no default (or event which, with the passage of time and/or the giving of notice, would constitute a default) of AVI shall have occurred under this Agreement or the Transaction Documents.

(m) *Information to Be Provided to Investor at Second, Third, and Fourth Closings.* Upon achieving each of the Second Closing Milestone, Third Closing Milestone, and Fourth Closing Milestones, and in any event not less than ten (10) business days prior to the applicable Closing, AVI shall provide to Investor an updated Disclosure Schedule that qualifies or supplements information contained in the representations and warranties of AVI set forth in Article 3 hereof and in the accompanying Disclosure Schedule, so as to reflect changes and developments in the business, operations, and condition (financial or otherwise) of AVI subsequent to the date hereof. Upon receipt thereof, Investor's obligations shall be subject to Section 6.1(k) for any information disclosed therein.

(n) *Deadlines.* Investor's obligation at the Second Closing shall be subject to the condition that the Second Closing Milestone shall have occurred on or before [*] Investor's obligation at the Third Closing shall be subject to the condition that the Third Closing Milestone shall have

occurred on or before [*]; and Investor's obligation at the Fourth Closing shall be subject to the condition that the Fourth Closing Milestone shall have occurred on or before [*].

6.2 *Conditions to AVI's Obligations.* The obligations of AVI to issue, sell and deliver certificates representing the Purchased Shares and the Warrant pursuant to Article 2 are subject to the satisfaction or waiver, on or before the respective Closing Date of the conditions set forth below:

(a) *Execution of Transaction Documents.* Investor or Medtronic, as the case may be, shall have executed and delivered the Transaction Documents.

(b) *Representations and Warranties to be True and Correct.* The representations and warranties contained in Article 4 shall be true, complete and correct on and as of such Closing Date with the same effect as though such representations and warranties had been made on and as of such date.

ARTICLE 7
INDEMNIFICATION

7.1 *Indemnification of Medtronic.* AVI shall indemnify, defend and hold harmless Investor, Medtronic and each of its Affiliates, and their respective officers, directors and stockholders (Investor, Medtronic and such other indemnities referred to in this Article 7 as "Medtronic") from and against and in respect of any and all demands, claims, actions or causes of action, assessments, losses, damages, liabilities, interest and penalties, costs and expenses (including, without limitation, reasonable legal fees and disbursements incurred in connection therewith and in seeking indemnification therefor, and any amounts or expenses required to be paid or incurred in connection with any action, suit, proceeding, claim, appeal, demand, assessment or judgment) ("Indemnifiable Losses"), resulting from, arising out of, or imposed upon or incurred by any person to be indemnified hereunder by reason of any breach of any representation, warranty, covenant or agreement of AVI contained in this Agreement, the Transaction Documents, or any agreement, certificate or document executed and delivered by AVI pursuant hereto or in connection with any of the transactions contemplated by this Agreement.

7.2 *Third-Party Claims.* If a claim by a third party is made against Medtronic and if Medtronic intends to seek indemnity with respect thereto under this Article 7, Medtronic shall promptly notify AVI of such claim; provided, however, that failure to give timely notice shall not affect the rights of Medtronic so long as the failure to give timely notice does not materially and adversely affect AVI's ability to defend such claim against a third party. Medtronic shall not settle such claim without the consent of AVI, which consent shall not be unreasonably withheld or delayed. If AVI acknowledges in writing its indemnity obligations for Indemnifiable Losses resulting therefrom, AVI may participate at its own cost and expense in the settlement or defense of any claim for which indemnification is sought; *provided that* such settlement or defense shall be controlled by Medtronic.

7.3 *Cooperation as to Indemnified Liability.* Each party hereto shall cooperate fully with the other parties with respect to access to books, records, or other documentation within such party's control, if deemed reasonably necessary or appropriate by any party in the defense of any claim which may give rise to indemnification hereunder.

7.4 *Brokerage.* AVI will indemnify and hold harmless Medtronic against and in respect of any claim for brokerage or other commissions relative to this Agreement or to the transactions contemplated hereby, based in any way on agreements, arrangements or understandings made or claimed to have been made by AVI with any third party.

7.5 *Limitation on Certain Claims.* To the extent Medtronic wishes to make a claim for indemnification under Section 7.1 with respect to Purchased Securities purchased at a Closing and the breach of the Company's representations and warranties deemed made as of the Closing Date applicable thereto, such claim for indemnification shall be made within two (2) years after such Closing

Date applicable to such purchase. However, the foregoing two (2) year limitation shall not apply to any claim for indemnification arising out of any third party claim made against Medtronic, nor to the breach of any representation or warranty made in Sections 3.1, 3.2, 3.3, 3.4, 3.11 or 3.23.

ARTICLE 8
CLOSING

8.1 *First Closing.* The consummation of the purchase and sale of the Purchased Shares and the issuance of the Warrant pursuant to Section 2.1 (the "First Closing") shall, subject to the satisfaction of the conditions set forth in Article 6, occur not later than thirty (30) days after the date hereof, as specified in writing by Investor (the "First Closing Date"). At the First Closing, the parties shall also execute the Transaction Documents.

8.2 *Second Closing.* The consummation of the purchase and sale of the Purchased Shares pursuant to Section 2.2 (the "Second Closing") shall, subject to the satisfaction of the conditions set forth in Article 6, take place within thirty (30) days after the written notice referenced in such Section regarding the occurrence of the Second Closing Milestone, as specified in writing by Investor, or on such other date as the parties may agree (the "Second Closing Date").

8.3 *Third Closing.* The consummation of the purchase and sale of the Purchased Shares pursuant to Section 2.3 (the "Third Closing") shall, subject to the satisfaction of the conditions set forth in Article 6, take place within thirty (30) days after the written notice referenced in such Section regarding the occurrence of the Third Closing Milestone, as specified in writing by Investor, or on such other date as the parties may agree (the "Third Closing Date").

8.4 *Fourth Closing.* The consummation of the purchase and sale of the Purchased Shares pursuant to Section 2.4 (the "Fourth Closing") shall, subject to the satisfaction of the conditions set forth in Article 6, take place within thirty (30) days after the written notice referenced in such Section regarding the occurrence of the Fourth Closing Milestone, as specified in writing by Investor, or on such other date as the parties may agree (the "Fourth Closing Date").

8.5 *Closings.* Each of the Closings shall take place at the offices of Medtronic in Minneapolis, Minnesota, or by telecopy exchange of signature pages with originals to follow by overnight delivery, or in such other manner or at such place as the parties hereto may agree.

ARTICLE 9
TERMINATION AND DEFAULT

9.1 *Termination.* The obligation of the parties hereto to consummate the remaining transactions contemplated hereby may be terminated and abandoned at any time at or before the First Closing, Second Closing, Third Closing or Fourth Closing if any of the following events occurs:

(a) by and at the option of Investor or AVI, if the First Closing does not occur within sixty (60) days from the date hereof, provided that Investor or AVI, as the case may be, is not then in material default under this Agreement; or

(b) by and at the option of Investor, if the Second Closing Milestone, Third Closing Milestone or Fourth Closing Milestone does not occur by the dates set forth in Section 6.1(n); or

(c) by and at the option of Investor, if AVI is in default under this Agreement or the Transaction Documents, and does not cure such default within thirty (30) days after having received a notice from Medtronic or Investor regarding such default; or

(d) by and at the option of AVI, if Investor or Medtronic is in default under this Agreement or the Transaction Documents, and does not cure such default within thirty (30) days after having received a notice from AVI regarding such default; or

(e) by and at the option of Investor, any event or circumstance occurs or exists that renders any condition to Investor's obligations set forth in Article 6 incapable of being satisfied; or

(f) by and at the option of Investor if the conditions precedent in Section 6.1 hereof are not satisfied by AVI or waived by Investor within thirty (30) days after written notice has been given by Investor pursuant to Section 2.2, 2.3 or 2.4 hereof as the case may be; or

(g) by and at the option of AVI if the conditions precedent in Section 6.2 hereof are not satisfied by Investor or waived by AVI within thirty (30) days after written notice has been given by Investor pursuant to Section 2.2, 2.3 or 2.4 hereof as the case may be; or

(h) by and at the option of Investor if AVI exercises its option under Section 4.2 of the License and Development Agreement to convert the license granted thereunder from exclusive to non-exclusive; or

(i) by and at the option of Investor if a Material Adverse Effect with respect to AVI shall have occurred; or

(j) by the mutual written consent of the parties; or

(k) by and at the option of either Investor or AVI if any governmental authority shall have issued an order, decree, or ruling or taken any other action restraining, enjoining or otherwise prohibiting in any material respects the transactions contemplated hereby and such order, decree, ruling or other action shall have become final and nonappealable.

9.2 *Effect.* Termination of this Agreement by a party shall not relieve the other parties hereto of any liability for breach of representation, warranty, covenant or agreement by such other parties including liability for monetary damages and/or specific performance. Investor's or Medtronic's rights pursuant to the Transaction Documents shall survive any termination of this Agreement.

ARTICLE 10
OTHER PROVISIONS

10.1 *Further Assurances.* At such time and from time to time on and after the Closing Date, upon request by the other party, Investor and AVI will execute, acknowledge and deliver, or will cause to be done, executed, acknowledged and delivered, all such further acts, deeds, assignments, transfers, conveyances, powers of attorney and assurances that may be required for the better conveying, transferring, assigning, delivering, assuring and confirming to Investor, or to its respective successors and assigns, all of the Purchased Shares or to otherwise carry out the purposes of this Agreement.

10.2 *Complete Agreement.* This Agreement and the Transaction Documents (including all schedules and exhibits hereto and thereto) constitute the entire agreement among the parties hereto with respect to the subject matter hereof and thereof. There are no restrictions, promises, warranties or undertakings, other than those set forth or referred to herein or therein, with respect to the subject matter hereof and thereof. This Agreement supersedes all prior agreements and understandings among the parties hereto with respect to the subject matter hereof.

10.3 *Survival of Representations, Warranties and Agreements.* The representations, warranties, covenants and agreements contained in Articles 3 and 4 of this Agreement shall survive each Closing and remain in full force and effect. No independent investigation of AVI by Investor, its counsel, or any of its agents or employees shall in any way limit or restrict the scope of the representations and warranties made by AVI in this Agreement.

10.4 *Waiver, Discharge, Amendment, Etc.* The failure of any party hereto to enforce at any time any of the provisions of this Agreement shall not, absent an express written waiver signed by the party making such waiver specifying the provision being waived, be construed to be a waiver of any such

provision, nor in any way to affect the validity of this Agreement or any part thereof or the right of the party thereafter to enforce each and every such provision. No waiver of any breach of this Agreement shall be held to be a waiver of any other or subsequent breach. This Agreement may be amended by AVI and Investor, by mutual action approved by their respective Boards of Directors or their respective officers authorized by such Board of Directors, at any time. Any amendment to this Agreement shall be in writing and signed by AVI and Investor.

10.5 *Notices.* All notices or other communications to a party required or permitted hereunder shall be in writing and shall be delivered personally or by telecopy (receipt confirmed) to an executive officer of such party or shall be sent by a reputable express delivery service or by certified mail, postage prepaid with return receipt requested, addressed as follows:

if to Investor or Medtronic to:

Medtronic, Inc.
710 Medtronic Parkway NE
Minneapolis, MN 55432-5604

with separate copies thereof addressed to

Attention: General Counsel
Mail Stop LC400
Telecopier No.: (763) 572-5459

and

Attention: Vice President and Chief Development Officer
Mail Stop LC390
Telecopier No.: (763) 505-2542

if to AVI to:

AVI BioPharma, Inc.
One SW Columbia
Portland, OR 97258
Attn: President, Alan P. Timmins

With a copy to:

HURLEY, LYNCH & RE, P.C.,
747 SW Industrial Way
Bend, Oregon 97702
Attn: Robert A. Stout, Esq.

Any party may change the above-specified recipient and/or mailing address by notice to the other party given in the manner herein prescribed. All notices shall be deemed given on the day when actually delivered as provided above (if delivered personally or by telecopy) or on the day shown on the return receipt (if delivered by mail or delivery service).

10.6 *Public Announcement.* In the event any party proposes to issue any press release or public announcement concerning any provisions of this Agreement or the transactions contemplated hereby, such party shall so advise the other party hereto, and the parties shall thereafter use their best efforts to cause a mutually agreeable release or announcement to be issued. Neither party will publicly or privately disclose or divulge any provisions of this Agreement or the transactions contemplated hereby without the other parties' written consent, except as may be required by applicable law, rule, regulation, order or stock exchange regulation, and except for communications to employees; provided that, prior to disclosure of any provision of this Agreement that either party considers particularly sensitive or

confidential to any governmental agency or stock exchange, the parties shall cooperate to seek confidential treatment or other applicable limitations on the public availability of such information.

10.7 *Expenses.* AVI and Investor shall each pay their own expenses incident to this Agreement and the preparation for, and consummation of, the transactions provided for herein.

10.8 *Governing Law.* The formation, legality, validity, enforceability and interpretation of this Agreement shall be governed by the laws of the State of Minnesota, without giving effect to the principles of conflict of laws; provided, however, that nothing in Minnesota procedural law shall be deemed to alter or affect the applicability of the Federal Arbitration Act as governing arbitration of disputes as provided in Section 10.12 and, provided further, that no Minnesota laws or rules of arbitration shall be applicable. Subject to Section 10.12 hereof, if arbitration is sought by Investor, such arbitration shall be in Multnomah County, Oregon; and, if sought by AVI, such arbitration shall be in Hennepin County, Minnesota; and in each such case, the parties hereto hereby submit to the exclusive jurisdiction of the United States federal and state courts located in such county with respect to any dispute arising under this Agreement, the agreements entered into in connection herewith or the transactions contemplated hereby or thereby, and irrevocably consent to the exclusive jurisdiction and venue of such courts and waive any objections they may have at any time to such exclusive jurisdiction and venue.

10.9 *Titles and Headings; Construction.* The titles and headings to the Articles and Sections herein are inserted for the convenience of reference only and are not intended to be a part of or to affect the meaning or interpretation of this Agreement. This Agreement shall be construed without regard to any presumption or other rule requiring construction hereof against the party causing this Agreement to be drafted.

10.10 *Benefit.* Nothing in this Agreement, expressed or implied, is intended to confer on any person other than the parties hereto or their respective successors or assigns, any rights, remedies, obligations or liabilities under or by reason of this Agreement.

10.11 *Counterparts.* This Agreement may be executed in any number of counterparts, each of which shall be deemed as original and all of which together shall constitute one instrument.

10.12 *Arbitration.* Any dispute arising out of or relating to this Agreement or the Registration Rights Agreement, including the formation, interpretation or alleged breach hereof, shall be settled in accordance with the **Exhibit E** attached hereto. The results of such arbitration proceedings shall be binding upon the parties hereto, and judgment may entered upon the arbitration award in any court having jurisdiction thereof. Notwithstanding the foregoing, either party may seek interim injunctive relief from any court of competent jurisdiction.

10.13 *Non-Disclosure.* Each party agrees not to disclose or use (except as permitted or required for performance by the party receiving such Confidential Information of its rights or duties hereunder or under the Transaction Documents) any Confidential Information of the other party obtained during the term of this Agreement until the expiration of three (3) years after the earlier of the First Closing or the termination of this Agreement. Each party further agrees to take appropriate measures to prevent any such prohibited disclosure by its present and future employees, officers, agents, subsidiaries, or consultants during such term

IN WITNESS WHEREOF, each of the parties has caused this Investment Agreement to be executed in the manner appropriate for each, and to be dated as of the date first above-written.

AVI BIOPHARMA, INC.

By: /s/ DENIS BURGER

Its: CEO

MEDTRONIC ASSET MANAGEMENT, INC.

By: /s/ MICHAEL D. ELLWEIN

Its: VP

Exhibits and Schedules:

Exhibit A—Warrant
Exhibit B—License and Development Agreement
Exhibit C—Supply Agreement
Exhibit D—Registration Rights agreement
Exhibit E—Alternative Dispute Resolution
AVI Disclosure Schedule

EXHIBIT E

ALTERNATIVE DISPUTE RESOLUTION

1) *Negotiations.* If any dispute arises between AVI and Investor with respect to the Investment Agreement or the Registration Rights Agreement (the "Agreements"), or any alleged breach thereof, any party may, by written notice to the other party, have such dispute referred to their respective designees listed below or their successors for attempted resolution by good faith negotiations within 30 days after such notice is received. Such designees are as follows:

For AVI—the President of AVI or his/her designee

For Investor—the President of Medtronic, Inc.'s business unit to which the Agreements relate, or his/her designee

Any settlement reached by the parties under this Section 1 shall not be binding until reduced to writing and signed by the above-specified designees of Investor and AVI. When reduced to writing, such settlement agreement shall supersede all other agreements, written or oral, to the extent such agreements specifically pertain to the matters so settled. If the designees are unable to resolve such dispute within such 30-day period, any party may invoke the provisions of Section 2 below.

2) *Arbitration.* All claims, disputes, controversies, and other matters in question arising out of or relating to the Agreements, including claims for Indemnifiable Losses and disputes regarding the making of the Agreements, including claims of fraud in the inducement, or to the alleged breach hereof, shall be settled by negotiation between the parties as described in Section 1 above or, if negotiation is unsuccessful, by binding arbitration in accordance with procedures set forth in Section 3 and 4 below.

3) *Notice.* Notice of demand for binding arbitration shall be given in writing to the other party and shall be delivered personally or by facsimile (receipt confirmed) to an executive officer of such party or shall be sent by a reputable express delivery service or by certified mail, postage prepaid with return receipt requested, addressed as follows:

Medtronic Asset Management, Inc.
710 Medtronic Parkway NE
Minneapolis, MN 55432-5604

with separate copies thereof addressed to

Attention: General Counsel
Mail Stop LC400
Telecopier No.: (763) 572-5459

and

Attention: Vice President and Chief Development Officer
Mail Stop LC390
Telecopier No.: (763) 505-2542

if to AVI to:

AVI BioPharma, Inc.
One SW Columbia
Portland, OR 97258
Attn: President, Alan P. Timmins

With a copy to:

HURLEY, LYNCH & RE, P.C.
747 SW Industrial Way
Bend, Oregon 97702
Attn: Robert A. Stout, Esq.

