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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

LESTER HAYES,
Plaintiff,
vs.
WRIGHT MEDICAL TECHNOLOGY,
INC.,
Defendant.

Case No. 16-CV-1072-CAB(WVG)
**ORDER GRANTING JOINT
MOTION FOR PROTECTIVE
ORDER; and PROTECTIVE ORDER**
[Doc. No. 37.]

The Court enters this Order in accordance with Rule 26 of the Federal Rules of Civil Procedure to protect the specific and serious trade secret and confidentiality interests of the parties to the above-captioned matter, as well as any third parties from whom information is sought in this matter, and to expedite discovery without delay caused by possible disputes regarding claims of confidentiality of information, documents and things that may contain or constitute trade secrets, confidential research and development, and any commercial, financial or other proprietary information.

1 IT IS HEREBY ORDERED, pursuant to Federal Rule of Civil Procedure 26
2 that:

3 **I. SCOPE OF PROTECTIVE ORDER**

4 **1.01 Scope of Order.**

5 This Order shall apply to discovery initiated by any of the parties to one or
6 more other parties or to any third parties and shall apply to all information,
7 documents, electronically stored information (“ESI”), and/or things in the
8 possession of or under the control of any party or third party subject to discovery in
9 this action. This Order shall further govern the production of documents and
10 information supplied in this case in any form by a party and designated by that
11 producing party as embodying “Confidential” material for purposes of discovery or
12 otherwise.

13 **II. PROCEDURES FOR PROTECTION OF CONFIDENTIAL**
14 **INFORMATION**

15 **2.01 “Confidential” Information Defined.**

16 “Confidential” material shall include any non-public material that the
17 Producing Party reasonably and in good faith believes contains or reveals trade
18 secrets; confidential research, development or commercial information, including
19 but not limited to inspections of premises or things; or other proprietary or sensitive
20 information or know-how that derives its value from secrecy, or such material the
21 public disclosure of which would cause the Producing Party, or third parties
22 identified therein, undo annoyance or embarrassment. The scope of this Order shall
23 include all copies, excerpts, summaries, or notes that are prepared or derived
24 therefrom and that incorporate or reflect information contained in any Confidential
25 material, as well as testimony and oral conversations derived therefrom or related
26 thereto.

1 **2.02 Designation of Confidential Information.**

2 Each deposition transcript page or portion thereof, each interrogatory answer
3 or portion thereof, each produced document or portion thereof, and each premise or
4 thing or portion thereof which is deemed by the Producing Party to disclose
5 confidential information (hereinafter “Confidential Information”), will be identified
6 and labeled as “CONFIDENTIAL.”

7 Such identification and marking shall be made at the time when the Producing
8 Party provides responses, documents, inspections, or things that it considers to be
9 Confidential Information. In the case of deposition transcript pages, the designating
10 party shall advise opposing counsel of the specific pages to be maintained in
11 confidence, if any, within thirty (30) days after the receipt of the transcript of the
12 deposition, if such request for a confidential designation is not made at or during the
13 deposition. If such request is made during the course of a deposition, no further
14 action is required to maintain the transcript in confidence. During the 30-day
15 period, the entire deposition transcript shall be deemed to be confidential.

16 Further, at the beginning of any physical inspection of any tangible item,
17 premise, or thing or portion thereof, either party, through counsel, may declare the
18 inspection itself, and any and all visual observations, measurements, drawings,
19 depictions, photographic and/or videotaped images, audio-taped and/or transcribed
20 audio-taped information, recordings of any kind, notes, and any documents received
21 or generated related to the physical inspection as containing Confidential
22 Information.

23 **2.03 Disputes as to Confidential Information.**

24 A party may object to the designation of particular Confidential Information
25 by giving written notice to the party designating the disputed information. The
26 written notice shall identify the information to which the objection is made. If the
27 parties cannot resolve the objection within ten (10) business days after the time the
28 notice is received, it shall be the obligation of the party designating the information

1 as CONFIDENTIAL to file an appropriate motion, requesting that the Court
2 determine whether the disputed information should be subject to the terms of this
3 Protective Order. If such a motion is timely filed, the disputed information shall be
4 treated as Confidential Information under the terms of this Protective Order until the
5 Court rules on the motion. If the designating party fails to file such a motion within
6 the prescribed time, the disputed information shall lose its designation as
7 CONFIDENTIAL and shall not thereafter be treated as Confidential Information in
8 accordance with this Protective Order. In connection with a motion filed under this
9 provision, the party designating the information as CONFIDENTIAL shall bear the
10 burden of establishing that good cause exists for the disputed information to be
11 treated as Confidential Information.

