ROBBINS GELLER RUDMAN & DOWD LLP
Shawn A. Williams (Bar No. 213113)
Post Montgomery Center
One Montgomery Street, Suite 1800
San Francisco, CA 94104
Telephone: 415/288-4545
415/288-4534 (fax)
shawnw@rgrdlaw.com

Liaison Counsel for Plaintiffs and the Proposed Class

LABATON SUCHAROW LLP
JONATHAN GARDNER *(pro hac vice)*
SERENA P. HALLOWELL (*pro hac vice*)
CAROL C. VILLEGAS (*pro hac vice*)
SAMUEL B. C. DE VILLIERS (*pro hac vice*)
140 Broadway
New York, NY 10005
Telephone: 212/907-0700
212/818-0477 (fax)
jgardner@labaton.com
shallowell@labaton.com
cvillegas@labaton.com
sdevilliers@labaton.com

Counsel for Plaintiffs and the Proposed Class

[Additional counsel appear on signature page]

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IN RE INTUITIVE SURGICAL, INC. SECURITIES LITIGATION	No. 5:13-cv-01920-EJD CLASS ACTION **PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR CLASS CERTIFICATION, APPOINTMENT OF CLASS REPRESENTATIVES, AND APPROVAL OF CLASS COUNSEL** DATE: January 21, 2016 TIME: 9:00 a.m. COURTROOM: Honorable Edward J. Davila

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes and Rules

Other Authorities

NOTICE OF MOTION

TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on January 21, 2016 at 9:00 a.m., or as soon thereafter as the matter may be heard in the Courtroom of the Honorable Edward J. Davila, movants herein will ask this Court for an Order certifying this matter as a class action pursuant to Federal Rule of Civil Procedure 23, appointing Lead Plaintiff Employees' Retirement System of the State of Hawaii and named Plaintiff Greater Pennsylvania Carpenters' Pension Fund as Co-Class Representatives, and appointing Labaton Sucharow LLP as class counsel. This motion is supported by the following memorandum of points and authorities, all pleadings and papers filed herein, arguments of counsel, and any other matters properly before the Court.

STATEMENT OF ISSUES TO BE DECIDED

1. Whether this matter should be certified as a class action.
2. Whether Employees' Retirement System of the State of Hawaii and Greater Pennsylvania Carpenters' Pension Fund should be appointed as Co-Class Representatives.
3. Whether Labaton Sucharow LLP should be appointed as class counsel.

MEMORANDUM OF POINTS AND AUTHORITIES

Lead Plaintiff Employees' Retirement System of the State of Hawaii ("Hawaii ERS") and additionally named Plaintiff Greater Pennsylvania Carpenters' Pension Fund ("Greater Pennsylvania") (together "Plaintiffs") respectfully submit this memorandum of law in support of their motion for (i) class certification pursuant to Fed. R. Civ. P. ("Rule") 23(a) and (b)(3); (ii) the appointment of Plaintiffs as Class Representatives; and (iii) the appointment of Labaton Sucharow LLP ("Lead Counsel") as Class Counsel pursuant to Fed. R. Civ. P. 23(g).

I. INTRODUCTION

Plaintiffs seek certification of a class consisting of all persons and entities who purchased or acquired the publicly traded common stock of Intuitive Surgical, Inc. ("Intuitive" or the "Company") during the period from February 6, 2012 through July 18, 2013, inclusive (the "Class Period"), and who were damaged thereby (the "Class").[1] Securities fraud cases such as this one are particularly appropriate candidates for class action treatment under Rule 23(b)(3) because the elements of the cause of action generally relate to the acts or omissions of the defendants and because individual damages might be insufficient to justify bringing individual cases.

Like most securities cases, this action easily satisfies all the requirements of Rule 23(a): (i) the fact that, as Defendants admit, tens of millions of Intuitive shares traded on the NASDAQ stock exchange during the Class Period and more than 1,000 persons and/or entities purchased or acquired Intuitive common stock during the Class Period, demonstrates that the proposed class is so numerous that joinder of all members is impracticable; (ii) common questions of law and fact