Any party may change the above-specified recipient and/or mailing address by notice to the other party given in the manner herein prescribed. All notices shall be deemed given on the day when actually delivered as provided above (if delivered personally or by facsimile (upon appropriate electronic confirmation of successful transmission)) or on the day shown on the return receipt (if delivered by mail or delivery service). In no event may a notice of demand of any kind be filed more than two years after the date the claim, dispute, controversy, or other matter in question was asserted by one party against another, and if such demand is not timely filed, the claim, dispute, controversy, or other matter in question referenced in the demand shall be deemed released, waived, barred, and unenforceable for all time, and barred as if by statute of limitations.

4) *Binding Arbitration.* Upon filing of a notice of demand for binding arbitration by any party hereto, arbitration shall be commenced and conducted as follows:

(a) *Arbitrators.* All claims, disputes, controversies, and other matters (collectively "matters") in question shall be referred to and decided and settled by a standing panel of three independent arbitrators, one selected by each of AVI and Investor's representative and the third by the two arbitrators so selected. The third shall be a former judge of one of the U.S. District Courts or one of the U.S. Court of Appeals or such other classes of persons as the parties may agree. Selection of arbitrators shall be made within 30 days after the date of the first notice of demand given pursuant to Section 3 and within 30 days after any resignation, disability or other removal of such arbitrator. Following appointment, each arbitrator shall remain a member of the standing panel, subject to removal for just cause or resignation or disability; provided, however, an arbitrator can be removed by the party who appointed the arbitrator, or in the case of the third arbitrator, by either party for any reason at any time when no matter is in arbitration.

(b) *Cost of Arbitration.* The cost of each arbitration proceeding, including without limitation the arbitrators' compensation and expenses, hearing room charges, court reporter transcript charges etc., shall be borne by the party whom the arbitrators determine has not prevailed in such proceeding, or borne equally by the parties if the arbitrators determine that neither party has prevailed. The arbitrators shall also award the party that prevails

substantially in its pre-hearing position its reasonable attorneys' fees and costs incurred in connection with the arbitration. The arbitrators are specifically instructed to award attorneys' fees for instances of abuse of the discovery process.

(c) *Location of Proceedings.* All arbitration proceedings shall be held in the county selected pursuant to Section 10.8 of the Investment Agreement unless the parties agree otherwise.

(d) *Pre-hearing Discovery.* The parties shall have the right to conduct and enforce pre-hearing discovery in accordance with the then current Federal Rules of Civil Procedure, subject to these limitations: Document discovery and other discovery shall be under the control of and enforceable by the arbitrators. The arbitrators shall permit and facilitate such other discovery as they shall determine is appropriate under the circumstances, taking into account the needs of the parties and the desirability of making discovery expeditious and cost effective. The arbitrators shall decide discovery disputes. The arbitrators are empowered:

(i) to issue subpoenas to compel pre-hearing document or deposition discovery;

(ii) to enforce the discovery rights and obligations of the parties; and

(iii) to otherwise control the scheduling and conduct of the proceedings.

Notwithstanding any contrary foregoing provisions, the arbitrators shall have the power and authority to, and to the fullest extent practicable shall, abbreviate arbitration discovery in a manner that is fair to all parties in order to expedite the arbitration proceeding and render a final decision within six months after the pre-hearing conference.

(e) *Pre-hearing Conference.* Within 45 days after filing of notice of demand for binding arbitration, the arbitrators shall hold a pre-hearing conference to establish schedules for completion of discovery, for exchange of exhibit and witness lists, for arbitration briefs, for the hearing, and to decide procedural matters and all other questions that may be presented.

(f) *Hearing Procedures.* The hearing shall be conducted to preserve its privacy and to allow reasonable procedural due process. Rules of evidence need not be strictly followed, and the hearing shall be streamlined as follows:

(i) Documents shall be self-authenticating, subject to valid objection by the opposing party;

(ii) Expert reports, witness biographies, depositions, and affidavits may be utilized, subject to the opponent's right of a live cross-examination of the witness in person;

(iii) Charts, graphs, and summaries shall be utilized to present voluminous data, provided (i) that the underlying data was made available to the opposing party 30 days prior to the hearing, and (ii) that the preparer of each chart, graph, or summary is available for explanation and live cross-examination in person;

(iv) The hearing should be held on consecutive business days without interruption to the maximum extent practicable; and

(v) The arbitrators shall establish all other procedural rules for the conduct of the arbitration in accordance with the rules of arbitration of the Center for Public Resources.

(g) *Governing Law.* This arbitration provision shall be governed by, and all rights and obligations specifically enforceable under and pursuant to, the Federal Arbitration Act (9 U.S.C. § 1 *et seq*.) and the laws of the State of Minnesota shall be applied, without reference to the choice of law principles thereof, in resolving matters submitted to such arbitration.

(h) *Consolidation.* No arbitration shall include, by consolidation, joinder, or in any other manner, any additional person not a party to this Agreement (other than affiliates of any such party, which affiliates may be included in the arbitration), except by written consent of the parties hereto containing a specific reference to this Agreement.

(i) *Award.* The arbitrators shall be required to render their final decision within six months after the pre- hearing conference. The arbitrators are empowered to render an award of general compensatory damages and equitable relief (including, without limitation, injunctive relief), but are not empowered to award punitive or presumptive damages. The award rendered by the arbitrators (1) shall be final; (2) shall not constitute a basis for collateral estoppel as to any issue; and (3) shall not be subject to vacation or modification, except in the event of fraud or gross misconduct on the part of the arbitrators.

(j) *Confidentiality.* The parties hereto will maintain the substance of any proceedings hereunder in confidence and make disclosures to others only to the extent necessary to properly conduct the proceedings.

Exhibit 10.36

Exhibit 10.39

[*] Confidential portions omitted and filed separately

LICENSE AND DEVELOPMENT AGREEMENT

THIS LICENSE AND DEVELOPMENT AGREEMENT (this "Agreement") is made and entered into as of June 20, 2001 between AVI BIOPHARMA, INC. ("AVI"), an Oregon corporation, and MEDTRONIC, INC. ("Medtronic"), a Minnesota corporation.

RECITALS

WHEREAS, AVI has developed technology relating to antisense compounds which may have application in the treatment of vascular disease;

WHEREAS, Medtronic makes and sells medical devices relating to the treatment of vascular disease;

WHEREAS, an affiliate of Medtronic, Medtronic Asset Management, Inc. ("MAMI"), has entered into an Investment Agreement dated as of May 22, 2001 (the "Investment Agreement") pursuant to which, among other things, MAMI has purchased, and AVI has sold, certain shares of AVI Common Stock and a Warrant to purchase certain shares of AVI Common Stock;

WHEREAS, AVI desires to grant, and Medtronic desires to obtain, the rights set forth herein;

WHEREAS, AVI and Medtronic are entering into a Supply Agreement of even date herewith (the "Supply Agreement") regarding AVI's supplying Medtronic's requirements for the Drug; and

WHEREAS, the parties desire that Medtronic attempt to develop products using the Technology (as defined below) for the treatment of vascular disease through non-systemic applications.

AGREEMENT

NOW, THEREFORE, in consideration of the respective representations, warranties, covenants and agreements contained herein, and for other valuable consideration, the receipt and adequacy of which is hereby acknowledged, the parties hereto agree as follows:

ARTICLE 1
DEFINITIONS

1.1 *Specific Definitions.* As used in this Agreement, the following terms shall have the meanings set forth or as referenced below:

"*Additional License Agreement*" has the meaning given in Section 4.4(c).

"*Additional Supply Agreement*" has the meaning given in Section 4.4(d).

"*Affiliate*" of a specified person (natural or juridical) means a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the person specified. "Control" shall mean ownership of more than 50% of the shares of stock entitled to vote for the election of directors in the case of a corporation, and more than 50% of the voting power in the case of a business entity other than a corporation.

"*Agreement*" means this Agreement and all Exhibits and Schedules hereto.

"*Collaboration Agreement*" means the *Collaboration Agreement* dated [*] by and between AVI and [*], as amended from time to time.

"*Compound*" means (a) any "drug" as defined in the Federal Food, Drug and Cosmetic Act, as amended, not licensed hereunder and all derivatives and analogues of such drug, (b) any "biological product" as defined in the Public Health Service Act, as amended, not licensed hereunder and all derivatives and analogues of such biological product and (c) the antisense compounds not licensed hereunder.

"*Compound Option Period*" means the period commencing on the First Closing Date (as defined in the Investment Agreement) and continuing until termination of this Agreement.

"*Drug*" means formulation or formulations of antisense compounds (including the bulk drug substance known as AVI 4126) that target the genes listed on Exhibit B attached hereto, all derivatives and analogues thereof, and all modifications and improvements thereto.

"*Exclusivity Termination Date*" means, with respect to a Compound, the date which is six (6) months from the date that written notice is given by AVI pursuant to Section 4.4(a).

[*] means [*] and any successors and assignees thereto under the *Collaboration Agreement*.

"*Expiration*" or "*Expired*" means, with respect to a particular patent, the patent's expiration, abandonment, cancellation, disclaimer, award to another party other than AVI in an interference proceeding, or declaration of invalidity or unenforceability by a court or other authority of competent jurisdiction (including final rejection in a re-examination or re-issue proceeding).

"*FDA*" means the U.S. Food and Drug Administration.

"*FDA Approval*" means the receipt by Medtronic of all approvals by the FDA necessary or required for the commercialization in the United States of a Royalty Product.

"*Field*" means the treatment of vascular disease only in conjunction with the use of a (i) stent, (ii) balloon, (iii) catheter or (iv) any other medical device (other than a medical device providing for systemic application). The parties acknowledge that the "Field" does not include the treatment of hypertension or congestive heart failure except as may occur through the treatment of restenosis or atherosclerosis.

"*First Commercial US Sale*" means the first commercial sale of a Royalty Product in the United States pursuant to Medtronic's customary commercial release executive approval procedures and guidelines. Commercial sales do not include sales for use in clinical trials or other testing purposes.

"*Intellectual Property*" means U.S. and foreign patents and patent applications, trademarks, service marks and registrations thereof and applications therefor, copyrights and copyright registrations and applications, mask works and registrations thereof, know-how, trade secrets, inventions, discoveries, ideas, technology, data, information, processes, drawings, designs, licenses, computer programs and software, and technical information including but not limited to information embodied in material specifications, processing instructions, equipment specifications, product specifications, confidential data, electronic files, research notebooks, invention disclosures, research and development reports and the like related thereto, and all amendments, modifications, and improvements to any of the foregoing.

"*Invention*" means any invention, discovery, know-how, trade secret, data, information, technology, process or concept, whether or not patented or patentable, and whether or not memorialized in writing.

"*Investment Agreement*" means the Investment Agreement dated May 22, 2001 by and between AVI and Medtronic Asset Management, Inc.

"*Joint Inventions*" is defined in Section 6.3.

"*Know-How*" means all know-how, trade secrets, expertise, Inventions, discoveries and technical information now or hereafter owned by, licensed to, possessed by, or under the control of, AVI which are necessary, appropriate or useful for designing, developing, processing, manufacturing, using, selling

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or delivering the Drug within the Field, including but not limited to information embodied in drawings, designs, copyrights, copyright registrations and applications, trademarks, service marks and registrations thereof and applications therefor, patent applications, material specifications, processing instructions, formulas, equipment specifications, product specifications, confidential data, computer software, electronic files, research notebooks, invention disclosures, research and development reports and the like related thereto, and all amendments, modifications, upgrades and improvements to any of the foregoing, occurring before or during the term of this Agreement.

"*Liens*" means liens, mortgages, charges, security interests, claims, voting trusts, pledges, encumbrances, options, assessments, restrictions, licenses, sublicenses, or third party or spousal interests of any nature.

"*Net Sales*" of Royalty Products with respect to a particular period means the amounts that Medtronic or any Affiliate of Medtronic receives from third parties (eliminating transactions among Affiliates of Medtronic and/or Medtronic) for net sales (excluding sales for use in clinical trials for which Medtronic receives no revenue or other scientific testing, but including post-approval clinicals, market research studies, and the like) of Royalty Products during such period, excluding sales, use, occupation or excise taxes, freight, duty or transportation insurance included therein, returns, discounts, and allowances, credits or repayments due to rejections, defects or returns, and net of amounts previously included in Net Sales of Royalty Products that were written-off by Medtronic during such period as uncollectible; provided that if Medtronic or any Affiliate of Medtronic sells at a single price or rate a packaged combination of products, not all of which if sold individually would be Royalty Products, then Net Sales of Royalty Products with respect to such sales of packaged products shall equal the number of units of Royalty Products sold as part of such packaged products (less rejections, defects and returns) multiplied by either (i) the respective average net selling price during such period of the same type of Royalty Products sold individually, or (ii) the average net selling price during such period for a comparable product determined by Medtronic (if the same type of Royalty Product is not sold individually), in either case excluding sales, use or excise tax, freight, duty or transportation insurance, returns, discounts, etc. and any allocated discount on the Royalty Product for such packaged combination.

"*Patents*" means (a) the patents and patent applications, together with any patents that may issue based thereon, set forth on Exhibit A; (b) any other patents or patent applications now or hereafter owned by or licensed to AVI that are necessary, appropriate or useful for designing, developing, processing, manufacturing, using, selling or delivering the Drug within the Field; (c) all continuation, divisional, re-issue, re-examination and substitution applications that may be filed, before or during the term of this Agreement, by or for the benefit of AVI based on the foregoing referenced patents or patent application, together with any patents that may issue based thereon; and (d) all foreign applications that may be filed, before or during the term of this Agreement, by or for the benefit of AVI based on the foregoing referenced patents and patent applications, together with all patents which may issue based thereon.

"*PHS License*" means the Patent License Agreement-Exclusive by and between the National Institutes of Health, the Center for Disease Control and the Food and Drug Administration, agencies of the United States Public Health Service within the Department of Health and Human Services, on the one hand, as licensor, and AVI (as assignee), as licensee, on the other, dated September 17, 1996, as amended from time to time, covering certain patents involving the "Inhibition of Cell Proliferation using Anti-Sense Oligonucleotides".

"*Restenosis*" means a reduction greater than or equal to [*] in the minimum lumen diameter compared to the reference vessel minimum lumen diameter based upon a binary angiographic follow-up at such period of time following the deployment of the stent as may be required by the FDA to permit Medtronic to make a labeling claim with respect thereto.

"*Restenosis Rate*" shall mean the rate at which Restenosis occurs in the clinical trial.

"*Royalty Product*" means the Drug and the portion of the medical device that directly provides for the application of the Drug to the tissue to be treated; provided that the Drug, in the country of its manufacture or sale, is covered by a Valid Claim of any Unexpired patent that is included within the Patents. For example, if the Drug is applied to the affected tissue by means of a coated stent inserted by means of a guidewire and balloon-catheter system, the Royalty Product would be the Drug and the stent. No more than one (1) payment calculated in accordance with Section 3.3 shall be paid on any single product covered by the Patents even though such product, including its manufacture, sale or use may be covered by Valid Claims of more than one patent included in the Patents.

"*Technology*" means the Patents and the Know-How.

"*Third Closing Milestone*" shall have the meaning set forth in the Investment Agreement.

"*Unexpired*" shall mean a patent that has not Expired.

"*Valid Claim*" means a claim in an Unexpired patent included with the Patents which has not been held unenforceable, unpatentable or invalid by a decision of a court or other governmental agency of competent jurisdiction, unappealable or unappealed within the time allowed for appeal and which has not been admitted to be invalid or unenforceable through reissue or disclaimer.

1.2 *Definitional Provisions.*

(a) The words "hereof," "herein," and "hereunder" and words of similar import, when used in this Agreement, shall refer to this Agreement as a whole and not to any particular provisions of this Agreement.

(b) Terms defined in the singular shall have a comparable meaning when used in the plural, and vice-versa.

(c) References to an "Exhibit" or to a "Schedule" are, unless otherwise specified, to one of the Exhibits or Schedules attached to or referenced in this Agreement, and references to an "Article" or a "Section" are, unless otherwise specified, to one of the Articles or Sections of this Agreement.

(d) The term "person" includes any individual, partnership, joint venture, corporation, trust, unincorporated organization or government or any department or agency thereof.

ARTICLE 2
LICENSE TO MEDTRONIC

2.1 *Grant of License.* Subject to the terms and conditions of this Agreement, AVI hereby grants to Medtronic an irrevocable, worldwide, sublicensable, exclusive license to the Technology to make, have made, use, import, export, distribute, sell, offer to sell and have sold the Drug in the Field and to make, have made, use, import, export, distribute, sell, offer to sell and have sold products incorporating or utilizing the Drug and/or the Technology in the Field, practice methods covered thereby, and otherwise to commercialize and exploit, the Drug and/or the Technology in the Field.

2.2 *Technology Transfer.* AVI shall, upon Medtronic's reasonable request from time to time, provide to Medtronic at no charge available drawings, specifications, processes, materials, and any manufacturing procedures and such other documentation and Know-How as is reasonably necessary or useful to enable Medtronic to fully utilize the license granted to Medtronic under this Agreement. In addition, AVI will make available personnel as requested by Medtronic, to provide such individual training to Medtronic technical and manufacturing personnel as is necessary to enable Medtronic to fully utilize the license granted to Medtronic under this Agreement, at such reasonable times and places as Medtronic may request from time to time, including, without limitation, to complete any

development of the Technology in the Field, and to assist in the transfer of any manufacturing and regulatory submissions (including raw and compiled clinical data), certificates or other documents or approvals.

ARTICLE 3
FEES, ROYALTIES AND REPORTS

3.1 *Fee Based on First Commercial US Sale.*

(a) Medtronic shall pay to AVI an up-front one-time licensing fee of [*] within thirty (30) days after the date of the First Commercial US Sale of a Royalty Product, provided that Medtronic has received FDA Approval with respect thereto before [*] (or [*], if at any time the regulatory process necessary or required to obtain FDA Approval consists of the Investigational New Drug/New Drug Application process followed by the Investigational Device Exemption/Premarket Approval process).

(b) The parties acknowledge and agree that if FDA Approval occurs on or after [*] (or [*], if applicable), then no fee shall be payable under this Section 3.1. Further, the fee under this Section 3.1 shall be payable only with respect to the first system incorporating any Royalty Product, and no additional fees shall be payable under this Section 3.1 for the first commercial sale in the U.S. or outside the U.S. of other systems incorporating Royalty Products.