12 **III. AUTHORIZED USE OF CONFIDENTIAL INFORMATION**

13 **3.01 Use of Confidential Information.**

14 Confidential Information shall not be used or shown, disseminated, copied or
15 in any way communicated to any person for any purpose whatsoever, other than as
16 required for the preparation and trial of this action, including any appeals, and only
17 in compliance with this Order. Confidential Information shall not be used for
18 competitive purposes. No person shall under any circumstances sell, offer for sale,
19 advertise or in any way disclose Confidential Information (*e.g.*, no person shall
20 permit the viewing, dissemination, copying, recording, duplicating, transmitting or
21 sharing of Confidential Information). Counsel for Plaintiff or Defendant shall take
22 necessary and reasonably proper precautions to prevent the unauthorized or
23 inadvertent disclosure or distribution of any Confidential Information.

24 Except with the prior written consent of counsel for the party designating the
25 information or upon further order of this Court, disclosure of Confidential
26 Information shall be limited to the following persons, who shall be referred to as
27 “Qualified Persons”:
28

1 (a) attorneys of record for any of the parties and necessary employees of
2 the attorneys of record or the law firm of the attorneys of record in this case;

3 (b) all outside experts and consultants, who are not employees, officers,
4 directors, or representatives of any party, retained by the parties and whose
5 assistance is necessary in the preparation and trial of this action and who have a
6 need related to this litigation to review the Confidential Information, as well as the
7 employees of the outside experts and consultants or the firm of such experts and
8 consultants who have a need related to this litigation to review the Confidential
9 Information;

10 (c) all named parties who have made an appearance in this lawsuit and
11 their employees; and

12 (d) the judge and jury that hears this case at trial and any necessary court
13 personnel.

14 Copies of Confidential Information bearing a label specified in paragraph
15 2.01 and 2.02 hereof shall not be disclosed to any person, other than the Qualified
16 Persons of paragraph 3.01, by the party to whom they are produced, unless they
17 become a part of the public record of this action.

18 **3.02 Prerequisites to Disclosure to Qualified Persons.**

19 No person listed in Paragraph 3.01 (a) - (c) shall be allowed access to
20 Confidential Information unless each such person is (i) given a copy of this Order
21 and thoroughly advised as to its terms by the respective party's attorney; and (ii)
22 agrees in writing to strictly comply with the terms of this Order through completion
23 of the form that is attached to this Order as Exhibit 1. For the persons listed in
24 Paragraph 3.01 (a), the requirements of this Paragraph 3.02 can be met by the
25 attorney of record completing the form attached as Exhibit 1 on behalf of the
26 attorney and the attorney's agents or employees.

27 Before disclosing Confidential Information to any person who is known to be
28 a competitor (or an employee of a competitor of the party that so designated the

1 discovery material), the party wishing to make such disclosure shall give at least
2 seven (7) business days advance notice in writing to the counsel who designated
3 such discovery material as Confidential Information, stating that such disclosure
4 will be made, identifying by subject matter category the discovery material to be
5 disclosed, and stating the purpose of such disclosure. If, within the seven (7)
6 business day period, an application is made to the Court, objecting to the proposed
7 disclosure, disclosure is not permissible until the Court has ruled on such
8 application. As used in this paragraph, the term “competitor” means any medical
9 device manufacturer, distributor or seller other than Wright Medical Technology.

10 For each Qualified Person to whom disclosure of Confidential Information is
11 made, each respective counsel shall retain a copy of the signed agreement pursuant
12 to the requirements of the preceding paragraph.

13 **3.03 Depositions.**

14 The confidentiality requirements of this Order extend to oral depositions and
15 depositions on written questions. Any individual not authorized by this Protective
16 Order to be a recipient of Confidential Information may be excluded from a
17 deposition while such information is being elicited.