[1] *See* Amended Class Action Complaint for Violations of the Federal Securities Laws ("CAC" or "Complaint"), ECF No. 48, at 1 and ¶ 256. Excluded from the Class are (i) Defendants Intuitive, Gary S. Guthart ("Guthart"), Marshall L. Mohr ("Mohr"), and Lonnie M. Smith ("Smith") (collectively, "Defendants"); (ii) members of the immediate families of Guthart, Mohr, and Smith; (iii) any subsidiaries and affiliates of Defendants; (iv) any person who is or was an officer or director of Intuitive or any of Intuitive's subsidiaries or affiliates; (v) Defendants' directors' and officers' liability insurance carriers, and any affiliates or subsidiaries thereof; (vi) Intuitive's employee retirement and benefit plan(s); and (vii) the legal representatives, heirs, successors and assigns of any such excluded person or entity. *Id.* ¶ 256.

predominate because Class members were injured by the same alleged misconduct;[2] (iii) for the same reason, the claims of the representative parties as well as the defenses thereto are typical of the claims and defenses applicable to the Class; and (iv) Plaintiffs are adequate Class Representatives because their interests are not antagonistic to those of other Class members, and Plaintiffs and their counsel are fully able to vigorously prosecute this action on behalf of the Class.

This action also satisfies Rule 23(b)(3)'s predominance and superiority requirements. Questions common to all Class members predominate over any questions affecting only individual Class members. In particular, a class-wide presumption of reliance is doubly satisfied here: *First*, the fact that Defendants' material omissions predominate triggers the presumption of reliance articulated in *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 153-54 (1972); *second*, Plaintiffs' showing of market efficiency for Intuitive's common stock triggers the "fraud-on-the-market" presumption of reliance articulated in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), and recently reaffirmed in *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2413 (2014) (*Halliburton II*). Further, proceeding as a class action is superior to other available methods for fairly and efficiently adjudicating Class members' claims.

Accordingly, Plaintiffs request certification of the Class, with Plaintiffs serving as Co-Class Representatives and Lead Counsel serving as Class Counsel.

II. LEGAL STANDARD

When a court evaluates class certification, "the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather, whether the requirements of Rule 23 are met." *In re Diamond Foods, Inc., Sec. Litig.*, 295 F.R.D. 240, 245 (N.D. Cal. 2013) (quoting *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177–78 (1974)). Importantly, while "the trial court must conduct a 'rigorous analysis' to determine whether the party seeking certification has met the prerequisites of Rule 23 . . . the substantive allegations of

[2] Common questions of law and fact implicated include Defendants' alleged misrepresentations and omissions, the materiality of such misrepresentations and omissions, and Defendants' scienter.

the complaint must be accepted as true . . . [and] [n]either the possibility that a plaintiff will be unable to prove his allegations, nor the possibility that the later course of the suit might unforeseeably prove the original decision to certify the class wrong, is a basis for declining to certify a class which apparently satisfies Rule 23." *Marsh v. First Bank of Del.*, 2014 WL 554553, at *4 (N.D. Cal. Feb. 7, 2014) (internal quotations and citations omitted). Because merits questions may be considered "only to the extent [] that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied," *In re Diamond Foods*, 295 F.R.D. at 245 (quoting *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1194–95 (2013)), the court only requires "sufficient material before him to determine the nature of the allegations, and rule on compliance with the Rule's requirements[.]" *Blackie v. Barrack*, 524 F.2d 891, 901 (9th Cir. 1975).

III. STATEMENT OF FACTS

This action alleges that Defendants violated Sections 10(b), 20(a) and 20A of the Securities Exchange Act of 1934 and U.S. Securities and Exchange Commission ("SEC") Rule 10b-5 promulgated thereunder. This Court has already determined that the Complaint provides detailed allegations that Intuitive and certain of its officers deceived the investing public by engaging in concerted efforts to conceal the true safety risk profile of Intuitive's flagship product and source of revenues, a robotic surgery system called da Vinci. *See* Order Granting in Part and Denying in Part Defendants' Motion to Dismiss ("Order"), ECF No. 83, pgs. 11–14. Throughout the Class Period, the Complaint alleges that Defendants made numerous materially false and misleading statements and omissions regarding the safety of the da Vinci system, including failing to disclose (i) adverse event reports, which resulted in the underreporting of serious injuries and deaths resulting from da Vinci defects, (ii) the number and nature of products liability claims brought against the Company, and (iii) three "secret recalls" that took place in October 2011. *Id.* at 12.