3.2 *Fee Based on Clinical Study Restenosis Rate.*

(a) If the Restenosis Rate in the clinical trial conducted by Medtronic in the U.S., the European Union or Japan in order to obtain regulatory approval for the commercial sale of the Royalty Product in the United States is equal to or less than [*] percent [*], then Medtronic will pay AVI an up-front one-time licensing fee of [*] within sixty (60) days after the completion of such study, provided, however, that such payment of such licensing fee shall not occur unless and until Medtronic has received FDA Approval for the Royalty Product to which such study pertained.

(b) The parties acknowledge and agree that if the Restenosis Rate exceeds [*] percent ([*]%), then no fee shall be payable under this Section 3.2.

3.3 *Earned Royalty.*

(a) Subject to the terms of this Agreement, Medtronic shall pay to AVI a royalty equal to [*] percent ([*]%) of Medtronic's Net Sales of Royalty Products.

(b) If Medtronic determines that, in order to make the Drug functional, fully utilize the license granted hereunder or to commercialize a product incorporating or utilizing the Drug or the Technology, it is required to make a payment to one or more third parties because of the rights of any such third party, then the royalties due under Section 3.3(a) to AVI shall be reduced by [*] percent ([*]%) of any payments due to such third parties, provided, however, the application of the foregoing shall not reduce the amount due to AVI under Section 3.3(a) to less than [*] percent ([*]%).

(c) Provided that AVI has complied with its obligations set forth in Section 5.4, the royalty payable pursuant to Section 3.3(a) shall be increased by [*] of the amount of the "earned royalty" payment that AVI is required to make pursuant to Section 6.05 of the PHS License for sales by Medtronic. Such increase is not subject to reduction under Section 3.3(b) (including as Section 3.3(b) may be modified pursuant to Section 4.2).

(d) After the date hereof, if the parties agree that AVI needs to obtain rights to a third party patent that it does not have rights to on the date hereof to commercialize the Drug within the

Field, then the parties shall agree on the allocation between the parties of the cost of obtaining such rights (including any royalties that may be payable).

3.4 *Reports and Payments.* Within sixty (60) days after the end of each calendar quarter, Medtronic shall provide AVI with a written report indicating the amount of Net Sales of Royalty Products during such preceding period and the amount of the royalties due for such period. Simultaneous with making such report, Medtronic shall pay to AVI the amount of royalties then due. Notwithstanding the foregoing, if AVI is obligated to make any royalty payments to third parties with respect to sales by Medtronic hereunder within 45 days or less of the end of each calendar quarter, then such written report and the payment of royalties by Medtronic shall be due within 45 days after the end of each calendar quarter. With respect to sales of Royalty Products outside the United States on which any earned royalties are payable hereunder, conversions to U.S. dollars, if applicable, shall be made in accordance with Medtronic's standard accounting policy for conversion of foreign currencies. Notwithstanding anything to the contrary contained in this Agreement, Medtronic shall be entitled to withhold, from earned royalties payable hereunder, all taxes thereon required, by competent governmental authorities, to be withheld.

3.5 *Records.* Medtronic agrees to keep accurate written records sufficient in detail to enable the royalties payable under this Agreement by Medtronic to be determined and verified for a period of three (3) years after the delivery of any royalty report (or such longer period of time as may be necessary for AVI to comply with its reporting requirements under Section 8.01 of the PHS License).

3.6 *Audit of Records.* Upon reasonable notice and during regular business hours, Medtronic shall from time to time, but no more frequently than once annually (or as often as may be necessary for AVI to comply with requirements set forth in Section 8.01 of the PHS License), make available the records referred to in Section 3.5 for audit at AVI's expense by independent representatives selected by AVI and reasonably acceptable to Medtronic to verify the accuracy of the reports provided to AVI. Such representatives shall execute a suitable confidentiality agreement reasonably acceptable to Medtronic prior to conducting such audit. Such representatives may disclose to AVI only their conclusions regarding the accuracy of royalty payments and of records related thereto, and shall not disclose Medtronic's information to AVI without the prior written consent of Medtronic. No claim may be asserted by AVI against Medtronic for any errors unless made within six (6) months following completion of such examination or audit made pursuant to this Section 3.6. The right to audit shall extend for three (3) years (or such longer period of time as may be necessary for AVI to comply with its reporting requirements under Section 8.01 of the PHS License) from delivery of any royalty report and thereafter any royalty report shall be deemed complete and accurate. Each royalty report shall be subject to only one such examination and audit. The party benefiting from any discrepancy will promptly pay the amount of such discrepancy to the other. If a discrepancy is found that is greater than 10% of royalties due in any calendar quarter and AVI is the party benefited, Medtronic shall reimburse AVI for all reasonable audit costs incurred for the related audit and Medtronic shall pay for the next succeeding annual audit.

ARTICLE 4
DEVELOPMENT PROJECT

4.1 *Development Efforts.*

(a) During the Term of this Agreement, Medtronic will control and fund any regulatory and clinical programs for the Drug in the Field as Medtronic deems appropriate (including the clinical trials set forth in Section 3.2) and obtain in its name any necessary device or medical regulatory approvals from the FDA, and any applicable regulatory agencies of such other countries as Medtronic deems appropriate, prerequisite to the commercial sale of products for their intended uses. AVI will, at its expense, supply Medtronic with all available documents, instruments,

information and reports reasonably necessary or convenient as requested by Medtronic in connection with such regulatory approval efforts and in connection with pre-clinical efforts. During the Term of this Agreement, AVI will, at its expense, assist and cooperate with the development of the Drug in the Field, including, without limitation, supplying the Drug to Medtronic and advising and participating in product scientific research and development proceedings and all governmental actions, including filings, proceedings and meetings, as requested by Medtronic. AVI will also assist and cooperate, at its expense, with Medtronic in Medtronic's development of coating technology and processes necessary or convenient for the use of the Drug in the Field. In connection with the foregoing and at Medtronic's reasonable request, AVI shall make available senior AVI personnel responsible for and knowledgeable about the Drug and the Technology. AVI grants to Medtronic the right of reference to AVI's regulatory files with the FDA or other appropriate government agencies as necessary or helpful for support of Medtronic's regulatory submissions with respect to the Drug in the Field. AVI hereby acknowledges and agrees that Medtronic shall be entitled to exercise its discretion, taking into account its goals, objectives and priorities, in determining the amount of resources that it will utilize hereunder. All regulatory approvals funded by Medtronic, and all related studies, documents, instruments, information and reports, will be in Medtronic's name and owned by Medtronic. Medtronic grants to AVI the right of reference to Medtronic's regulatory files relating to the Drug with the FDA or other appropriate governmental agencies as necessary for support of AVI's current or future regulatory submissions outside the Field; provided that AVI shall not be entitled to utilize such right in connection with any commercialization efforts

involving a medical device company. AVI shall provide prior written notice to Medtronic of any exercise of such right of reference specifying the time of such exercise, the type of filing, the regulatory files to be referenced and such other circumstances as may be appropriate for Medtronic to determine AVI's compliance with the exercise of such right. AVI's sole remedy for any breach of Medtronic's obligations under this Section 4.1 shall be as set forth in Section 4.2 or Section 9.2.

(b) AVI shall supply to Medtronic, at no cost to Medtronic, such quantities of the Drug as is reasonably required by Medtronic in connection with pre-clinical and clinical trials and in connection with obtaining regulatory approvals. AVI represents and warrants to Medtronic that all Drugs supplied to Medtronic hereunder will have been manufactured, labeled and packaged in accordance with all applicable laws and regulations, including (as applicable) FDA GMP requirements and all other applicable manufacturing requirements. Medtronic agrees to provide AVI rolling twelve-month forecasts of Medtronic's requirements for the Drug under this Section 4.1(b), specifying quantities and shipping dates and Medtronic shall update such forecasts at least every six months. Such rolling forecasts by Medtronic shall be used for purposes of facilitating Medtronic's pre-clinical and clinical plans and meeting the lead times required by AVI, but they are not legally binding on Medtronic.

4.2 *Nonexclusive Conversion.* In the event that the Third Closing Milestone has not occurred on or before the [*] anniversary of the date of this Agreement, Medtronic Asset Management, Inc. ("MAMI") may indicate in writing (a "Waiver Notice") within seven days thereafter that it is prepared to make the investment specified in Section 2.3 of the Investment Agreement in accordance with the terms of the Investment Agreement as if the Third Closing Milestone had occurred on the [*] anniversary of the date of this Agreement subject to the satisfaction of any conditions to Medtronic's requirement to make such investment (other than the occurrence of the Third Closing Milestone). If (i) AVI provides written notice of its rejection of such offer contained in the Waiver Notice within seven calendar days after AVI's receipt of such Waiver Notice or (ii) MAMI does not provide a Waiver Notice within seven days after the [*] anniversary date of this Agreement, and, in either of the cases set forth in clause (i) and clause (ii), AVI is not otherwise in material breach of any agreement with Medtronic or an Affiliate of Medtronic, then AVI shall have the right to convert the license granted to Medtronic under Section 2.1 from exclusive to nonexclusive. Notwithstanding the foregoing, if at any

time the regulatory process necessary or required to obtain FDA Approval consists of the Investigational New Drug/New Drug Application process followed by or preceded by the Investigational Device Exemption/Premarket Approval process, then AVI shall not have the foregoing right and MAMI shall not be required to give the Waiver Notice until the [*] anniversary of the date of this Agreement. In order to exercise suchright, AVI must provide Medtronic with written notice of such conversion within thirty (30) days of the [*] anniversary of the date of this Agreement or the [*] anniversary of the date of this Agreement, as the case may be. Upon the exercise of such option by AVI, the royalty rate in Section 3.3(a) hereof shall be reduced to [*] percent ([*]%) and provided that AVI has royalty rights with respect to sales of Royalty Products hereunder that in the aggregate exceed its royalty obligations with respect to sales of Royalty Products hereunder, the minimum royalty in Section 3.3(b) shall be reduced to [*] percent ([*]%).

4.3 *Delays.* If: (a) any of Medtronic's activities under Section 4.1 are delayed by an event of Force Majeure (as defined in Section 10.13) or (b) AVI is in material breach of any agreement with Medtronic or an Affiliate of Medtronic, then the applicable anniversary date of the Third Milestone under Section 4.2 and the applicable anniversary date of the Third Milestone under Section 9.2 shall be extended by a period of time equal to the period of time of the delay caused by the Force Majeure event under Section 4.3(a) above plus the period of time during which AVI is in such breach of such agreements under Section 4.3(b) above.

4.4 *Medtronic's Compound Option.*

(a) *Option.* During the Compound Option Period, AVI shall give written notice of its (or its Affiliates') intention to, directly or indirectly, commercialize any Compound that is or may be suitable for use in the Field. Medtronic shall have the right, exercisable at Medtronic's option, to acquire a license, on the terms set forth in Section 4.4(c) below, and to enter into a supply agreement with AVI in accordance with Section 4.4(d) below, with respect to such Compound. AVI shall provide such notice with respect to each such Compound that AVI or its Affiliates intends, directly or indirectly, to commercialize. Medtronic shall have the right during the period ending on the Exclusivity Termination Date with respect to such Compound, to exercise such right by giving written notice thereof to AVI. Within sixty (60) days after written notice of such exercise by Medtronic, AVI agrees to enter into the Additional License Agreement and Additional Supply Agreement with Medtronic with respect to such Compound. Such sixty (60) day period shall survive the termination of this Agreement. Upon execution and delivery of the Additional License Agreement and Additional Supply Agreement with respect to such Compound, Medtronic shall pay an up-front license fee of [*].

(b) *Exclusivity.* Until the Exclusivity Termination Date, AVI shall not directly or indirectly market or sell, or directly or indirectly encourage or solicit the submission of, or entertain inquiries, proposals or offers from any person or entity (other than Medtronic or its Affiliates), or otherwise provide information to or engage in discussions with any other person or entity, in any way relating to the sale, licensing, distribution or other disposition of any Compound for use or application in the Field or any Intellectual Property relating to the Compound for use or application in the Field.

(c) *Additional License Agreement Terms.* Unless otherwise mutually agreed in writing by Medtronic and AVI, each license agreement for a Compound (the "Additional License Agreement") shall provide for:

(i) A grant of an exclusive license for the Compound in the Field including an exclusive license to use, market, sell, make and have made, the Compound for the Field, on terms substantially similar to Article 2.

(ii) Control and funding by the Medtronic of all regulatory and clinical programs required for regulatory approval of the Compound for use or application in the Field, on terms substantially similar to Section 4.1.

(iii) In addition to the [*] fee referenced in Section 4.4(a), the payment of the licensing fees set forth in Section 3.1 and Section 3.2 on terms and conditions substantially similar to those set forth in such Sections and the payment of a royalty of [*]% of the net sales of the Compound and any Medtronic device providing for direct application of the Compound subject to reduction for royalties payable to third parties, but to not less than [*]%, on terms substantially similar to Section 3.3.

(iv) Such other terms and conditions as are customary for license agreements of this type and as reasonably requested by Medtronic or AVI.

(d) *Additional Supply Agreement.* Unless otherwise mutually agreed by Medtronic and AVI, each supply agreement for a Compound (the "Additional Supply Agreement") shall provide for:

(i) AVI to produce and supply Medtronic with all of its requirements for the Compound at an agreed cost of manufacture (with such cost to be determined in the same manner as set forth in the Supply Agreement), on terms substantially similar to Article 4 of the Supply Agreement.

(ii) Such other terms and conditions as are customary for supply agreements of this type and as reasonably requested by Medtronic or AVI.

(e) *Right of First Refusal.* If Medtronic does not exercise its rights under Section 4.4(a) with respect to a Compound during the Compound Option Period, then AVI shall be free to negotiate with third parties with respect to the sale, licensing, distribution or other disposition of the Compound within the Field or any Intellectual Property related to the Compound within the Field, subject to the following rights of Medtronic. If AVI reaches agreement in principle with, or receives a good faith, bona fide offer acceptable to AVI from any third party regarding such sale, licensing, distribution or other disposition, then AVI shall promptly give written notice to Medtronic, which notice shall (i) specify the pricing, terms, conditions and all material provisions with respect to the proposed transaction, (ii) identify the proposed party or parties to such transaction, and (iii) include a copy of any written agreement in principle, letter of intent or other communication setting forth the terms of the proposed transaction between AVI and the proposed third party or parties. Medtronic shall have the irrevocable right and option, exercisable in writing to AVI any time within 30 days after Medtronic's receipt of such notice, to elect to enter into such proposed transaction upon the same pricing (or the monetary equivalent of any nonmonetary consideration), terms, conditions and other material provisions as set forth in such notice. Such thirty (30) day period shall survive the termination of this Agreement. If Medtronic so elects to exercise its first refusal option, AVI shall use its reasonable best efforts to permit consummation of such proposed transaction with Medtronic within ninety (90) days following exercise. If Medtronic fails to exercise its first refusal option to enter into such proposed transaction, AVI and the proposed party identified in such notice may complete such transaction with the third party upon the pricing, terms, conditions and material provisions specified in such notice and contained in the proposed definitive agreement included with such notice; *provided that*, if (x) AVI and such third party fail to complete such transaction within ninety (90) days after the expiration of Medtronic's thirty (30) day option, or (y) if any of the pricing, terms, conditions or other material provisions specified in such notice and contained in the proposed definitive agreement are modified so as to be less favorable to AVI, or (z) if the identity of such third party changes, then, in any such event, AVI shall give a new notice to Medtronic, and Medtronic shall have a new first refusal option, with respect to such delayed or modified proposed transaction, in accordance with the foregoing procedure.

(f) *Exception to Right of First Refusal.* Notwithstanding Section 4.4(e) and for a period of six months commencing on the Exclusivity Termination Date for a particular Compound, AVI shall have the right to enter into a transaction with a third party involving the sale, licensing or other disposition of such Compound within the Field if the pricing, terms, conditions and all material provisions of such transaction are equal to or more favorable to AVI than those pricing, terms, conditions and material provisions specified in Section 4.4(a), Section 4.4(c) and Section 4.4(d). On the date that is six months and one day after the Exclusivity Termination Date for a particular Compound, Medtronic's right of first refusal set forth in Section 4.4(e) for such Compound shall be available and in full force and effect with respect to such Compound.

ARTICLE 5
AVI'S OBLIGATIONS

5.1 *Maintain Licenses in Force.* AVI shall comply with all of the provisions of, and shall maintain in full force and effect, all license agreements with third parties, including, specifically the PHS License, pursuant to which AVI is licensee of Intellectual Property included in the Technology. AVI shall promptly notify Medtronic if any such third party alleges any breach, default, or event that, with the passage of time or giving of notice could become a default, by AVI of any such license agreement. Medtronic shall be entitled, but not obligated, to cure any alleged breach or default by AVI of such license agreement and set-off the cost of such cure against amounts otherwise owed to AVI hereunder.

5.2 *Medtronic Exclusivity.* AVI will not, without the prior written consent of Medtronic, supply, sell, transfer or otherwise dispose of the Drug or any products or components utilizing the Drug or the Technology or any Joint Invention to any third party if AVI should have known after making reasonable inquiry or has actual knowledge (including the actual knowledge of any of AVI's executive officers) that such third party intends or is likely to use, sell, supply, transfer or otherwise dispose of the Drug or any such products, components, Technology or any Joint Inventions in the Field. Prior to any sale, supply, transfer or other disposition to any third party of the Drug or any products or components utilizing the Drug or any such products, components, Technology or any Joint Invention, AVI shall obtain the agreement of such third party that it will not use, sell, supply, transfer or otherwise dispose of the Drug or any such products, components, Technology or any Joint Inventions in the Field. AVI shall obtain the agreement of such third party that Medtronic will be an express third party beneficiary of such agreement. The restrictions set forth in this Section 5.2 shall not apply to transfers of the Drug to consultants or agents of AVI who are performing research or consulting services on behalf of AVI in connection with such transfer.

5.3 *No Amendments to PHS License.* AVI agrees not to modify, waive or amend any provision of the PHS License without the prior written consent of Medtronic.

5.4 *No Amendments With Adverse Effects to Medtronic.* AVI agrees not to modify, waive or amend any provision of any agreement in effect as of the date hereof that would adversely affect Medtronic's obligations under Section 3.3(c) without the prior written consent of Medtronic, including any modification, waiver or amendment to any agreement in effect as of the date hereof that could have the effect of increasing the amount payable to the licensor under Section 6.03 of the PHS License as a result of a reduction of (a) the earned royalty offset set forth in Section 6.03 of the PHS License relating to sales of Combined Products or (b) the earned royalty offset set forth in Appendix C to the PHS License relating to patents belonging to third parties that, in either case, is in effect as of the date hereof.