18 **3.04 Filing Confidential Information.**

19 The parties shall comply with Local Rule 79.2 and Judge Gallo’s Civil
20 Chambers Rules when filing motions to seal and when filing Confidential
21 Information under seal. Confidential Information shall not be filed with the Court
22 except when required in connection with matters pending before the Court;
23 however, Confidential Information and other papers filed under seal shall be
24 available to the Court, to counsel of record, and to all other persons entitled to
25 receive the Confidential Information contained therein under the terms of this Order.

26 No document shall be filed under seal unless counsel secures a Court order
27 allowing the filing of a document under seal. An application to file a document
28 under seal shall be served on opposing counsel, and on the person or entity that has

1 custody and control of the document, if different from opposing counsel. If
2 opposing counsel, or the person or entity who has custody and control of the
3 document, wishes to oppose the application, he/she must contact the chambers of the
4 judge who will rule on the application, to notify the judge's staff that an opposition
5 to the application will be filed.

6 **3.05 Use of Confidential Information during the course of litigation and**
7 **at trial.**

8 Confidential Information may be included in whole or in part in pleadings,
9 motions, briefs, or otherwise filed with the court as necessary as long as the filing
10 party complies with the requirements of Local Rule 79.2 outlined in paragraph 3.04,
11 above.

12 **IV. PROCEDURES UPON THE CONCLUSION OF THIS LITIGATION**

13 **4.01 Return of materials containing Confidential Information.**

14 Within thirty (30) days after entry of dismissal or of final judgment in this
15 action, including appeals, and upon written request, all documents and information,
16 together with all copies thereof that have been and remain designated as including
17 Confidential Information, shall be collected and returned to Plaintiff and/or
18 Defendant, as the case might be. Additionally, the parties' counsel shall cooperate
19 in confirming that said documents and information in the possession of the Qualified
20 Persons have been returned to Plaintiff and/or Defendant, as the case might be. If
21 requested by Plaintiff or Defendant, all Qualified Persons to whom any Confidential
22 Information was disseminated shall sign a certification to verify that all documents
23 and materials in their possession, containing Confidential Information, have been
24 returned.

25 **4.02 Continuing jurisdiction of the Court.**

26 After termination of this litigation, the provisions of this Order shall continue
27 to be binding unless otherwise ordered by the Court. This Court retains and shall
28

1 have jurisdiction over the parties and recipients of Confidential Information for
2 enforcement of the provisions of this Order.

3 **V. MISCELLANEOUS PROVISIONS**

4 **5.01 Binding effect.**

5 This Order shall be binding upon the parties, their attorneys, and their
6 successors, executors, personal representatives, administrators, heirs, legal
7 representatives, assigns, employees, agents, independent contractors and other
8 persons or organizations over which they have control.

9 **5.02 No waiver or admission.**

10 Neither the taking of any action in accordance with the provisions of this
11 Protective Order, nor the failure to object thereto, shall be construed as a waiver of
12 any claim or defense in this action. The entry of this Protective Order shall not be
13 construed as a waiver of any right to object to furnishing information in response to
14 a discovery request or to object to a requested inspection of documents or things.
15 Nothing contained in this Protective Order, and no action taken in compliance with
16 it, shall: (a) operate as an admission by any party or person that any particular
17 document or information is or is not confidential; (b) operate as a waiver of any
18 claim or defense in this action; or (c) prejudice in any way the right of any party or
19 person to seek a Court determination of whether or not particular documents or
20 information should be disclosed or, if disclosed, whether or not they should be
21 deemed Confidential Information and subject to this Protective Order.

22 **5.03 Inadvertent Disclosure by Producing Party.**

23 The inadvertent and/or unintentional disclosure by the Producing Party of
24 Confidential Information, either by way of document production or by deposition
25 testimony, regardless of whether the information was so designated at the time of
26 disclosure, shall not be deemed a waiver in whole or in part of a party's claim of
27 confidentiality, either as to the specific information disclosed or as to any other
28 information relating thereto or concerning the same or unrelated subject matter.

1 Any such inadvertently or unintentionally disclosed material by a Producing Party
2 not designated as such at the time of its release shall be designated as
3 CONFIDENTIAL as soon as reasonably possible after the Producing Party becomes
4 aware of the erroneous release and shall thereafter be treated as confidential
5 hereunder. No liability shall attach for the Receiving Party's disclosure of
6 inadvertently or unintentionally disclosed Confidential Information from the time of
7 receipt of that material until such time as the Producing Party properly designates it
8 as confidential.