Through a series of corrective disclosures, between February 28 and July 18, 2013, news of the FDA's focus on da Vinci's safety trickled out to the public, along with revelations of the concealed defects causing injury and death. CAC ¶¶ 174–79. On February 28, 2013, Bloomberg

reported publicly for the first time that the FDA was "prob[ing]" da Vinci's safety. *Id.* ¶ 174. On March 5, 2013, an analyst at Janney Capital Markets said that Intuitive shares were under pressure as a result of "business journal articles continu[ing] to harp on potential safety concerns on da Vinci," following the revelation of the FDA probe. *Id.* ¶ 175(a). By April 2013, Intuitive began publicly reporting that patients were not electing to use da Vinci as rapidly as before. *Id.* ¶ 176(a). Wall Street analysts attributed the lack of procedure growth to the then-recent "negative press." *Id.* Toward the end of the Class Period, on July 8, 2013, Intuitive reported preliminary 2Q 2013 financial results that fell well below expectations, reflected in part by weaker-than-expected da Vinci system sales. *Id.* ¶ 177 (a). Analysts believed that, rather than being attributable to economic factors such as hospitals cutting capital expenditures, these results reflected a changing perception of da Vinci's safety among Intuitive's hospital clients as U.S. regulators initiated hospital probes surveying surgeons about their use of the system. *Id.* ¶¶ 177 (b)–(f). Then, on July 16, 2013, the FDA issued an official "FDA Warning Letter"—the most serious agency communication and often the last step prior to seizure, injunction, and/or civil money penalties—concluding that, among other things, Intuitive knew that defective instrument "Tip Covers" and intraoperative cleaning processes for da Vinci instruments posed a risk to health when it conducted secret recalls seeking to address these risks in October 2011, but the Company failed to report these attempted "corrections" in violation of FDA reporting requirements. *Id.* ¶¶ 1, 16–17. On July 19, 2013 a Bloomberg article entitled "Intuitive Reeling as FDA Cites Lack of Visibility on Problems" reported "Intuitive . . . has lost about $6 billion in value over five months after disclosures about adverse events with its products, a recent recall, and now, a regulatory warning [that Intuitive] hasn't adequately reported on issues concerning the devices." *Id.* ¶ 178(c). Further, a "review of [FDA] records [*i.e.*, the MAUDE database] now shows the reports of injuries involving robot procedures have doubled in the first six months of 2013." *Id.* Cumulatively, these disclosures resulted in a dramatic decline in the price of Intuitive's stock as the market responded to the revelation that Defendants had been concealing the risk posed by da Vinci. *Id.* ¶ 18.

IV. ARGUMENT

A. Plaintiffs' Claims are Well Suited for Class Treatment

This is a quintessential case for class certification. The claims arise from the alleged false and misleading public statements and omissions made by Defendants in violation of the federal securities laws. Class actions like this one serve both public and private interests in obtaining legal redress for violations of regulatory schemes, particularly those governing the securities markets. *See Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 345 (2005) ("The securities statutes seek to maintain public confidence in the marketplace. They do so by deterring fraud, in part, through the availability of private securities fraud actions.") (citations omitted).

In determining whether this action should be certified as a class action, the question is not whether Plaintiffs will prevail on the merits of the claims alleged, but whether the requirements of Rule 23 are satisfied. *See Amgen*, 133 S. Ct. at 1194–95 ("Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage. Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied.").

Furthermore, it has long been recognized that securities fraud cases such as this one are particularly appropriate candidates for class action treatment under Rule 23(b)(3) because the elements of the cause of action generally relate to the acts or omissions of the defendants and because individual damages might be insufficient to justify bringing individual cases. *See, e.g.*, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997). Where, as here, the underlying securities are traded in an efficient market, reliance upon the alleged misrepresentations is presumed. *Halliburton II*, 134 S. Ct. at 2414 (upholding the fraud on the market presumption adopted in *Basic*, 485 U.S. 224). Additionally, because "the case can be characterized as one that primarily alleges omissions," Plaintiffs are also entitled to a presumption of reliance pursuant to *Affiliated Ute*, 406 U.S. 128. *See Binder v. Gillespie*, 184 F.3d 1059, 1063–64 (9th Cir. 1999). Consequently, here there is no question that common issues predominate and class certification is proper in this action.

B. The Requirements of Rule 23(a) are Satisfied

Class certification should be granted because this action satisfies each of the four prerequisites set forth in Rule 23(a): (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy. *See, e.g.*, *Parsons v. Ryan*, 754 F.3d 657, 674 (9th Cir. 2014); *In re Diamond Foods*, 295 F.R.D. at 244–45.