5.5 *Collaboration Agreement.*

(a) AVI shall not approve the Drug as [*] under the Collaboration Agreement and shall not otherwise subject the Drug to any of the terms thereof without obtaining the prior written agreement (in form and substance reasonably satisfactory to Medtronic) of [*] that the Drug is

subject to Medtronic's rights in the Field hereunder, including but not limited to Medtronic's rights under Section 2.1. AVI shall obtain the written agreement of [*] that Medtronic will be an express third party beneficiary of such agreement.

(b) AVI shall not approve any Compound as [*] under the Collaboration Agreement and shall not otherwise subject any Compound to any of the terms thereof without obtaining the prior written agreement (in form and substance reasonably satisfactory to Medtronic) of [*] that the Compound is subject to Medtronic's rights in the Field under Section 4.4. AVI shall obtain the written agreement of [*] that Medtronic will be an express third party beneficiary of such agreement.

ARTICLE 6
INTELLECTUAL PROPERTY

6.1 *Protect Know-How.* AVI and Medtronic agree to maintain the confidentiality of all Confidential Information (as such term is defined in the Investment Agreement), including but not limited to the status of any patent applications included in the Patents. Each party agrees not to disclose or use (except as permitted or required for performance by the party receiving such Confidential Information of its rights or duties hereunder) any Confidential Information of the other party obtained during the term of this Agreement. Each party further agrees to take appropriate measures to prevent any such prohibited disclosure by its present and future employees, officers, agents, subsidiaries, or consultants during the term of this Agreement and shall be liable for any breach of this Article 6 by and such person.

6.2 *Protection of Technology.* During the term of this Agreement, AVI shall promptly inform Medtronic of any Invention, improvement, amendment, upgrading or modification relating to the Drug or the Technology which may be applicable or useful in the Field. AVI agrees to protect the Technology by obtaining and maintaining appropriate patent rights as recommended by reputable patent counsel; provided, however, that Medtronic shall have the right to review and approve any filings or other correspondence with the appropriate patenting authority relating to the Technology or the Drug in the Field. Medtronic shall not unreasonably withhold such approval. If Medtronic determines, in its sole discretion, that any Technology conceived, reduced to practice or otherwise made, developed or acquired by one or more employees or agents of AVI is not being adequately protected by patents, Medtronic may so inform AVI. If Medtronic decides that AVI's response has been inadequate, Medtronic may take whatever action it deems necessary at its expense to protect such Technology. All patents and copyright registrations shall be applied for in the names of the actual inventors or authors and shall be assigned to AVI, subject to Medtronic's rights and license therein; each party shall execute and deliver such forms of assignment, power of attorney and other documents which are necessary to give effect to the provisions hereof.

6.3 *Ownership of Intellectual Property.* Subject to the rights and licenses granted to Medtronic by this Agreement, (a) any Intellectual Property conceived, reduced to practice or otherwise made, developed or acquired by one or more employees or agents of AVI shall be the property of AVI, (b) any Intellectual Property conceived, reduced to practice or otherwise made, developed or acquired by one or more employees or agents of Medtronic shall be the property of Medtronic, and (c) AVI and Medtronic shall each have an undivided one-half interest in any Intellectual Property jointly conceived, reduced to practice or otherwise made, developed or acquired by one or more employees or agents of AVI and one or more employees or agents of Medtronic ("Joint Inventions"). For purposes of this Section, Intellectual Property which is the subject of a patent application shall be deemed to have been developed jointly by employees or agents of Medtronic and AVI, and thus be a Joint Invention, if at least one employee or agent of each of Medtronic and AVI is required to be named as an inventor in such application in order for such patent to be valid.

6.4 *Prosecution of Patents on Joint Inventions.* If either AVI or Medtronic proposes to file an application for any U.S or foreign patents, copyright registration, or any continuation or modification thereof, with respect to any Joint Invention, then such party proposing such registration ("the first party") shall notify the other party ("the second party") in writing and the second party shall have option of joining in such action. If the second party elects to join in such action, the second party shall pay one-half of the total expenses incurred by Medtronic and AVI therein and be entitled to participate in all material steps in such action. If the second party elects not to join in such action, the first party shall be entitled to control such action, but such failure to participate shall not affect the second party's ownership interest in the Joint Inventions or in any Intellectual Property rights therein. Whether or not the second party elects to join in such action, the second party shall, upon the request of the first party, cooperate with and assist the first party in such action to the extent required by statute, regulation or government agency, including without limitation, executing and delivering all documents in connection therewith and using its reasonable efforts to obtain such executions from all appropriate employees and agents of the second party at the second party's cost. Each party will treat Joint Inventions as Confidential Information.

6.5 *Prosecution of Infringement of Technology.*

(a) Each of Medtronic and AVI shall promptly notify the other if it knows or has reason to believe that any of the rights to the Technology in the Field are being infringed or misappropriated by a third party or that such infringement or misappropriation is threatened. The parties shall consult with each other as promptly as reasonably practicable to review actions to be taken in connection with such alleged infringement or misappropriation. Medtronic shall have the right to institute and control the prosecution of any alleged infringement or misappropriation of the Technology in the Field.

(b) Medtronic shall be solely responsible for payment of all costs and expenses it incurs in the prosecution and/or a negotiation of a settlement. Medtronic shall have the right to act in the name of, or on behalf of AVI, and join AVI as a party plaintiff to any such proceeding if Medtronic believes it is necessary or advisable to successfully prosecute such infringement or misappropriation. AVI shall cooperate in connection with the initiation and prosecution by Medtronic of such suit or action. The proceeds from any judgment, decision or settlement shall first be used to reimburse Medtronic for all costs and expenses it incurred relating to prosecution and settlement of any action; second, be allocated on a 50/50 basis between Medtronic and AVI until AVI obtains the amount of royalties it would have obtained hereunder if and to the extent the infringement or misappropriation relates to lost sales of Royalty Products hereunder; and finally, the remainder of any proceeds shall accrue to Medtronic's sole benefit.

(c) If Medtronic fails to initiate the prosecution of any alleged infringement or misappropriation of the Technology in the Field within six (6) months of receiving written notice from AVI of any commercially significant infringement or misappropriation, AVI shall have the right to institute and control the prosecution of any such alleged infringement or misappropriation. AVI shall be solely responsible for the payment of all costs and expenses it incurs in the prosecution and/or a negotiation of a settlement. AVI shall have the right to act in the name of, or on behalf of Medtronic, and join Medtronic as a party plaintiff to any such proceeding if AVI believes it is necessary or advisable to successfully prosecute such infringement or misappropriation. Medtronic shall cooperate in connection with the initiation and prosecution by AVI of such suit or action. The proceeds from any judgment, decision or settlement shall first be used to reimburse AVI for all costs and expenses it incurred relating to prosecution and settlement of any action; second, be allocated on a 50/50 basis between Medtronic and AVI until AVI obtains the amount of royalties it would have obtained hereunder if and to the extent the infringement or misappropriation relates to lost sales of Royalty Products hereunder; and finally, the remainder of any proceeds shall accrue to Medtronic's sole benefit.

ARTICLE 7
REPRESENTATIONS AND WARRANTIES

7.1 *Representations of AVI.* AVI represents, warrants and covenants to Medtronic that:

(a) AVI is a corporation duly organized, validly existing, and in good standing under the laws of the State of Oregon and has full corporate power to conduct the business in which it is presently engaged and to enter into and perform its obligations under this Agreement.

(b) AVI has taken all necessary corporate action under the laws of the state of its incorporation and its certificate of incorporation and by-laws to authorize the execution and consummation of this Agreement and, when executed and delivered by AVI, this Agreement shall constitute the valid and legally binding agreement of AVI enforceable against AVI in accordance with the terms hereof, subject to bankruptcy, insolvency, fraudulent transfer, reorganization, moratorium and similar laws of general applicability relating to or affecting creditors' rights and to general equity principles.

(c) Neither the execution and delivery of this Agreement nor the consummation of the transactions contemplated herein will violate any provision of the certificate of incorporation or bylaws of AVI or any law, rule, regulation, writ, judgment, injunction, decree, determination, award or other order of any court or governmental agency or instrumentality, domestic or foreign, or conflict with or result in any breach of any of the terms of or constitute a default under or result in termination of or the creation or imposition of any Lien pursuant to the terms of any contract or agreement to which AVI is a party or by which AVI or any of its assets is bound.

(d) AVI exclusively owns, or has valid and subsisting exclusive license rights (with the right to sublicense) to, all of the Technology within the Field, subject to no Lien whatsoever. Other than payment obligations under the Article 6 of the PHS License and under Section 4 of the Technology Transfer Agreement dated February 9, 1992 by and between AVI and Anti-Gene Development Group, an Oregon limited partnership, as amended to the date hereof, AVI is not subject to any obligation to any person or entity for royalties, fees or commissions in respect of the Technology within the Field. No current or former stockholder, employee, officer, agent or consultant of AVI has any rights in or to any of the Technology within the Field. The Technology is valid and enforceable and has not been challenged in any judicial or administrative proceeding and AVI has not received and is not aware of any claim or notice of any person that such person is contemplating such action. AVI's execution and performance of this Agreement, the transactions contemplated herein and Medtronic's use of the Technology within the Field will not infringe, misappropriate, misuse or conflict with the rights, including patent and other Intellectual Property or contractual rights, of third parties. AVI has the right and authority to enter into this Agreement and to grant the license granted herein. To AVI's knowledge, no person or entity nor such person's or entity's business or products has infringed, misused, misappropriated or conflicted with the Technology within the Field or currently is infringing, misusing, misappropriating or conflicting with such Technology within the Field.

(e) There are no actions, suits, claims, disputes or proceedings or governmental investigations pending or, to AVI's knowledge, threatened against AVI or any of its Affiliates with respect to the Technology or the use thereof by AVI, either at law or in equity, before any court or administrative agency or before any governmental department, commission, board, bureau, agency or instrumentality, or before any arbitration board or panel whether located in the United States or a foreign country. AVI has not failed to comply with any law, rule, regulation, writ, judgment, injunction, decree, determination, award or other order of any court or other governmental department, commission, board, bureau, agency or instrumentality, or before any arbitration board or panel whether located in the United States or a foreign country, which failure in any case would in any material respect impair any rights of Medtronic under this Agreement.

(f) All Patents identified in Exhibit A have the status indicated therein and all applications are still pending in good standing and have not been withdrawn or abandoned. The Patents identified in Exhibit A constitute all of the current patents and patent applications of AVI having applicability to the Technology or the Drug within the Field. AVI has made all statutorily required filings, if any, to record its interest in the Patents.

(g) No representation or warranty made by AVI herein and no information disclosed by AVI to Medtronic contains any untrue statement of a material fact or omits to state a material fact necessary to make the statement made herein or therein not misleading.

(h) The PHS License is in full force and effect and there are no existing defaults, or events, which, with the passage of time or giving of notice, would become defaults thereunder. AVI is the sole and exclusive owner of the licensee's interest in the PHS License, free and clear of any Liens. The execution and delivery by AVI of this Agreement and its performance hereunder will not constitute a default (or an event which, with the passage of time or giving of notice, would constitute a default) under the PHS License. AVI has not received notice, nor is AVI otherwise aware, that the licensor under the PHS License intends to cancel or terminate the PHS License or provide notice of a default (or an event which, with the passage of time or giving of notice, would constitute a default) thereunder. None of the terms of the PHS License has been impaired, waived, altered, amended or modified in any respect (including pursuant to Section 13.05 of the PHS License) prior to the date hereof. AVI has previously delivered to Medtronic a true and correct copy of the PHS License.

(i) AVI has made no public disclosure of any non-patented Technology in the Field and shall make no public disclosure of any such Technology in the Field or any such Technology in the Field which may come into existence during the term of this Agreement, except to the extent required by law or to obtain patent protection therefore. AVI has otherwise taken reasonable steps to protect its rights in the Technology.

(j) As of the date hereof, the genes referred to in the definition of "Drug" set forth in Section 1.1 constitute all of the genes that AVI has researched, developed, tested or otherwise investigated with any antisense compound in connection with or related to restenosis and, as of the date hereof, AVI has not identified or selected, and AVI is not otherwise aware of, any other genes (including [*]) with respect to which it has plans to research, develop, test or otherwise investigate with any antisense compound in connection with or related to restenosis.

7.2 *Representations of Medtronic.* Medtronic represents, warrants and covenants to AVI that:

(a) Medtronic is a corporation duly organized, validly existing, and in good standing under the laws of the State of Minnesota and has full corporate power to conduct the business in which it is presently engaged and to enter into and perform its obligations under this Agreement.

(b) Medtronic has taken all necessary corporate action under the laws of the state of its incorporation and its articles of incorporation and bylaws to authorize the execution and consummation of this Agreement and, when executed and delivered by Medtronic, this Agreement shall constitute the valid and legally binding agreement of Medtronic enforceable against Medtronic in accordance with the terms hereof, subject to bankruptcy, insolvency, fraudulent transfer, reorganization, moratorium and similar laws of general applicability relating to or affecting creditors' rights and to general equity principles.

(c) Neither the execution and delivery of this Agreement nor the consummation of the transactions contemplated herein will violate any provision of the articles and bylaws of Medtronic or any law, rule, regulation, writ, judgment, injunction, decree, determination, award or other order of any court or governmental agency or instrumentality, domestic or foreign, or conflict with or result in any breach of any of the terms of or constitute a default under or result in termination of

or the creation or imposition of any Lien pursuant to the terms of any contract or agreement to which Medtronic is a party or by which Medtronic or any of its assets is bound.

ARTICLE 8
INDEMNIFICATION

8.1 *Indemnification by AVI.* AVI shall indemnify, defend and hold harmless Medtronic and each of its subsidiaries, officers, directors, shareholder, employees, agents and affiliates (collectively, all such indemnities are referred to in this Section as "Medtronic") against and in respect of any and all claims, demands, losses, obligations, liabilities, damages (and including without limitation, compensatory and punitive damages), deficiencies, actions, settlements, judgments, costs and expenses which Medtronic may incur or suffer or with which it may be faced (including reasonable costs and legal fees incident thereto or in seeking indemnification therefor), (referred to as "Costs") arising out of or based upon the breach by AVI of any of its representations, warranties, covenants or agreements contained or incorporated in this Agreement or any agreement, certificate or document executed and delivered to Medtronic by AVI in connection with the transactions hereunder. An amount for which Medtronic is entitled to indemnification pursuant hereto is referred to as an "Indemnified Amount." During the term of this Agreement, AVI shall maintain, at its expense, a policy of comprehensive general liability insurance sufficient to honor the indemnity made herein, with products liability endorsement, but in no event less than $10,000,000.00 per occurrence and in the annual aggregate. Such policy shall name Medtronic and its Affiliates as additional insureds. AVI shall furnish Medtronic with a certificate of insurance evidencing such coverage within thirty (30) days of the execution of this Agreement, which certificate shall provide for not less than thirty (30) days notice to Medtronic prior to material change in coverage or policy cancellation.

8.2 *Indemnification by Medtronic.* Medtronic shall indemnify, defend and hold harmless AVI and each of its subsidiaries, officers, directors, shareholder, employees, agents and affiliates (collectively, all such indemnities are referred to in this Section as "AVI") against and in respect of any and all claims, demands, losses, obligations, liabilities, damages (and including without limitation, compensatory and punitive damages), deficiencies, actions, settlements, judgments, costs and expenses which AVI may incur or suffer or with which it may be faced (including reasonable costs and legal fees incident thereto or in seeking indemnification therefor), (referred to as "Costs") arising out of or based upon the breach by Medtronic of any of its representations, warranties, covenants or agreements contained or incorporated in this Agreement or any agreement, certificate or document executed and delivered to AVI by Medtronic in connection with the transactions hereunder. An amount for which AVI is entitled to indemnification pursuant hereto is referred to as an "Indemnified Amount." During the term of this Agreement, Medtronic shall maintain, at its expense, a policy of comprehensive general liability insurance sufficient to honor the indemnity made herein, with products liability endorsement, but in no event less than $10,000,000.00 per occurrence and in the annual aggregate. Such policy shall name AVI and its Affiliates as additional insureds. Medtronic shall furnish AVI with a certificate of insurance (or a self-insurance letter (if Medtronic is self-insured)) evidencing such coverage within thirty (30) days of the execution of this Agreement, which certificate shall provide for not less than thirty (30) days notice to Medtronic prior to material change in coverage or policy cancellation.

8.3 *Third Party Claims.* If a claim by a third party is made against any indemnified party, and if the indemnified party intends to seek indemnity with respect thereto under this Article 8, such indemnified party shall promptly notify the indemnifying party of such claim; provided, however, that failure to give timely notice shall not affect the rights of the indemnified party so long as the failure to give timely notice does not adversely affect the indemnifying party's ability to defend such claim against a third party. The indemnifying party shall be entitled to settle or assume the defense of such claim, including the employment of counsel reasonably satisfactory to the indemnified party. If the indemnifying party elects to settle or defend such claim, the indemnifying party shall notify the

indemnified party within thirty (30) days (but in no event less than twenty (20) days before any pleading, filing or response on behalf of the indemnified party is due) of the indemnifying party's intent to do so. If the indemnifying party elects not to settle or defend such claim or fails to notify the indemnified party of the election within thirty (30) days (or such shorter period provided above) after receipt of the indemnified party's notice of a claim of indemnity hereunder, the indemnified party shall have the right to contest, settle or compromise the claim without prejudice to any rights to indemnification hereunder. Regardless of which party is controlling the settlement of defense of any claim, (a) both the indemnified party and indemnifying party shall act in good faith, (b) the indemnifying party shall not thereby permit to exist any Lien, encumbrance or other adverse charge upon any asset of any indemnified party or of its subsidiaries, (c) the indemnifying party shall permit the indemnified party to participate in such settlement or defense through counsel chosen by the indemnified party, with all fees, costs and expenses of such counsel borne by the indemnified party, (d) no entry of judgment or settlement of a claim may be agreed to without the written consent of the indemnified party, and (e) the indemnifying party shall promptly reimburse the indemnified party for the full amount of such claim and the related expenses as incurred by the indemnified party pursuant to this Article 8. So long as the indemnifying party is reasonably contesting any such third party claim in good faith and the foregoing clause (b) is being complied with, the indemnified party shall not pay or settle any such claim. The controlling party shall upon request deliver, or cause to be delivered, to the other party copies of all correspondence, pleadings, motions, briefs, appeals or other written statements relating to or submitted in connection with the settlement or defense of any such claim, and timely notices of any hearing or other court proceeding relating to such claim.