9 **5.04 Privileges and Objections.**

10 Nothing in this Order shall preclude any party from asserting the attorney-
11 client, work product, or any other applicable privilege as to any document or
12 information. It is understood and agreed that nothing herein constitutes a waiver of
13 the right of any party to raise or assert any objections, including but not limited to
14 defenses or objections with respect to the use, relevance, or admissibility at trial of
15 any evidence. This Order shall not be construed as a waiver by any party of any
16 legally cognizable privilege or protection to withhold any document or information,
17 or of any right that any party may have to assert such privilege or protection at any
18 stage of the proceeding.

19 **5.05 Termination of Litigation**

20 This Order, insofar as it restricts the communication and use of Confidential
21 Information, shall survive and continue to be binding after the conclusion of this
22 action, and the Court shall retain jurisdiction over these parties and this matter for
23 the purpose of ensuring compliance with the Order and granting such other and
24 further relief as may be necessary.

25 At the conclusion of this action, including any appeals, all documents,
26 records, tangible materials, or other information designated as CONFIDENTIAL
27 and (except as provided herein with respect to documents reflecting privileged
28 communication or attorney work product) and all copies of any of the foregoing

1 shall be promptly returned by counsel for the Receiving Party to counsel for the
2 Producing Party. In the alternative, to the extent that documents reflecting privileged
3 communications or attorney work product contain information designated
4 CONFIDENTIAL, the Receiving Party may, in lieu of returning such documents to
5 the Producing Party, certify in writing to the Producing Party, within forty two (42)
6 days of the termination of the litigation, that such documents have been destroyed.

7 **5.06 Relief from Order.**

8 Any person may request the Court to grant relief from any provisions of this
9 Protective Order.

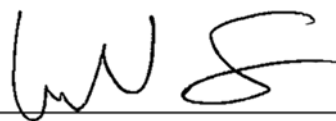
10 **5.07 Exclusions.**

11 Nothing herein shall impose any restrictions on the use or disclosure by any
12 party or any witness of documents or information obtained lawfully by any party or
13 any witness independently of the discovery proceedings in this action, whether or
14 not such documents or information are also obtained from Plaintiff or Defendant, as
15 the case might be, in this action. Nothing in this Protective Order shall prevent a
16 party or non-party from using or disclosing its own documents or information for
17 any purpose, regardless of whether they are designated Confidential under this
18 Protective Order. Nothing in this Protective Order shall prevent a party from
19 disclosing information to any person who authored, or who otherwise lawfully
20 received or possessed such information, including, without limitation, for purposes
21 of obtaining additional discovery from that person.

22 **5.08** The Court retains the final and complete authority to redesignate any
23 confidential document as a public document.

24 IT IS SO ORDERED.

25 DATED: April 3, 2017

26 

27 Hon. William V. Gallo
28 United States Magistrate Judge

Hayes v. Wright Medical Technology, Inc.
Case No: 16-cv-01072-CAB (WVG)

EXHIBIT 1

AGREEMENT TO BE BOUND BY PROTECTIVE ORDER

I, _____, hereby declare that:

1. My address is _____.

2. My present employer is _____ and the address of my present employment is _____.

3. My present occupation or job description is _____.

4. I have received a copy of the Protective Order in this case.

5. I have carefully read and understand the provisions of the Protective Order.

6. I agree to be bound by the terms of the Protective Order, and to use the information provided to me only for the purposes of this action.

7. I will hold in confidence and not disclose to anyone not qualified under the Protective Order, any Confidential Information or any words, summaries, abstracts, or indices of Confidential Information disclosed to me.

8. I will return all Confidential Information and summaries, abstracts and indices thereof which come into my possession, and documents or things which I have prepared relating thereto, to counsel for the party by whom I am employed or retained.

9. I understand that my failure to abide by the terms of the Protective Order entered in the above-captioned action will subject me, without limitation, to civil and criminal penalties for contempt of Court.

10. I acknowledge that, by signing this agreement, I am subjecting myself to the jurisdiction of the United States District Court for the Southern District of California with respect to enforcement of this Protective Order.

By: _____