1. The Members of the Proposed Class are so Numerous that Joinder of All Members is Impracticable

Rule 23(a)(1) permits class certification if "the class is so numerous that joinder of all members is impractical." To satisfy the numerosity requirement, "[a] specific minimum number is not necessary, and plaintiff[s] need not state the exact number of potential class members." *Richie v. Blue Shield of Cal.*, 2014 WL 6982943, at *15 (N.D. Cal. Dec. 9, 2014). Rather, "numerosity is presumed where the plaintiff class contains forty or more members," *In re Cooper Cos. Inc. Sec. Litig.*, 254 F.R.D. 628, 634 (C.D. Cal. 2009); *see also* William B. Rubenstein, NEWBERG ON CLASS ACTIONS § 3:12 (5th ed. 2015) (same).

While the exact number of Class members is unknown to Plaintiffs at this time and can be ascertained only through a notice program,[3] Defendants have admitted that more than 1,000 persons and/or entities purchased or acquired Intuitive common stock during the Class Period. *See* Defendants' Objections and Responses to Plaintiffs' First Set of Requests for Admission ("RFA Responses"), Ex. 1 at 5.[4] Furthermore, Intuitive had between 39 million and 40 million shares outstanding and actively trading on the NASDAQ during the Class Period. *Id.* at 22; *see also* Expert Report of Chad Coffman, CFA ("Coffman Report"), Ex. 2 at ¶ 62. "The Court certainly may infer that, when a corporation has millions of shares trading on a national exchange, more than 40 individuals purchased stock over the course of more than a year." *Cooper Cos.*, 254 F.R.D. at 634 (finding numerosity). Furthermore, Intuitive common stock had

[3] Record owners and other members of the Class may be identified from records maintained by Intuitive or its transfer agent and may be notified of the pendency of the Action by mail, using a form of notice similar to that customarily used in securities class actions.

[4] Throughout, "Ex." refers to exhibits to the Declaration of Jonathan Gardner in Support of Plaintiffs' Motion for Class Certification.

an average daily trading volume of approximately 375,000 shares over the year-and-a-half Class Period (Coffman Report, Ex. 2 at ¶¶ 23, 26), adding up to well over 100 million shares traded during that period. As with the total number of shares outstanding, "in securities cases, when millions of shares are traded during the proposed class period, a court may infer that the numerosity requirement is satisfied." *Dean v. China Agritech*, 2012 WL 1835708, at *4 (C.D. Cal. May 3, 2012) (finding numerosity).

Accordingly, the numerosity prong is satisfied.

2. Questions of Law and Fact are Common to the Proposed Class

Rule 23(a)(2) requires that there be "questions of law or fact common to the class." The commonality requirement has been construed permissively. *In re UTStarCom, Inc., Sec. Litig.*, 2010 WL 1945737, at *4 (N.D. Cal. May 12, 2010). "All questions of fact and law need not be common to satisfy the rule." *In re Juniper Networks, Inc. Sec. Litig.*, 264 F.R.D. 584, 588 (N.D. Cal. 2009) (internal quotations omitted). "The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies." *Parra v. Bashas', Inc.*, 536 F.3d 975, 978 (9th Cir. 2008) (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998)). Indeed, "[c]ommonality simply requires that there be at least *one* legal or factual issue common to the class." *In re VeriSign, Inc. Sec. Litig.*, 2005 WL 7877645, at *5 (N.D. Cal. Jan. 13, 2005) (emphasis added); *see also Parsons*, 754 F.3d at 675 ("Plaintiffs need not show . . . that every question in the case, or even a preponderance of questions, is capable of class wide resolution. So long as there is even a single common question, a would-be class can satisfy the commonality requirement of Rule 23(a)(2).") (quotations and citations omitted). "[C]ommonality 'is easily met in cases where class members all bought or sold the same stock in reliance on the same disclosures made by the same parties, even if damages vary.'" *Verisign*, 2005 WL 7877645, at *5; *see also In re LDK Solar Sec. Litig.*, 255 F.R.D. 519, 528 (N.D. Cal. 2009) ("Confronted with a class of purchasers allegedly defrauded over a period of time by similar misrepresentations, courts have taken the common sense approach that the class is united by a common interest in determining whether a defendant's course of conduct is in its broad outlines actionable, which is not defeated by slight

differences in class members' positions, and that the issue may profitably be tried in one suit.") (quoting *Blackie*, 524 F.2d at 902) (alteration omitted).