8.4 *Set-Off.* In the event Medtronic is entitled to indemnification under this Article 8, Medtronic shall be entitled in its discretion, without limitation of any other rights or remedies of Medtronic, to set-off all or any part of the Indemnified Amount against any amounts which are then owed or thereafter become owed by Medtronic to AVI. Medtronic shall be entitled to set-off an Indemnified Amount when such Costs are threatened, whether or not yet incurred and whether or not the amount thereof has been finally determined. If Medtronic defers payment of any amount to AVI past the scheduled payment date because there exists a pending indemnification claim by Medtronic pursuant to this Article the amount of which has not then been finally determined, the excess, if any, of such deferred amount over the finally determined amount of the indemnification claim shall be promptly paid upon such final determination, together with simple interest at the rate of eight percent (8%) per annum on such excess accrued from the originally scheduled payment date for such deferred amount.

ARTICLE 9
TERM AND TERMINATION

9.1 *Term of License.* Unless otherwise terminated under provisions of Section 9.2, this Agreement and the license granted under Section 2.1 shall continue until such time as all Patents have Expired, at which time the license rights of Medtronic set forth in Section 2.1 shall be deemed to be converted, into a fully paid, exclusive, worldwide, irrevocable, sublicensable, royalty-free license of the Technology to make, have made, use, import, export, distribute, sell, offer to sell and have sold the Drug in the Field and products incorporating or utilizing the Drug and/or the Technology in the Field, practice methods covered thereby, and otherwise to commercialize and exploit, the Drug and/or the Technology in the Field ("Term").

9.2 *Termination.* (a) If either party is in material breach of the terms, conditions or agreements of this Agreement, then the other party may terminate this Agreement, at its option and without prejudice to any of its other legal and equitable rights and remedies, by giving the breaching party thirty (30) days notice in writing, particularly specifying the breach. Such notice of termination shall not be effective if the breaching party cures the specified breach within such thirty (30) day period. Each

party shall have the right to suspend payment of any amount due to the other hereunder during the time that the breach of the other party remains uncured.

(b) In the event that the Third Closing Milestone has not occurred on or before the [*] anniversary of the date of this Agreement, Medtronic Asset Management, Inc. ("MAMI") may indicate in writing (a "Waiver Notice") within seven days thereafter that it is prepared to make the investment specified in Section 2.3 of the Investment Agreement in accordance with the terms of the Investment Agreement as if the Third Closing Milestone had occurred on the [*] anniversary of the date of this Agreement subject to the satisfaction of any conditions to Medtronic's requirement to make such investment (other than the occurrence of the Third Closing Milestone). If (i) AVI provides written notice of its rejection of such offer contained in the Waiver Notice within seven calendar days after AVI's receipt of such Waiver Notice or (ii) MAMI does not provide a Waiver Notice within seven days after the third [*] anniversary date of this Agreement, and, in either of the cases set forth in clause (i) and clause (ii), AVI is not otherwise in material breach of any agreement with Medtronic or an Affiliate of Medtronic, then AVI shall have the right to terminate this Agreement. Notwithstanding the foregoing, if at any time the regulatory process necessary or required to obtain FDA Approval as determined by Medtronic consists of the Investigational New Drug/New Drug Application process followed by or preceded by the Investigational Device Exemption/Premarket Approval process and Medtronic has not abandoned the process of seeking regulatory approval on and as of the [*] anniversary of the date of this Agreement, then AVI shall not have the foregoing right and MAMI shall not be required to give the Waiver Notice until the [*] anniversary of the date of this Agreement. In order to exercise such termination right, AVI must provide Medtronic with written notice of such termination within thirty (30) days after the [*] anniversary of the date of this Agreement or the [*] anniversary of the date of this Agreement, as the case may be.

(c) If on the [*] anniversary of the date of this Agreement, cumulative Net Sales of Royalty Products by Medtronic are less than [*], AVI shall have the right to terminate this Agreement by providing written notice to Medtronic of such termination within thirty (30) days after such date.

9.3 *Effect of Termination.*

(a) In the event of termination of this Agreement, Medtronic shall be entitled to complete all work-in-process and sell its remaining inventory of Royalty Products, subject to the payment of royalties pursuant to Section 3.3 on such Net Sales.

(b) Upon termination of this Agreement, each party will within thirty (30) days return to the other all tangible Confidential Information of the other party (except one copy which may be retained by legal counsel solely for evidentiary purposes in the event of a dispute), and each party will deliver to the other a copy of any documentation in its possession or control specifically relating to the Joint Inventions.

(c) In the event of termination of the PHS License pursuant to Article 13 thereof, the license granted hereunder, to the extent it constitutes a sub-license under the PHS License, shall, at the option of Medtronic, convert to a license directly between Medtronic and PHS pursuant to, and subject to the satisfaction of the conditions to such conversion set forth in, Section 4.03 of the PHS License. AVI shall assist Medtronic (as Medtronic may reasonably request) in exercising its rights under this Section 9.3(c) and satisfying the conditions to such conversion. Any such conversion shall not have any effect on the license granted hereunder to the extent it does not constitute a sub-license under the PHS License.

ARTICLE 10
MISCELLANEOUS

10.1 *Further Assurances.* Each party agrees to execute and deliver without further consideration any further applications, licenses, assignments or other documents, and to perform such other lawful acts as the other party may reasonably request to fully secure and/or evidence the rights or interests herein.

10.2 *Complete Agreement.* This Agreement (including all schedules and exhibits hereto and thereto) constitutes the entire agreement among the parties hereto with respect to the subject matter hereof and thereof. There are no restrictions, promises, warranties or undertakings, other than those set forth or referred

to herein or therein, with respect to the subject matter hereof and thereof. This Agreement supersedes all prior agreements and understandings among the parties hereto with respect to the subject matter hereof.

10.3 *Survival of Representations, Warranties and Agreements.* The representations, warranties, covenants and agreements contained in Articles 6 and 8 of this Agreement shall survive termination of this Agreement and remain in full force and effect. No independent investigation of AVI by Medtronic, its counsel, or any of its agents or employees shall in any way limit or restrict the scope of the representations and warranties made by AVI in this Agreement.

10.4 *Waiver, Discharge, Amendment, Etc.* The failure of any party hereto to enforce at any time any of the provisions of this Agreement shall not, absent an express written waiver signed by the party making such waiver specifying the provision being waived, be construed to be a waiver of any such provision, nor in any way to affect the validity of this Agreement or any part thereof or the right of the party thereafter to enforce each and every such provision. No waiver of any breach of this Agreement shall be held to be a waiver of any other or subsequent breach. Any amendment to this Agreement shall be in writing and signed by AVI and Medtronic.

10.5 *Notices.* All notices or other communications to a party required or permitted hereunder shall be in writing and shall be delivered personally or by telecopy (receipt confirmed) to an executive officer of such party or shall be sent by a reputable express delivery service or by certified mail, postage prepaid with return receipt requested, addressed as follows:

if to Medtronic:

Medtronic, Inc.
710 Medtronic Parkway NE
Minneapolis, MN 55432-5604

with separate copies thereof addressed to

Attention: General Counsel
Mail Stop LC400
Telecopier No.: (763) 572-5459

and

Attention: Vice President and Chief Development Officer
Mail Stop LC390
Telecopier No.: (763) 505-2542

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if to AVI:

AVI BioPharma, Inc.
One SW Columbia
Portland, OR 97258
Attn: President, Alan P. Timmins

With a copy to:

HURLEY, LYNCH & RE, P.C.
747 SW Industrial Way
Bend, Oregon 97702
Attn: Robert A. Stout, Esq.

Any party may change the above-specified recipient and/or mailing address by notice to the other party given in the manner herein prescribed. All notices shall be deemed given on the day when actually delivered as provided above (if delivered personally or by telecopy) or on the day shown on the return receipt (if delivered by mail or delivery service).

10.6 *Public Announcement.* In the event any party proposes to issue any press release or public announcement concerning any provisions of this Agreement or the transactions contemplated hereby, such party shall so advise the other party hereto, and the parties shall thereafter use their best efforts to cause a mutually agreeable release or announcement to be issued. Neither party will publicly or privately disclose or divulge any provisions of this Agreement or the transactions contemplated hereby without the other parties' written consent, except as may be required by applicable law, rule, regulation, order or stock exchange regulation, and except for communications to employees; provided that, prior to disclosure of any provision of this Agreement that either party considers particularly sensitive or confidential to any governmental agency or stock exchange, the parties shall cooperate to seek confidential treatment or other applicable limitations on the public availability of such information. In particular, prior to such disclosure, each party shall use its best efforts to redact the royalty rates and payment terms specified herein and each party shall provide the other the opportunity to redact other information and seek confidential treatment of any such disclosure.

10.7 *Expenses.* AVI and Medtronic shall each pay their own expenses incident to this Agreement and the preparation for, and consummation of, the transactions provided for herein.

10.8 *Governing Law.* The formation, legality, validity, enforceability and interpretation of this Agreement shall be governed by the laws of the State of Minnesota, without giving effect to the principles of conflict of laws; provided, however, that nothing in Minnesota procedural law shall be deemed to alter or affect the applicability of the rules of the Federal Arbitration Act as governing arbitration of disputes as provided in Section 10.12 and, provided further, that no Minnesota laws or rules of arbitration shall be applicable. Subject to Section 10.12 hereof, the parties hereto hereby submit to the exclusive jurisdiction of the

United States federal and state courts located in the county in which arbitration is conducted with respect to any dispute arising under this Agreement, the agreements entered into in connection herewith or the transactions contemplated hereby or thereby, and irrevocably consent to the exclusive jurisdiction and venue of such courts and waive any objections they may have at any time to such exclusive jurisdiction and venue.

10.9 *Titles and Headings; Construction.* The titles and headings to the Articles and Sections herein are inserted for the convenience of reference only and are not intended to be a part of or to affect the meaning or interpretation of this Agreement. This Agreement shall be construed without regard to any presumption or other rule requiring construction hereof against the party causing this Agreement to be drafted.

10.10 *Benefit.* Nothing in this Agreement, expressed or implied, is intended to confer on any person other than the parties hereto or their respective successors or assigns, any rights, remedies, obligations or liabilities under or by reason of this Agreement.

10.11 *Counterparts.* This Agreement may be executed in any number of counterparts, each of which shall be deemed as original and all of which together shall constitute one instrument.

10.12 *Arbitration.* Any dispute arising out of or relating to this Agreement or the Registration Rights Agreement, including the formation, interpretation or alleged breach hereof, shall be settled in accordance with the Exhibit **C** attached hereto. The results of such arbitration proceedings shall be binding upon the parties hereto, and judgment may entered upon the arbitration award in any court having jurisdiction thereof. Notwithstanding the foregoing, either party may seek interim injunctive relief from any court of competent jurisdiction.

10.13 *Force Majeure*. Neither party shall be in default because of any failure to perform this Agreement if such failure arises from causes beyond the control of such party ("the first party") and without the fault or negligence of such first party, including without limitation, acts of God or of the public enemy, acts of the Government in either its sovereign or contractual capacity, fires, floods, earthquakes, epidemics, quarantine restrictions, strikes, freight embargoes or unusually severe weather. In each instance, the failure to perform must be beyond the reasonable control and without the fault or negligence of the first party. If it appears that performance under this Agreement may be delayed by an event of Force Majeure, the first party will immediately notify the other party as soon as practicable in writing at the address specified in this Agreement. During the period that the performance by one of the parties of its obligations under this Agreement has been suspended by reason of an event of Force Majeure, the other party may likewise suspend the performance of all or part of its obligations hereunder to the extent that such suspension is commercially reasonable.

10.14 *Assignment.* This Agreement shall be binding upon and inure to the benefit of the parties hereto and the successors or assigns of the parties hereto; provided, that (i) the rights and obligations of AVI herein may not be assigned except to any person who succeeds to substantially all of AVI's business, and (ii) the rights and obligations of Medtronic herein may not be assigned except to an Affiliate or any person who succeeds to all or a substantial portion of Medtronic's business to which this Agreement relates. Any attempted assignment of this Agreement in violation of this Section 10.14 shall be null and void.

10.15 *PHS License.* Medtronic agrees to be bound by the provisions of the Paragraphs 5.01-5.04, 8.01, 10.01, 10.02, 12.05 and 13.07-13.09 (copies of which are attached hereto as Exhibit D) of the PHS License as if Medtronic were a party to the PHS License.

IN WITNESS WHEREOF, each of the parties has caused this License and Development Agreement to be executed in the manner appropriate for each, and to be dated as of the date first above-written.

AVI BIOPHARMA, INC.

By: /s/ DENIS BURGER

Denis Burger

Its: CEO

MEDTRONIC, INC.

By: /s/ MICHAEL D. ELLWEIN

Michael D. Ellwein

Its: VP

EXHIBIT A

Insert identification of patents and patent applications

U.S. Patent Number [*]
U.S. Patent Number [*]
U.S. Patent Number [*]
U.S. Patent Number [*]
U.S. Patent Number [*]
U.S. Patent Number [*]
U.S. Patent Number [*]
U.S. Patent Number [*]
International Publication Number [*]

EXHIBIT B

List of Genes referenced in definition of "Drug"

[*]
[*]
[*]
[*]
[*]
[*]
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[*]
[*]

In addition, any other genes that breach AVI's representation and warranty set forth in Section 7.1(j) shall be deemed to be listed on this Exhibit B

Exhibit C
Arbitration Procedures

1) *Negotiations.* If any dispute arises between AVI and Medtronic with respect to the Supply Agreement or the License and Development Agreement (the "Agreements"), or any alleged breach thereof, any party may, by written notice to the other party, have such dispute referred to their respective designees listed below or their successors for attempted resolution by good faith negotiations within 30 days after such notice is received. Such designees are as follows:

For AVI—the President of AVI or his/her designee

For Medtronic—the President of Medtronic, Inc.'s business unit to which the Agreements relate, or his/her designee

Any settlement reached by the parties under this Section 1 shall not be binding until reduced to writing and signed by the above-specified designees of Medtronic and AVI. When reduced to writing, such settlement agreement shall supersede all other agreements, written or oral, to the extent such agreements specifically pertain to the matters so settled. If the designees are unable to resolve such dispute within such 30-day period, any party may invoke the provisions of Section 2 below.

2) *Arbitration.* All claims, disputes, controversies, and other matters in question arising out of or relating to the Agreements, including claims for Indemnifiable Losses and disputes regarding the making of the Agreements, including claims of fraud in the inducement, or to the alleged breach hereof, shall be settled by negotiation between the parties as described in Section 1 above or, if negotiation is unsuccessful, by binding arbitration in accordance with procedures set forth in Section 3 and 4 below.

3) *Notice.* Notice of demand for binding arbitration shall be given in writing to the other party and shall be delivered personally or by facsimile (receipt confirmed) to an executive officer of such party or shall be sent by a reputable express delivery service or by certified mail, postage prepaid with return receipt requested, addressed as follows:

Medtronic Asset Management, Inc.
710 Medtronic Parkway NE
Minneapolis, MN 55432-5604

with separate copies thereof addressed to

Attention: General Counsel
Mail Stop LC400
Telecopier No.: (763) 572-5459

and

Attention: Vice President and Chief Development Officer
Mail Stop LC390
Telecopier No.: (763) 505-2542

if to AVI to:

AVI BioPharma, Inc.
One SW Columbia
Portland, OR 97258
Attn: President, Alan P. Timmins

With a copy to:

Hurley, Lynch & Re, PC
747 SW Industrial Way
Bend, OR 97702
Attn: Robert A. Stout, Esq.

Any party may change the above-specified recipient and/or mailing address by notice to the other party given in the manner herein prescribed. All notices shall be deemed given on the day when actually delivered as provided above (if delivered personally or by facsimile (upon appropriate electronic confirmation of successful transmission)) or on the day shown on the return receipt (if delivered by mail or delivery service). In no event may a notice of demand of any kind be filed more than two years after the date the claim, dispute, controversy, or other matter in question was asserted by one party against another, and if such demand is not timely filed, the claim, dispute, controversy, or other matter in question referenced in the demand shall be deemed released, waived, barred, and unenforceable for all time, and barred as if by statute of limitations.

4) *Binding Arbitration.* Upon filing of a notice of demand for binding arbitration by any party hereto, arbitration shall be commenced and conducted as follows:

(a) *Arbitrators.* All claims, disputes, controversies, and other matters (collectively "matters") in question shall be referred to and decided and settled by a standing panel of three independent arbitrators, one selected by each of AVI and Medtronic's representative and the third by the two arbitrators so selected; provided, if the amount in controversy (including reasonably anticipated future amounts or payments under the Agreement affected by such arbitrated matter) is under $300,000, a single arbitrator will be used. The third (or the single arbitrator, if applicable) shall be a former judge of one of the U.S. District Courts or one of the U.S. Court of Appeals or such other classes of persons as the parties may agree. Selection of arbitrators shall be made within 30 days after the date of the first notice of demand given pursuant to Section 3 and within 30 days after any resignation, disability or other removal of such arbitrator. Following appointment, each arbitrator shall remain a member of the standing panel, subject to removal for just cause or resignation or disability; provided, however, an arbitrator can be removed by the party who appointed the arbitrator, or in the case of the third arbitrator, by either party for any reason at any time when no matter is in arbitration.

(b) *Cost of Arbitration.* The cost of each arbitration proceeding, including without limitation the arbitrators' compensation and expenses, hearing room charges, court reporter transcript charges etc., shall be borne by the party whom the arbitrators determine has not prevailed in such proceeding, or borne equally by the parties if the arbitrators determine that neither party has prevailed. The arbitrators shall also award the party that prevails substantially in its pre-hearing position its reasonable attorneys' fees and costs incurred in connection with the arbitration. The arbitrators are specifically instructed to award attorneys' fees for instances of abuse of the discovery process.

(c) *Location of Proceedings.* An arbitration proceeding initiated by AVI shall be held in Hennepin County, Minnesota and an arbitration proceeding initiated by Medtronic shall be held in Multnomah County, Oregon, unless the parties agree otherwise.

(d) *Pre-hearing Discovery.* The parties shall have the right to conduct and enforce pre-hearing discovery in accordance with the then current Federal Rules of Civil Procedure, subject to these limitations: Document discovery and other discovery shall be under the control of and enforceable by the arbitrators. The arbitrators shall permit and facilitate such other discovery as they shall determine is appropriate under the circumstances, taking into account the needs of the

parties and the desirability of making discovery expeditious and cost effective. The arbitrators shall decide discovery disputes. The arbitrators are empowered:

(i) to issue subpoenas to compel pre-hearing document or deposition discovery;

(ii) to enforce the discovery rights and obligations of the parties; and

(iii) to otherwise control the scheduling and conduct of the proceedings.

Notwithstanding any contrary foregoing provisions, the arbitrators shall have the power and authority to, and to the fullest extent practicable shall, abbreviate arbitration discovery in a manner that is fair to all parties in order to expedite the arbitration proceeding and render a final decision within six months after the pre-hearing conference.

(e) *Pre-hearing Conference.* Within 45 days after filing of notice of demand for binding arbitration, the arbitrators shall hold a pre-hearing conference to establish schedules for completion of discovery, for exchange of exhibit and witness lists, for arbitration briefs, for the hearing, and to decide procedural matters and all other questions that may be presented.

(f) *Hearing Procedures.* The hearing shall be conducted to preserve its privacy and to allow reasonable procedural due process. Rules of evidence need not be strictly followed, and the hearing shall be streamlined as follows:

(i) Documents shall be self-authenticating, subject to valid objection by the opposing party;

(ii) Expert reports, witness biographies, depositions, and affidavits may be utilized, subject to the opponent's right of a live cross-examination of the witness in person;

(iii) Charts, graphs, and summaries shall be utilized to present voluminous data, provided (i) that the underlying data was made available to the opposing party 30 days prior to the hearing, and (ii) that the preparer of each chart, graph, or summary is available for explanation and live cross-examination in person;

(iv) The hearing should be held on consecutive business days without interruption to the maximum extent practicable; and

(v) The arbitrators shall establish all other procedural rules for the conduct of the arbitration in accordance with the rules of arbitration of the Center for Public Resources.

(g) *Governing Law.* This arbitration provision shall be governed by, and all rights and obligations specifically enforceable under and pursuant to, the rules of the Federal Arbitration Act and the laws of the State of Minnesota shall be applied, without reference to the choice of law principles thereof, in resolving matters submitted to such arbitration.

(h) *Consolidation.* No arbitration shall include, by consolidation, joinder, or in any other manner, any additional person not a party to this Agreement (other than affiliates of any such party, which affiliates may be included in the arbitration), except by written consent of the parties hereto containing a specific reference to this Agreement.

(i) *Award.* The arbitrators shall be required to render their final decision within six months after the pre-hearing conference. The arbitrators are empowered to render an award of general compensatory damages and equitable relief (including, without limitation, injunctive relief), but are not empowered to award punitive or presumptive damages. The award rendered by the arbitrators (1) shall be final; (2) shall not constitute a basis for collateral estoppel as to any issue; and (3) shall not be subject to vacation or modification, except in the event of fraud or gross misconduct on the part of the arbitrators.

(j) *Confidentiality.* The parties hereto will maintain the substance of any proceedings hereunder in confidence and make disclosures to others only to the extent necessary to properly conduct the proceedings.

Exhibit D

Paragraphs 5.01 - 5.04, 8.01, 10.01, 12.05 and 13.07 - 13.09 of the PHS License.

QuickLinks

Exhibit 10.40

[*] Confidential portions omitted and filed separately.

SUPPLY AGREEMENT

THIS SUPPLY AGREEMENT (the "Agreement") is made and entered into as of June 20, 2001, (the "Effective Date") between AVI BIOPHARMA, INC. (as defined below, "Supplier"), an Oregon corporation, and MEDTRONIC, INC. (as defined below, "Medtronic"), a Minnesota corporation.

WITNESSETH:

WHEREAS, Supplier is establishing manufacturing facilities to manufacture drugs such as the Drug (as defined below);

WHEREAS, Medtronic and Supplier have entered into a License and Development Agreement of even date herewith with respect to the Drug (the "License and Development Agreement");

WHEREAS, Supplier and Medtronic wish to enter into this Agreement regarding Supplier's supplying the Product (as defined below) to Medtronic; and

AGREEMENTS:

NOW THEREFORE, in consideration of the representations, warranties, covenants and agreements contained herein, and for other valuable consideration, the receipt and adequacy of which is hereby acknowledged, the parties mutually agree as follows:

ARTICLE 1
DEFINITIONS

1.1 *Specific Definitions.* As used in this Agreement, the following terms shall have the meanings set forth or as referenced below:

"*Affiliate*" of a specified person (natural or juridical) means a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the person specified. "Control" shall mean ownership of more than 50% of the shares of stock entitled to vote for the election of directors in the case of a corporation, and more than 50% of the voting power in the case of a business entity other than a corporation.

"*Agreement*" means this Agreement and all Exhibits and Schedules hereto.

"*Confidential Information*" means know-how, trade secrets, and unpublished information disclosed (whether before or during the term of this Agreement) by one of the parties (the "disclosing party") to the other party (the "receiving party") or generated under this Agreement, excluding information which:

(a) was already in the possession of receiving party prior to its receipt from the disclosing party (provided that the receiving party is able to provide the disclosing party with reasonable documentary proof thereof and, if received from a third party, that such information was acquired without any party's breach of a confidentiality or non-disclosure obligation to the disclosing party related to such information);

(b) is or becomes part of the public domain by reason of acts not attributable to the receiving party;

(c) is or becomes available to receiving party from a source other than the disclosing party which source, has rightfully obtained such information and has no obligation of non-disclosure or confidentiality to the disclosing party with respect thereto; or

(d) has been independently developed by the receiving party without breach of this Agreement or use of any Confidential Information of the other party.

"*Drug*" has the meaning given such term in the License and Development Agreement.

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

"*Force Majeure*" means any event or condition, not existing as of the date of this Agreement, not reasonably foreseeable as of such date and not reasonably within the control of either party, which prevents in whole or in material part the performance by one of the parties of its obligations hereunder, such as an act of government, war or related actions, civil insurrection, riot, sabotage, strike, epidemic, fire, flood, windstorm, and similar events.

"*GMP*" means Good Manufacturing Practices as defined in 21 CFR Parts 210 through 226 and Parts 600 through 680 and any successor provisions thereof that apply to production of the Drug under this Agreement.

"*Intellectual Property*" means U.S. and foreign patents and patent applications, trademarks, service marks and registrations thereof and applications therefor, copyrights and copyright registrations and applications, mask works and registrations thereof, know-how, trade secrets, inventions, discoveries, ideas, technology, data, information, processes, drawings, designs, licenses, computer programs and software, and technical information including but not limited to information embodied in material specifications, processing instructions, equipment specifications, product specifications, confidential data, electronic files, research notebooks, invention disclosures, research and development reports and the like related thereto and all amendments, modifications, and improvements to any of the foregoing.

"*Manufacturing Cost*" means Supplier's actual cost of (a) raw materials (including the 4 genetic sub-units), (b) direct labor plus (c) Factory Overhead, in each case, used in manufacturing the Products plus a pro-rata allocation of administrative, supervisory and support personnel expenses (if such expenses are primarily related to the supply hereunder of the Product). Such costs and expenses shall be consistently applied and shall be determined and allocated in a manner consistent with generally accepted accounting principles in effect in the United States from time to time. Raw materials and direct labor are the actual cost of materials and labor consumed to manufacture the Products. "Factory Overhead" includes an allocation of building and equipment depreciation and rent and utilities. Further, Manufacturing Cost shall exclude any cost or expenses paid by Medtronic and expenses related to (i) research and development, (ii) marketing and sales and, (iii) finance, legal and other general corporate overhead. Manufacturing Cost shall be determined in accordance with, and shall be subject to, **Exhibit B**.

"*Medtronic*" means Medtronic, Inc. and its Affiliates.

"*Product*" means the Drug.

"*Product Liability Damages*" means any liability, claim or expense, including but not limited to reasonable attorneys' fees and medical expenses, arising in whole or in part out of claims of third parties for personal injury or loss of or damage to property relating to or arising out of the Products, whether based on strict liability in tort, negligent manufacture of product, or any other allegation of liability arising from the design, testing, manufacture, packaging, labeling (including instructions for use), or sale of the Products.

"*Specifications*" means the specifications and formulations for the Products as set forth on **Exhibit A**, as may be amended from time to time upon mutual agreement of the parties with respect to

the Product. Specifications specifically developed by Medtronic or included in any FDA approval of the Drug, but excluding in either case Supplier Specifications (as defined herein), shall be referred to as "*Medtronic Specifications*." "*Supplier Specifications*" shall mean specifications developed by Supplier and incorporated into the Specifications without modification by Medtronic.

"*Supplier*" means AVI BioPharma, Inc. and its Affiliates.

1.2 *Other Terms.* Other terms may be defined elsewhere in the text of this Agreement and shall have the meaning indicated throughout this Agreement.

1.3 *Definitional Provisions.*

(a) The words "hereof," "herein," and "hereunder" and words of similar import, when used in this Agreement, shall refer to this Agreement as a whole and not to any particular provisions of this Agreement.

(b) The terms defined in the singular shall have a comparable meaning when used in the plural, and vice versa.

(c) References to an "Exhibit" or to a "Schedule" are, unless otherwise specified, to one of the Exhibits or Schedules attached to or referenced in this Agreement, and references to an "Article" or a "Section" are, unless otherwise specified, to one of the Articles or Sections of this Agreement.

(d) The term "person" includes any individual, partnership, joint venture, corporation, trust, unincorporated organization or government or any department or agency thereof.

ARTICLE 2
SUPPLY

2.1 *Supply of Products.* Commencing upon the first regulatory approval of the commercial sale of the Product, Supplier shall manufacture, or have manufactured, and supply to Medtronic all of Medtronic's orders for Products made under Article 3, in accordance with the Specifications in effect at the time of order for each Product and with Medtronic's schedule for deliveries. In the event of any Product or material shortages or temporary or long-term production capacity restraints or Force Majeure events, Supplier may allocate production capacity among customers, but, in all events will supply Medtronic on a priority basis over supplying any other customers.

2.2 *Promotion and Training.* Upon a reasonable request by Medtronic and subject to staff and support availability, Supplier will assist Medtronic in preparing promotional, marketing and training literature and instructions for the Products, including any artwork, will conduct training courses and seminars to educate medical professionals on the use of Products and their use in connection with Medtronic's medical devices and for training its marketing, sales, and distribution groups, and will provide Medtronic with training related to the sale of Products. Medtronic shall reimburse Supplier for travel and other out-of-pocket costs reasonably incurred by Supplier in connection with such training upon submission by Supplier of appropriate documentation thereof.

2.3 *Packaging and Labeling.* Supplier shall package and label the Products in accordance with packaging and labeling specifications to be mutually agreed upon by Medtronic and Supplier and approved by the FDA.

2.4 *Compliance With Laws and Regulations.*

(a) Supplier shall be responsible for compliance with present and future applicable statutes, laws, ordinances and regulations of national, federal, state and local governments now or hereafter in effect materially relating to its manufacture of the Products. If required or necessary in connection with sales of Products by Medtronic, Supplier shall have its manufacturing facilities

become ISO 9001 certified. Without limitation of the foregoing, Supplier represents and warrants to Medtronic that all Products sold and delivered to Medtronic under this Agreement will have been manufactured, labeled and packaged in accordance with applicable FDA GMP requirements and, if

applicable, Supplier's ISO 9001 certifications, and that continually during the term of this Agreement no Products delivered by Supplier to Medtronic shall be adulterated or misbranded at the time of delivery within the meaning of the U.S. Food, Drug and Cosmetic Act and regulations thereunder or any similar law or regulation. Supplier shall cause Medtronic's regulatory personnel to be provided with reasonable access from time to time to the facilities and records of Supplier for the purpose of confirming Supplier's compliance with any applicable FDA GMP and all other applicable requirements noted in this Article 2. Supplier agrees to provide Medtronic with reasonable prior written notice of any FDA inspection of Supplier's facilities or records prior to such FDA inspection, or if such prior written notice is not feasible, then within three business days thereafter. Supplier also agrees to provide Medtronic with written notice of its receipt of any claim by the FDA or other governmental agency of any actual or alleged violation by Supplier of any GMP or other applicable requirements as soon as practicable following receipt of such notice (but in no event more than 5 business days thereafter). Medtronic shall have the right, at any time and from time-to-time upon not less than 72 hours prior notice to the Supplier, to inspect Supplier's manufacturing facilities in order to examine all phases of the manufacturing process and inspect or audit any or all of the Supplier's data and records related thereto and the Products compliance with the terms and conditions hereunder or with respect to any applicable law, rule or regulation. In the event Supplier uses a sub-contractor or third party to perform any part of the manufacturing, Supplier shall obtain the agreement of such sub-contractor or third party that Medtronic shall have similar inspection rights.

(b) Medtronic and Supplier (except where Supplier has the responsibility under Section 2.4(a) or elsewhere herein) shall comply with all applicable laws, rules, regulations, codes, and standards of all federal, state, local and municipal government agencies which affect their respective performance and activities under this Agreement. Notwithstanding anything contained herein, Medtronic shall be responsible for compliance with present and future applicable statutes, laws, ordinances and regulations of national, federal, state and local governments now or hereafter in effect including applicable import and export laws materially relating to its purchase, distribution or sale of the Products.

2.5 *Exclusivity.* During the term of this Agreement, or if longer, the term of the License and Development Agreement, Supplier shall not promote, market or sell the Drug for use in the Field (as defined in the License and Development Agreement). Prior to any sale, transfer or other disposition to any third party of the Drug, Supplier shall obtain the agreement of such third party that it will not use, promote, market or sell the Drug in the Field or resell the Drug for use in the Field. Supplier shall obtain the agreement of such third party that Medtronic will be an express third party beneficiary of such agreement.

2.6 *Complaints and Adverse Events.* Each party agrees to inform the other party promptly (but in no event no later than forty-eight (48) hours after becoming aware of same) of any information concerning any complaint involving the Products or that might be applicable to the Products or adverse drug experience (as defined in 21 C.F.R. § 314.80), injury, toxicity, or sensitivity reaction associated with the use of the Products or that might be applicable to the Products, provided that:

(a) if the adverse drug experience is serious, as defined in 21 C.F.R. § 314.80 (including any adverse drug reaction that is fatal or life-threatening, is permanently disabling, requires inpatient hospitalization, or is a congenital anomaly, cancer or overdose), then each party shall notify the other party within twenty-four (24) hours;

(b) all notifications to Medtronic shall be by facsimile and on Medtronic's designated adverse event forms; and

(c) all notifications to Supplier shall be by facsimile and on Supplier's designated adverse event forms.

2.7 *Records and Recall.* Medtronic shall maintain complete and accurate records of all Products sold by Medtronic in sufficient detail to enable Supplier to conduct an effective recall of Products purchased by Medtronic under this Agreement if Supplier determines that such a recall is required or otherwise necessary or appropriate. In the event of a recall of any of the Products by Supplier, Medtronic will cooperate with and assist Supplier in effecting such recall, including promptly contacting any purchasers that Supplier reasonably desires to be contacted and promptly communicating to such purchasers the information or instructions Supplier reasonably desires to be transmitted relating to such recall. Medtronic shall be responsible for all costs of effecting such recall of Products, including any shipping costs related to returning recalled Products to Supplier and replacing such recalled Products with new Products, except, such costs shall instead be paid by Supplier (directly or through reimbursement of Medtronic for costs reasonably incurred by Medtronic) where the recall relates to a matter for which Supplier would be required to indemnify Medtronic under Article 7 of this Agreement. Notwithstanding the foregoing, Medtronic shall control any recall of any products sold by Medtronic to third parties that may incorporate the Product.

2.8 *Certain Responsibilities.* Notwithstanding anything contained herein, Supplier shall not be responsible for any loss or damage, including Products Liability Damages, from the use or performance of the Products manufactured under this Agreement where (a) such use or performance did not result from a breach of this Agreement by Supplier, including, without limitation, Supplier's warranties, (b) the Products complied with the description and form described in any documents used for all governmental approvals, applications, submissions, and approvals filed by Medtronic with the FDA, or given to Medtronic by the FDA, and (c) the Products complied with the packaging, shipping, and labeling for the Products. Medtronic further agrees that no Products will be released for public use or consumption until all requisite governmental approvals therefore have been obtained for such use and consumption.

2.9 *[*] Supply.* Supplier agrees to have in place prior to the first regulatory approval of the commercial sale of the Product and maintain during the term of this Agreement [*] supply for the Drug (in addition to and independent of [*] to produce commercially reasonable quantities of the Drug in compliance with FDA GMP requirements and other regulatory requirements. Supplier agrees to store in a safe and secure off-site location a six-month supply of the Product (based upon Medtronic forecasts delivered pursuant to Section 3.1) and Supplier agrees to exercise commercially reasonable efforts to replenish such supply if it is used. The Products shall be stored in compliance with the Specifications and any applicable law or regulation.

ARTICLE 3
FORECASTS, ORDERS AND DELIVERY

3.1 *Forecasts.* Medtronic agrees to provide Supplier, to the extent practicable, at least six (6) months prior to the date of anticipated first commercial release of the Product, a rolling twelve-month forecast of Medtronic's purchase of such Product from Supplier, specifying quantities and shipping dates. Such forecast shall be updated by Medtronic on a semi-annual basis which updated forecast must be received by Supplier no later than sixty (60) days prior to the first day of each succeeding twelve-month period. Such rolling forecasts by Medtronic shall be used for purposes of facilitating Medtronic's clinical, sales and marketing plans and meeting the lead times required by certain of Supplier's suppliers, but they are not legally binding on Medtronic in any manner.

3.2 *Purchase Orders.* Medtronic shall submit purchase orders for the Products to Supplier in writing, whether by mail, facsimile, email or otherwise, which shall, at a minimum, set forth the product numbers, quantities, delivery dates, and shipping instructions and shipping addresses for all Products ordered. Each purchase order shall give rise to a contract between Medtronic and Supplier for the sale of the Products ordered and shall be subject to and governed by the terms of this Agreement. The terms and conditions of this Agreement shall so govern and supersede any additional or contrary terms set forth in Medtronic's purchase order or any Supplier or Medtronic acceptance, confirmation, invoice or other document unless duly signed by an officer of Medtronic and an executive officer of Supplier and expressly stating and identifying which specific additional or contrary terms shall supersede the terms and conditions of this Agreement. With respect to all purchase orders submitted at least seventy-five (75) days in advance of the earliest scheduled delivery date set forth in such order, Supplier shall fill such orders in accordance with the scheduled delivery dates set forth therein, and with respect to all other purchase orders, Supplier shall exercise commercially reasonable efforts to fill such orders in accordance with the scheduled delivery dates set forth therein.