Here, all Class members are alleged to have been harmed as a result of a common course of conduct arising from material misrepresentations and omissions Defendants made to the investing public. Thus, there is a well-defined community of interest in the questions of law and fact at issue, which include the following:

(a) Whether Defendants violated the Securities Exchange Act of 1934 (the "Exchange Act");

(b) Whether Defendants omitted and/or misrepresented material facts;

(c) Whether Defendants knowingly or recklessly disregarded that their statements and omissions were false and misleading;

(d) Whether the price of Intuitive's stock was artificially inflated as a result of Defendants' misrepresentations and/or omissions; and

(e) Whether and to what extent disclosure of the truth regarding Defendants' omissions and/or misrepresentations of material facts caused class members to suffer economic loss and damages.

These common issues satisfy the commonality prong. *See In re Juniper Networks*, 264 F.R.D. at 588-89 (noting that under 9th Circuit precedent, "[r]epeated misrepresentations by a company to its stockholders satisfy the commonality requirement," and embellishing on the plain logic behind this straightforward precedent by reciting a similar list of common factors typical to securities class actions in finding commonality); *In re Bridgepoint Educ., Inc. Sec. Litig.*, 2015 WL 224631, at *5 (S.D. Cal. Jan. 15, 2015) (holding that commonality was satisfied by common questions "including whether [defendant] made false statements, whether those statements were material, whether they were intentionally false, and whether they caused class members' losses.").[5]

[5] A finding of commonality is not affected by the fact that Class members will have varying damages because they purchased and sold securities at different times. *James v. UMG Recordings, Inc.*, 2012 WL 12265529, at *2 (N.D. Cal. Nov. 29, 2012) ("[E]ven though potential class members may have individual defenses and damages issues, this does not make class

3. Plaintiffs' Claims are Typical of Those of the Proposed Class

Rule 23(a)(3) requires that the class representative's claims and defenses must be "typical" of the claims or defenses of the prospective class. "The purpose of the typicality requirement is to assure that the interest of the named representative aligns with the interests of the class." *In re Diamond Foods*, 295 F.R.D. at 252 (quoting *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992)). "The test of typicality 'is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct.'" *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 984 (9th Cir. 2011) (quoting *Hanon*, 976 F.2d at 508). "Under the rule's permissive standards, representative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon*, 150 F.3d at 1020. Where a plaintiff's "claims arise from the same events and conduct that gave rise to the claims of other class members" they are typical of the class. *Bridgepoint*, 2015 WL 224631, at *5. Moreover, "[w]e do not insist that the named plaintiffs' injuries be identical with those of the other class members, only that the unnamed members have injuries similar to those of the named plaintiffs and that the injuries result from the same, injurious course of conduct." *Armstrong v. Davis*, 275 F.3d 849, 869 (9th Cir. 2001).

Here, typicality is satisfied because Plaintiffs' claims are founded on the same alleged facts and legal theories as the claims of all other Class members—*i.e.*, the alleged artificial inflation and consequent market correction of the price of Intuitive's stock caused by Defendants' fraudulent public statements and omissions—and the injury Plaintiffs suffered is alleged to be the same as the injury suffered by the proposed Class as a whole. *Bridgepoint*, 2015 WL 224631, at *5 ("Here, Plaintiffs' claims arise from the same events and conduct that gave rise to the claims of other class members. They are, therefore, typical of the class.").

(continued)
certification unreasonable if other common factors predominate.") (citing *In re Conseco Life Ins. Co. LifeTrend Ins. Sales & Mktg. Litig.*, 270 F.R.D. 521, 530 n.8 (N.D. Cal. 2010)).

4. Plaintiffs Will Fairly and Adequately Protect the Interests of the Proposed Class and Should be Appointed Co-Class Representatives

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." The purpose of adequacy "'is to protect the legal rights of absent class members.'" *Verisign*, 2005 WL 7877645, at *8. When Plaintiffs have "a sufficient interest in the outcome of the case to ensure vigorous advocacy" and do not have interests "antagonistic to those of the proposed class," the adequacy requirement is met. 1-14A James Moore et al., MOORE'S MANUAL: FEDERAL PRACTICE & PROCEDURE § 14A.25[1] (3d ed. 2012); *see also Ellis*, 657 F.3d at 985 ("Adequate representation depends on, among other factors, an absence of antagonism between representatives and absentees, and a sharing of interest between representatives and absentees."). "To determine whether named plaintiffs will adequately represent a class, courts must resolve two questions: '(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?'" *Ellis*, 657 F.3d at 985 (quoting *Hanlon*, 150 F.3d at 1020).