3.3 *Modification of Orders.* No purchase order shall be modified or canceled except upon the mutual agreement of the parties; provided, however, that Medtronic may cancel a purchase order based upon actions of a regulatory authority and Medtronic may make changes to a purchase order in quantities that do not exceed 10% more or less of such outstanding order, provided that Medtronic will reimburse for costs incurred on any such cancelled orders to the extent Supplier is not able, after reasonable effort, to recover its costs in connection therewith. Mutually agreed change orders shall be subject to all provisions of this Agreement, whether or not the change order so states. Notwithstanding the foregoing, any purchase order may be cancelled by Medtronic, without any liability to Medtronic, as to any Product that is not delivered within fifteen (15) days after the delivery date requested by Medtronic, and any such cancellation shall not limit or affect any contract remedies available to Medtronic with respect thereto. Any such cancellation by Medtronic must be by written notice to Supplier given within fifteen (15) business days after such 15th day.

3.4 *Delivery Terms.* All deliveries of Products shall be F.O.B. Supplier's manufacturing facility. Supplier shall have no further responsibility for risk of damage to or loss or delay of Products upon delivery by Supplier at the F.O.B. location to the common carrier specified by Medtronic or, in the event that no carrier shall have been specified by Medtronic on or before the date fifteen (15) days prior to the requested shipment date, a common carrier reasonably selected by Supplier. Medtronic shall be responsible for all shipping, handling, and insurance costs.

3.5 *Product Changes.* Supplier shall not, without Medtronic's prior written consent, materially alter the Specifications for Products. Supplier shall not, without Medtronic's prior written consent, modify the manufacturing processes, methods or procedures for the Product in any manner that increases the Manufacturing Costs. Such consent will not be unreasonably withheld by Medtronic if specifications, processes, methods, or procedures must be changed based upon demands by regulatory authority or changes in applicable law.

ARTICLE 4
PRICES AND PAYMENTS

4.1 *Prices.*

(a) Unless and until otherwise mutually agreed by the parties in writing, the purchase price for Product manufactured by Supplier for Medtronic under this Agreement (the "Transfer Price") shall be determined under the definition of "Manufacturing Cost" and Exhibit B.

(b) If Supplier subcontracts for the manufacturing of the Product, Manufacturing Cost shall be determined based on the actual price charged by the subcontractor to Supplier for the Product; provided that such price shall not be greater than the Manufacturing Cost of the Supplier;

provided further that if the purchase orders provided pursuant to Section 3.1 hereunder for any twelve month period exceed by more than [*] the forecasts for such 12 month period, the purchase price for the Product that exceeds [*] of the forecast shall equal the actual price charged by the subcontractor to Supplier.

4.2 *Payment Terms.* Payments made by Medtronic for Products purchased hereunder shall be due and payable in full within 30 days after the date of invoice by Supplier.

4.3 *Taxes.* The Transfer Price does not include any sales, use, value added or similar taxes, customs, duties, or tariffs imposed by any governmental authority or agency on Products or any components thereof that are imported by Medtronic into any country (other than taxes on the net income of Supplier), and Medtronic shall bear all such taxes and duties. Supplier shall be required to take appropriate steps to minimize imposition of such taxes by filing sales exemption certificates and taking similar actions where applicable to the Supplier. When Supplier has the legal obligation to collect and/or pay such taxes, the appropriate amount shall be added to Medtronic's invoice and paid by Medtronic, unless Medtronic provides Supplier with a valid tax exemption certificate authorized by the appropriate taxing authority. Notwithstanding the foregoing, Medtronic shall not be obligated to pay or reimburse Supplier for taxes, duties or tariffs that are not imposed on the sale of Product to Medtronic or taxes related to the net income of the Supplier.

ARTICLE 5
WARRANTY AND SERVICE

5.1 *Warranty.*

(a) Supplier represents and warrants to Medtronic that all Products sold under this Agreement will have been manufactured, labeled and packaged in accordance with all applicable laws and regulations, including (as applicable) FDA GMP requirements and, if applicable, ISO 9001 certifications, or successor requirements, and all other applicable manufacturing requirements, as well as the Specifications. Supplier represents, warrants and covenants that it will have, or will contract for, the facilities, equipment, licenses, permits and personnel to manufacture and supply the Product in accordance with the current expected requirements of Medtronic.

(b) Supplier represents and warrants to Medtronic that Products shall, when delivered to Medtronic, meet the Specifications and warranties set forth herein and shall be free from defects in materials and workmanship. Medtronic shall invoice Supplier for, and Supplier shall promptly pay, all shipping, transportation, insurance and other expenses actually incurred in replacing defective Products where either the defect arises from a breach of any representation or warranty of Supplier herein or from a matter for which Supplier would be required to indemnify Medtronic hereunder. Supplier will, at Medtronic's option, replace or credit Medtronic's account for any Product that Medtronic reasonably determines was defective at the time of shipment to

Medtronic or that does not conform to the express warranties of Supplier herein; provided, however, that Supplier shall have no obligation under this warranty to make replacements or grant credits necessitated in whole or in part by accidents; failure to maintain in accordance with any transportation, storage, handling, or maintenance, instructions supplied by Supplier; damage due to Medtronic Specifications where Supplier followed such specifications and the damage was due to defects in such Medtronic Specifications; where Medtronic is specifically liable for such damages or defect under the terms of Article 7; damage by acts of nature, vandalism, burglary neglect or misuse; or other fault or negligence of Medtronic or (except for any strict liability of Supplier) the customer or user (collectively, "Warranty Exclusions").

5.2 *Limited Warranty.* THE EXPRESS WARRANTIES SET FORTH ABOVE ARE IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, WHICH ARE HEREBY SPECIFICALLY DISCLAIMED, INCLUDING WITHOUT LIMITATION THE IMPLIED

WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE OR USE.

5.3 *Inspection of Product.* In the event of any shortage, damage or discrepancy in or to a shipment of Products or in the event any of the Products fail to comply with the then current Specifications (excluding Warranty Exclusions) or Supplier warranties for the Products, Medtronic shall report the same to Supplier within 45 days after delivery thereof to Medtronic and, if requested in writing by Supplier, furnish such written evidence or other documentation as Supplier reasonably may deem appropriate in connection therewith. In any such event, or if the Products are not delivered within the time periods required, Medtronic may reject the Product and return the Products to Supplier, at Supplier's expense (including handling, insurance and shipping charges), unless the Products' defect results from matters that are Medtronic's responsibility under Article 7 or constitute Warranty Exclusions. Any Products not rejected by Medtronic by written notice given to Supplier within such 45-day period shall be deemed to have been accepted by Medtronic. Following any such acceptance, the sole remedies of Medtronic with respect to damage to or defects in the Products shall be those set forth in Sections 5.1 and 7.1. Medtronic shall not be obligated to conduct any tests or inspections of the Products prior to or after its acceptance. Supplier shall promptly notify Medtronic in writing if it has reason to believe that any delivery of the Products fails to meet the Specifications, fails to satisfy the representations and warranties made under this Article 5, or is otherwise not free from defects in material and workmanship.

ARTICLE 6
CERTAIN REPRESENTATIONS AND WARRANTIES

6.1 *Representations and Warranties.*

(a) Supplier represents and warrants to Medtronic that the execution and delivery by Supplier of this Agreement and the performance by Supplier of its obligations hereunder have been duly authorized by all requisite corporate action and will not violate any provision of law, any order of any court or other agency of government, the Articles of Incorporation or Bylaws of Supplier, as amended, or any provision of any indenture, agreement or other instrument to which Supplier or any of its properties or assets is bound, or conflict with, result in a breach of or constitute (with due notice or lapse of time or both) a default under any such indenture, agreement or other instrument, or result in the creation or imposition of any lien, charge, restriction, claim or encumbrance of any nature whatsoever upon any of the properties or assets of Supplier. This Agreement has been duly executed and delivered by Supplier and constitutes the legal, valid and binding obligation of Supplier, enforceable in accordance with its terms, subject, as to the enforcement of remedies, to the discretion of the courts in awarding equitable relief and to applicable bankruptcy, reorganization, insolvency, moratorium and similar laws affecting the rights of creditors generally.

(b) Medtronic represents and warrants to Supplier that the execution and delivery by Medtronic of this Agreement and the performance by Medtronic of its obligations hereunder have been duly authorized by all requisite corporate action and will not violate any provision of law, any order of any court or other agency of government, the Articles of Incorporation or Bylaws of Medtronic, as amended, or any provision of any indenture, agreement or other instrument to which Medtronic or any of its properties or assets is bound, or conflict with, result in a breach of or constitute (with due notice or lapse of time or both) a default under any such indenture, agreement or other instrument, or result in the creation or imposition of any lien, charge, restriction, claim or encumbrance of any nature whatsoever upon any of the properties or assets of Medtronic. This Agreement has been duly executed and delivered by Medtronic and constitutes the legal, valid and binding obligation of Medtronic, enforceable in accordance with its terms, subject, as to the enforcement of remedies, to the discretion of the courts in awarding equitable relief and to applicable bankruptcy, reorganization, insolvency, moratorium and similar laws affecting the rights of creditors generally.

ARTICLE 7
INDEMNIFICATION

7.1 *Supplier's Liability.*

(a) Supplier shall indemnify, defend and hold harmless Medtronic and its subsidiaries, and their respective officers, directors, employees, shareholders and distributors from and against and in respect of any and all demands, claims, actions or causes of action, assessments, losses, damages, liabilities, interest and penalties, costs and expenses (including, without limitation, reasonable legal fees and disbursements incurred in connection therewith and in seeking indemnification therefor, and any amounts or expenses required to be paid or incurred in connection with any action, suit, proceeding, claim, appeal, demand, assessment or judgment) finally awarded ("Indemnifiable Losses"), resulting from, arising out of, or imposed upon or incurred by any person to be indemnified hereunder by reason of: (i) any breach of representation, warranty or agreement on the part of Supplier under this Agreement (collectively, "Supplier Breach"); (ii) Product Liability Damages with respect to the Products arising from or related to a Supplier Breach; (iii) any charges of patent or other intellectual property infringement due to the manufacture of the Products, the sale of the Products for use in the Field (as defined in the License and Development Agreement) or the formulation of the Product, except to the extent such formulation is required specifically for the Medtronic Specifications, and such infringement would have been avoided by compliance with Supplier Specifications (which indemnity shall be in addition to, and not in lieu of, Supplier's indemnity made in the License and Development Agreement), or (iv) other negligence or intentional misconduct of Supplier; provided that in no event shall Supplier be liable for matters for which Medtronic is responsible under Section 7.2 below or for punitive or exemplary damages.

(b) During the term of this Agreement, Supplier shall maintain, at its expense, a policy of comprehensive general liability insurance sufficient to honor the indemnity made herein, with products liability endorsement, but in no event less than $10,000,000.00 per occurrence and in the annual

aggregate. Said policy shall name Medtronic and its Affiliates as additional beneficiaries. Supplier shall furnish Medtronic with a certificate of insurance evidencing such coverage within thirty (30) days of the execution of this Agreement, which certificate shall provide for not less than thirty (30) days notice to Medtronic prior to material change in coverage or policy cancellation.

7.2 *Medtronic's Liability.* Medtronic shall indemnify, defend and hold harmless Supplier and its subsidiaries and their respective officers, directors, employees, shareholders and suppliers from and against and in respect of any and all Indemnifiable Losses resulting from, arising out of, or imposed upon or incurred by any person to be indemnified hereunder by reason of: (a) any breach of representation, warranty or agreement on the part of Medtronic under this Agreement; (b) Product Liability Damages with respect to the Products other than those arising from or related to a Supplier Breach; (c) any charges of patent or other intellectual property infringement that does not relate to a claim described in Section 7.1(a)(iii) and involves the marketing, distribution and sale of the Product by Medtronic; or (d) negligent handling by Medtronic of the Products or changes, additions or modifications to the Products by Medtronic (other than changes, additions or modifications made to the Products by Medtronic in connection with or related to the incorporation of the Products into or onto, or the utilization of the Products in connection with, a medical device, such as a balloon, catheter or stent), or (e) other negligent or intentional misconduct of Medtronic; provided that in no event shall Medtronic be liable for matters for which Supplier is responsible under Section 7.1 above or under the License and Development Agreement, or for punitive or exemplary damages.

7.3 *Procedure.* If a claim by a third party is made and a party (the "Indemnitee") intends to claim indemnification under this Article 7, the Indemnitee shall promptly notify the other party (the "Indemnitor") in writing of any claim in respect of which the Indemnitee or any of its subsidiaries,

directors, officers, employees, shareholders, suppliers or distributors intends to claim such indemnification. If the Indemnitor accepts liability for indemnifying Indemnitee hereunder, Indemnitor shall have sole control of the defense and/or settlement thereof; provided that the Indemnitee may participate in any such proceeding with counsel of its choice at its own expense. The indemnity agreement in this Article 7 shall not apply to amounts paid in settlement of any Indemnifiable Losses if such settlement is effected without the consent of the Indemnitor, which consent shall not be withheld unreasonably. The failure to deliver written notice to the Indemnitor within a reasonable time after the commencement of any such action, if adversely prejudicial to its ability to defend such action, shall relieve such Indemnitor of any liability to the Indemnitee under this Article 7 but the omission to so deliver written notice to the Indemnitor shall not relieve the Indemnitor of any liability that it may otherwise have to any Indemnitee other than under this Article 7. If the Indemnitor fails to provide defense of the claim, and diligently defend or settle the same after receipt of notice from Indemnitee of, and a reasonable opportunity to cure, such failure, the Indemnitee may defend or settle the claim without prejudice to its rights to indemnification hereunder, provided that the Indemnitee does so diligently and in good faith and further does not enter into any settlement or agree to any stipulation that would adversely affect the rights of the Indemnitor or impose any additional obligation on the Indemnitor without the Indemnitor's prior written consent (which consent will not be unreasonably withheld). The Indemnitee under this Article 7, its employees and agents, shall cooperate fully with the Indemnitor and its legal representatives and provide full information in the investigation of any Indemnifiable Losses covered by this indemnification.

ARTICLE 8
TERM AND TERMINATION

8.1 *Term.* This Agreement shall take effect as of the date hereof and shall continue in force until the termination of the License and Development Agreement (the "Term"). Nothing contained in this Agreement will be interpreted as requiring either party to renew or extend this Agreement beyond the initial term or any renewal term hereof.

8.2 *Termination.* Notwithstanding the provisions of Section 8.1 above, this Agreement may be terminated in accordance with the following provisions:

(a) A party may terminate this Agreement by giving notice in writing to the other party if the other party is in material breach of any representation, warranty or covenant of this Agreement and, except as otherwise provided herein, shall have failed to cure such breach within 30 days after receipt of written notice thereof from the first party;

(b) Either party may terminate this Agreement at any time by giving notice in writing to the other party, which notice shall be effective upon dispatch, if the other party (i) becomes insolvent; (ii) commences any action or proceeding under any bankruptcy or insolvency law for the reorganization, arrangement, composition or similar relief, (iii) has commenced against it any action or proceeding under any bankruptcy or insolvency law that remains undismissed or unstayed for a period of 60 days, or (iv) makes an assignment for the benefit of creditors, goes into liquidation or receivership or otherwise loses legal control of its business; or

(c) Medtronic may terminate this Agreement upon 30 days prior written notice to Supplier if Supplier has been in material breach of the representations, warranties and covenants contained herein on three or more occasions within any 12 month period. In order to exercise such termination right, Medtronic must provide Supplier with written notice of such termination within thirty (30) days after the end of any applicable 12 month period.

8.3 *Rights and Obligations on Termination.* In the event of termination of this Agreement for any reason, the parties shall have the following rights and obligations:

(a) Termination of this Agreement shall not release either party from the obligation to make payment of all amounts previously due and payable.

(b) The terminating party shall have the right, at its option, to cancel any or all purchase orders that provide for delivery after the effective date of termination.

(c) Upon termination of this Agreement for any reason, nothing herein shall be construed to release either party from any obligation that matured prior to the effective date of such termination.

(d) Upon any termination of this Agreement, the parties will return and deliver to the other party all of such party's materials and documents developed during the performance of this Agreement provided that a party may retain one copy of such materials and documents for legal purposes.

(e) The parties' obligations pursuant to Articles 5, 6, 7 and 8 and Sections 2.5, 2.6 and 2.7 hereof and any and all other terms and provisions hereof intended to be observed and performed by the parties after the termination hereof, shall survive termination of this Agreement. All other provisions of this Agreement shall terminate upon termination of this Agreement.

ARTICLE 9
FORCE MAJEURE; LICENSE

9.1 *Notice of Force Majeure.* Upon giving notice to the other party, a party affected by an event of Force Majeure shall be released without any liability on its part from the performance of its obligations under this Agreement, except for the obligation to pay any amounts due and owing hereunder, but only to the extent and only for the period that its performance of such obligations is prevented by the event of Force Majeure.

9.2 *Suspension of Performance.* During the period that the performance by one of the parties of its obligations under this Agreement has been suspended by reason of an event of Force Majeure, the other party may likewise suspend the performance of all or part of its obligations hereunder (except for the obligation to pay any amounts due and owing hereunder) to the extent that such suspension is commercially reasonable.

9.3 *Exercise of License.*

(a) Notwithstanding the terms hereof, Medtronic shall have the right to exercise its license to make or have made the Drug granted by, and subject to the terms of, the License and Development Agreement at any time.

(b) In connection with Medtronic's exercise of the license to make or have made the Drug, and upon Medtronic's request, Supplier shall promptly provide to Medtronic, or a third party designated by Medtronic, as applicable, copies of such technical documentation and related know-how and trade secrets, and training as is reasonably necessary for a skilled manufacturer to make such Product; provided that any such third party shall agree to maintain the confidentiality of all such information to the same extent that Medtronic is obligated to do so under this Agreement.

ARTICLE 10
MISCELLANEOUS

10.1 *Nondisclosure.* The parties agree not to disclose or use (except as permitted or required for performance by the party receiving such Confidential Information of its rights or duties hereunder or under other agreement between the parties or their Affiliates) any Confidential Information of the other party obtained during the during the term of this Agreement until the expiration of five years after the receiving party's receipt of such Confidential Information, but in no event prior to the termination of this Agreement. Each party further agrees to take appropriate measures to prevent any such prohibited disclosure of Confidential Information by its present and future employees, officers, agents, subsidiaries, or consultants during such period.

10.2 *Successors and Assigns.* This Agreement shall be binding upon and inure to the benefit of the parties hereto and the successors or assigns of the parties hereto; provided, that (i) the rights and obligations of Supplier herein may not be assigned except to any person who succeeds to substantially all of the assets and business of Supplier to which this Agreement relates, and (ii) the rights and obligations of Medtronic herein may not be assigned except to any person who succeeds to substantially all of that portion of Medtronic's business to which this Agreement relates. The Supplier may enter into agreements with third parties to provide for performance by third parties of any or all of its obligations to manufacture and supply the Products; provided that such agreement is consistent with this Agreement in all material respects. Notwithstanding the provisions of any such agreement, the Supplier shall remain obligated and liable to Medtronic for the performance of its obligations and duties hereunder.

10.3 *Complete Agreement.* This Agreement and the License and Development Agreement, and the Schedules and Exhibits hereto and thereto, constitute the entire agreement between the parties hereto with respect to the subject matter hereof and supersede all prior agreements whether written or oral relating hereto.

10.4 *Governing Law.* The formation, legality, validity, enforceability and interpretation of this Agreement shall be governed by the laws of the State of Minnesota, without giving effect to the principles of conflict of laws; provided, however, that nothing in Minnesota procedural law shall be deemed to alter or affect the applicability of the rules of the Federal Arbitration Act as governing arbitration of disputes as provided in Section 10.15 and, provided further, that no Minnesota laws or rules of arbitration shall be applicable. Subject to Section 10.15, the parties hereto hereby submit to the exclusive jurisdiction of the United States federal and state courts located in the county in which arbitration is conducted with respect to any dispute arising under this Agreement, the agreements entered into in connection herewith or the transactions contemplated hereby or thereby, and irrevocably consent to the exclusive jurisdiction and venue of such courts and waive any objections they may have at any time to such exclusive jurisdiction and venue.

10.5 *Waiver, Discharge, Amendment, Etc.* The failure of any party hereto to enforce at any time any of the provisions of this Agreement shall not, absent an express written waiver signed by the party making such waiver specifying the provision being waived, be construed to be a waiver of any such provision, nor in any way to affect the validity of this Agreement or any part thereof or the right of the party thereafter to enforce each and every such provision. No waiver of any breach of this Agreement shall be held to be a waiver of any other or subsequent breach. Any amendment to this Agreement shall be in writing and signed by the parties hereto.

10.6 *Notices.* All notices or other communications to a party required or permitted hereunder shall be in writing and shall be delivered personally or by facsimile (receipt confirmed electronically) to such party (or, in the case of an entity, to an executive officer of such party) or shall be sent by a

reputable express delivery service or by certified mail, postage prepaid with return receipt requested, addressed as follows:

if to Medtronic, to:

Medtronic, Inc.
710 Medtronic Parkway NE
Minneapolis, MN 55432-5604

with separate copies thereof addressed to

Attention: General Counsel
Mail Stop LC400
Telecopier No.: (763) 572-5459

and

Attention: Vice President and Chief Development Officer
Mail Stop LC390
Telecopier No.: (763) 505-2542

if to Supplier to:

AVI BioPharma, Inc.
One SW Columbia
Portland, OR 97258
Attn: President, Alan P. Timmins

With a copy to:

Hurley, Lynch & Re, PC
747 SW Industrial Way
Bend, OR 97702
Attn: Robert A. Stout, Esq.

Any party may change the above-specified recipient and/or mailing address by notice to all other parties given in the manner herein prescribed. All notices shall be deemed given on the day when actually delivered as provided above (if delivered personally or by facsimile) or on the day shown on the return receipt (if delivered by mail or delivery service).

10.7 *Expenses.* Except as expressly provided herein, Supplier and Medtronic shall each pay their own expenses incident to this Agreement and the preparation for, and consummation of, the transactions provided for herein.

10.8 *Titles and Headings; Construction.* The titles and headings to the Articles and Sections herein are inserted for the convenience of reference only and are not intended to be a part of or to affect the meaning or interpretation of this Agreement. This Agreement shall be construed without regard to any presumption or other rule requiring construction hereof against the party causing this Agreement to be drafted.

10.9 *Severability.* If any provision of this Agreement is held invalid, illegal or unenforceable, such provision shall be enforced to the maximum extent permissible and the remaining provisions shall nonetheless be enforceable according to their terms.

10.10 *Relationship.* This Agreement does not make either party the employee, agent or legal representative of the other for any purpose whatsoever. Neither party is granted any right or authority to assume or to create any obligation or responsibility, express or implied, on behalf of or in the name of the other party. In fulfilling its obligations pursuant to this Agreement, each party shall be acting as an independent contractor.

10.11 *Benefit.* Nothing in this Agreement, expressed or implied, is intended to confer on any person other than the parties hereto or their respective successors or assigns, any rights, remedies, obligations or liabilities under or by reason of this Agreement.

10.12 *Survival.* All of the representations, warranties, and covenants made in this Agreement, and all terms and provisions hereof intended to be observed and performed by the parties after the termination hereof, shall survive such termination and continue thereafter in full force and effect, subject to applicable statutes of limitations.

10.13 *Counterparts.* This Agreement may be executed in any number of counterparts, each of which shall be deemed as original and all of which together shall constitute one instrument.

10.14 *Execution of Further Documents.* Each party agrees to execute and deliver without further consideration any further applications, licenses, assignments or other documents, and to perform such other lawful acts as the other party may reasonably require to fully secure and/or evidence the rights or interests herein.

10.15 *Arbitration.* Any dispute arising out of or relating to this Agreement, including the formation, interpretation or alleged breach hereof, shall be settled in accordance with the **Exhibit C** attached hereto. The results of such arbitration proceedings shall be binding upon the parties hereto, and judgment may entered upon the arbitration award in any court having jurisdiction thereof. Notwithstanding the foregoing, either party may seek interim injunctive relief from any court of competent jurisdiction.

10.16 *Public Announcement.* In the event any party proposes to issue any press release or public announcement concerning any provisions of this Agreement or the transactions contemplated hereby, such party shall so advise the other parties hereto, and the parties shall thereafter use their best efforts to cause a mutually agreeable release or announcement to be issued. Neither party will publicly disclose or divulge any provisions of this Agreement nor the transactions contemplated hereby without the other party's written consent, except as may be required by applicable law or stock exchange regulation, and except for communications to such party's employees or customers or investors or prospective investors (subject to appropriate confidentiality obligations); provided that, prior to disclosure of any provision of this Agreement that either party considers particularly sensitive or confidential to any governmental agency or stock exchange, the parties shall cooperate to seek confidential treatment or other applicable limitations on the public availability of such information. In particular, prior to such disclosure, each party shall use its best efforts to redact the payment terms specified herein and each party shall provide the other the opportunity to redact other information and seek confidential treatment of any such disclosure.

IN WITNESS WHEREOF, each of the parties has caused this Supply Agreement to be executed in the manner appropriate to each, as of the date first above written.

AVI BIOPHARMA, INC.	MEDTRONIC, INC.
By: /s/ DENIS BURGER	By: /s/ MICHAEL D. ELLWEIN
Its: CEO	Its: VP & COO

Attachments:

Exhibit A—Specifications
Exhibit B—Pricing
Exhibit C—Alternative Dispute Resolution

[*] Confidential portions omitted and filed separately.

EXHIBIT A

Specifications

[*] Confidential portions omitted and filed separately.

EXHIBIT B

Pricing

1. Supplier shall use commercially reasonable efforts to minimize its Manufacturing Cost while maintaining quality and preserving its production capacity. Supplier agrees to provide Medtronic, to the extent practicable, at least six (6) months prior to the date of anticipated first commercial release of the Product, the initial Manufacturing Cost accompanied by a reasonably detailed report on the computation thereof. Thereafter, Supplier shall update the Manufacturing Cost by June 30th and December 31st of each year during the term, which notice shall be accompanied by a reasonably detailed report regarding the computation thereof. The Manufacturing Cost as so updated shall be effective for each six-month period commencing as of August 31st and March 31st following such update. However, in no event shall the Manufacturing Cost of the Supplier for the Product that targets the c-myc gene exceed [*] per stent (assuming [*] milligrams or less per stent) or an equivalent amount for the applicable medical device. For example, if the amount of such Product required to coat a stent is half the amount that is required for application utilizing a balloon without a stent, then the Manufacturing Cost of the Supplier shall not exceed [*] per balloon. In no event shall any increases in the Manufacturing Cost exceed the rate of [*] per annum.

2. Supplier agrees to keep accurate written records sufficient in detail to enable the Manufacturing Cost to be determined and verified. Supplier shall retain such records for a period of not less than three years (or such longer period of time as may be required by FDA GMP requirements or other applicable requirements). Upon reasonable notice and during regular business hours, Supplier shall from time to time (but no more frequently than once annually) make available such records for audit at Medtronic's expense by independent representatives selected by Medtronic and reasonably acceptable to Supplier to verify the accuracy of the Manufacturing Cost reported. Such representatives shall execute a suitable confidentiality agreement reasonably acceptable to Supplier prior to conducting such audit. Such representatives may disclose to Medtronic only their conclusions regarding the actual Manufacturing Cost, and shall not disclose Supplier's information to Medtronic without the prior written consent of Supplier. No claim may be asserted by Medtronic against Supplier for any errors unless made within six (6) months following completion of such examination or audit made pursuant to this Section 2. The right to audit shall extend for two (2) years from delivery of any report of the Manufacturing Cost and thereafter any report shall be deemed complete and accurate. Each Manufacturing Cost report shall be subject to only one such examination and audit. If a discrepancy is found, then the party benefiting from such discrepancy will promptly pay such discrepancy to the other. If a discrepancy is found which is greater than 10% of Manufacturing Cost paid in any quarter and Medtronic is the benefiting party, then Supplier shall pay all reasonable audit costs for the related audit and for the next succeeding annual audit.

EXHIBIT C

ALTERNATIVE DISPUTE RESOLUTION

1) *Negotiations.* If any dispute arises between Supplier and Medtronic with respect to the Supply Agreement or the License and Development Agreement (the "Agreements"), or any alleged breach thereof, any party may, by written notice to the other party, have such dispute referred to their respective designees listed below or their successors for attempted resolution by good faith negotiations within 30 days after such notice is received. Such designees are as follows:

For Supplier—the President of Supplier or his/her designee

For Medtronic—the President of Medtronic, Inc.'s business unit to which the Agreements relate, or his/her designee

Any settlement reached by the parties under this Section 1 shall not be binding until reduced to writing and signed by the above-specified designees of Medtronic and Supplier. When reduced to writing, such settlement agreement shall supersede all other agreements, written or oral, to the extent such agreements specifically pertain to the matters so settled. If the designees are unable to resolve such dispute within such 30-day period, any party may invoke the provisions of Section 2 below.

2) *Arbitration.* All claims, disputes, controversies, and other matters in question arising out of or relating to the Agreements, including claims for Indemnifiable Losses and disputes regarding the making of the Agreements, including claims of fraud in the inducement, or to the alleged breach hereof, shall be settled by negotiation between the parties as described in Section 1 above or, if negotiation is unsuccessful, by binding arbitration in accordance with procedures set forth in Section 3 and 4 below.

3) *Notice.* Notice of demand for binding arbitration shall be given in writing to the other party and shall be delivered personally or by facsimile (receipt confirmed) to an executive officer of such party or shall be sent by a reputable express delivery service or by certified mail, postage prepaid with return receipt requested, addressed as follows:

Medtronic Asset Management, Inc.
710 Medtronic Parkway NE
Minneapolis, MN 55432-5604

with separate copies thereof addressed to

Attention: General Counsel
Mail Stop LC400
Telecopier No.: (763) 572-5459

and

Attention: Vice President and Chief Development Officer
Mail Stop LC390
Telecopier No.: (763) 505-2542

if to Supplier to:

AVI BioPharma, Inc.
One SW Columbia
Portland, OR 97258
Attn: President, Alan P. Timmins

With a copy to:

Hurley, Lynch & Re, PC
747 SW Industrial Way
Bend, OR 97702
Attn: Robert A. Stout, Esq.

Any party may change the above-specified recipient and/or mailing address by notice to the other party given in the manner herein prescribed. All notices shall be deemed given on the day when actually delivered as provided above (if delivered personally or by facsimile (upon appropriate electronic confirmation of successful transmission)) or on the day shown on the return receipt (if delivered by mail or delivery service). In no event may a notice of demand of any kind be filed more than two years after the date the claim, dispute, controversy, or other matter in question was asserted by one party against another, and if such demand is not timely filed, the claim, dispute, controversy, or other matter in question referenced in the demand shall be deemed released, waived, barred, and unenforceable for all time, and barred as if by statute of limitations.

4) *Binding Arbitration.* Upon filing of a notice of demand for binding arbitration by any party hereto, arbitration shall be commenced and conducted as follows:

(a) *Arbitrators.* All claims, disputes, controversies, and other matters (collectively "matters") in question shall be referred to and decided and settled by a standing panel of three independent arbitrators, one selected by each of Supplier and Medtronic's representative and the third by the two arbitrators so selected; provided, if the amount in controversy (including reasonably anticipated future amounts or payments under the Agreement affected by such arbitrated matter) is under $300,000, a single arbitrator will be used. The third (or the single arbitrator, if applicable) shall be a former judge of one of the U.S. District Courts or one of the U.S. Court of Appeals or such other classes of persons as the parties may agree. Selection of arbitrators shall be made within 30 days after the date of the first notice of demand given pursuant to Section 3 and within 30 days after any resignation, disability or other removal of such arbitrator. Following appointment, each arbitrator shall remain a member of the standing panel, subject to removal for just cause or resignation or disability; provided, however, an arbitrator can be removed by the party who appointed the arbitrator, or in the case of the third arbitrator, by either party for any reason at any time when no matter is in arbitration.

(b) *Cost of Arbitration.* The cost of each arbitration proceeding, including without limitation the arbitrators' compensation and expenses, hearing room charges, court reporter transcript charges etc., shall be borne by the party whom the arbitrators determine has not prevailed in such proceeding, or borne equally by the parties if the arbitrators determine that neither party has prevailed. The arbitrators shall also award the party that prevails substantially in its pre-hearing position its reasonable attorneys' fees and costs incurred in connection with the arbitration. The arbitrators are specifically instructed to award attorneys' fees for instances of abuse of the discovery process.

(c) *Location of Proceedings.* An arbitration proceeding initiated by Supplier shall be held in Hennepin County, Minnesota and an arbitration proceeding initiated by Medtronic shall be held in Multnomah County, Oregon, unless the parties agree otherwise.

(d) *Pre-hearing Discovery.* The parties shall have the right to conduct and enforce pre-hearing discovery in accordance with the then current Federal Rules of Civil Procedure, subject to these limitations: Document discovery and other discovery shall be under the control of and enforceable by the arbitrators. The arbitrators shall permit and facilitate such other discovery as they shall determine is appropriate under the circumstances, taking into account the needs of the parties and the desirability of making discovery expeditious and cost effective. The arbitrators shall decide discovery disputes. The arbitrators are empowered:

(i) to issue subpoenas to compel pre-hearing document or deposition discovery;

(ii) to enforce the discovery rights and obligations of the parties; and

(iii) to otherwise control the scheduling and conduct of the proceedings.

Notwithstanding any contrary foregoing provisions, the arbitrators shall have the power and authority to, and to the fullest extent practicable shall, abbreviate arbitration discovery in a manner that is fair to all parties in order to expedite the arbitration proceeding and render a final decision within six months after the pre-hearing conference.

(e) *Pre-hearing Conference.* Within 45 days after filing of notice of demand for binding arbitration, the arbitrators shall hold a pre-hearing conference to establish schedules for completion of discovery, for exchange of exhibit and witness lists, for arbitration briefs, for the hearing, and to decide procedural matters and all other questions that may be presented.

(f) *Hearing Procedures.* The hearing shall be conducted to preserve its privacy and to allow reasonable procedural due process. Rules of evidence need not be strictly followed, and the hearing shall be streamlined as follows:

(i) Documents shall be self-authenticating, subject to valid objection by the opposing party;

(ii) Expert reports, witness biographies, depositions, and affidavits may be utilized, subject to the opponent's right of a live cross-examination of the witness in person;

(iii) Charts, graphs, and summaries shall be utilized to present voluminous data, provided (i) that the underlying data was made available to the opposing party 30 days prior to the hearing, and (ii) that the preparer of each chart, graph, or summary is available for explanation and live cross-examination in person;

(iv) The hearing should be held on consecutive business days without interruption to the maximum extent practicable; and

(v) The arbitrators shall establish all other procedural rules for the conduct of the arbitration in accordance with the rules of arbitration of the Center for Public Resources.

(g) *Governing Law.* This arbitration provision shall be governed by, and all rights and obligations specifically enforceable under and pursuant to, the rules of the Federal Arbitration Act and the laws of the State of Minnesota shall be applied, without reference to the choice of law principles thereof, in resolving matters submitted to such arbitration.

(h) *Consolidation.* No arbitration shall include, by consolidation, joinder, or in any other manner, any additional person not a party to this Agreement (other than affiliates of any such party, which affiliates may be included in the arbitration), except by written consent of the parties hereto containing a specific reference to this Agreement.

(i) *Award.* The arbitrators shall be required to render their final decision within six months after the pre-hearing conference. The arbitrators are empowered to render an award of general compensatory damages and equitable relief (including, without limitation, injunctive relief), but are not empowered to award punitive or presumptive damages. The award rendered by the arbitrators (1) shall be final; (2) shall not constitute a basis for collateral estoppel as to any issue; and (3) shall not be subject to vacation or modification, except in the event of fraud or gross misconduct on the part of the arbitrators.

(j) *Confidentiality.* The parties hereto will maintain the substance of any proceedings hereunder in confidence and make disclosures to others only to the extent necessary to properly conduct the proceedings.

QuickLinks

Exhibit 10.40