Adequacy is amply satisfied here because Plaintiffs' interests are not antagonistic to those of other Class members, and Plaintiffs' counsel is qualified, experienced, and fully capable of prosecuting this action vigorously on behalf of the Class. As set forth above, Plaintiffs purchased Intuitive common stock during the Class Period and were injured by the same material misrepresentations and omissions that injured all proposed Class members. Thus, Plaintiffs' interest in establishing Defendants' liability and obtaining the maximum possible recovery is aligned with the interests of absent Class members. Plaintiffs have also demonstrated their willingness and ability to serve as Class Representatives. Among other responsibilities throughout the litigation so far, Plaintiffs have supervised and monitored the progress of court proceedings, participated in discussions with Lead Counsel concerning case developments, requested and evaluated regular status reports from Lead Counsel, searched for and produced documents relevant to their claims and their status as Lead and named Plaintiffs, are preparing to

be deposed, and have reviewed pleadings in this action. *See* Plaintiffs' Declarations in Support of Class Certification, attached hereto.

Moreover, as set forth in Section D, below, Plaintiffs have engaged qualified, experienced and capable attorneys who have an excellent track record in prosecuting complex securities class actions such as this litigation. As their actions in this case and others demonstrate, Plaintiffs' chosen counsel have committed, and are willing to commit, considerable resources to the prosecution of this action, and have fully, fairly and more than adequately represented the interests of the Class in this action to date. *See K.M. v. Regence Blue Shield*, 2015 WL 519932, at *4 (W.D. Wash. Feb. 9, 2015) ("Questions of a class representative's adequacy dovetail with questions of his counsel's adequacy.").

In sum, Plaintiffs are well-suited to represent the Class, have no interests antagonistic to other Class members and, like other Class members, have been injured by Defendants' material misrepresentations and omissions during the Class Period and suffered losses therefrom. No unique defenses apply to Plaintiffs. Plaintiffs are willing and able to prosecute this action on behalf of the Class and "will fairly and adequately protect the interests of the class." *See* Rule 23(a)(4). Accordingly, the Court should appoint Plaintiffs as Co-Class Representatives and Lead Counsel as Class Counsel.

C. The Requirements of Rule 23(b) are Satisfied

In addition to meeting the prerequisites of Rule 23(a), a class action must also satisfy at least one of the conditions of Rule 23(b). Plaintiffs seek class certification under Rule 23(b)(3), which requires "predominance" and "superiority," both of which are satisfied here.

1. Common Questions of Law and Fact Predominate

Rule 23(b)(3) requires "that the questions of law or fact common to class members predominate over any questions affecting only individual members." This requirement "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623. Where "[t]he claims of all class members will be proven by the same evidence because Defendants' alleged misconduct affected all class members in the same manner," common questions predominate. *In re Celera Corp. Sec. Litig.*, 2014 WL 722408, at

*4 (N.D. Cal. Feb. 25, 2014); *see also In re Diamond Foods*, 295 F.R.D. at 246 ("[The predominance inquiry] focuses on the relationship between the common and individual issues. Class certification under Rule 23(b)(3) is proper when common questions represent a significant portion of the case and can be resolved for all members of the class in a single adjudication.") (citing *Hanlon*, 150 F.3d at 1022) (internal quotations omitted). Rule 23(b)(3) "does *not* require a plaintiff seeking class certification to prove that each 'elemen[t] of [her] claim [is] susceptible to classwide proof,'" just "that common questions '*predominate* over any questions affecting only individual [class] members.'" *Amgen*, 133 S. Ct. at 1196 (emphasis and alterations in original).

For class certification purposes, the Supreme Court has found, and recently reiterated, that falsity, materiality and loss causation are common issues to a class because "failure of proof" of any of these elements "would end the case" for all putative class members. *Amgen*, 133 S. Ct. at 1195-96 ("materiality is a 'common questio[n]' for purposes of Rule 23(b)(3)") (alterations in original); *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2186 (2011) (*Halliburton I*) (plaintiffs are not required to "show loss causation as a condition of obtaining class certification"); *Halliburton II*, 134 S. Ct. at 2416–17.

Here, it is beyond dispute that the questions of law and fact common to all class members include: (i) whether Defendants engaged in a scheme to defraud and intentionally or recklessly made materially false and misleading statements and omissions; and (ii) whether this scheme and these false and misleading statements and omissions caused damages to members of the Class as a whole. As in most securities fraud class action cases, the answer to each of these questions will be tried and proven by common evidence because Defendants' alleged misconduct affected all class members in the same manner, *i.e.*, Defendants' scheme and false and misleading statements and omissions artificially inflated the price of Intuitive common stock. *See, e.g., In re Emulex Corp. Sec. Litig.*, 210 F.R.D. 717, 721 (C.D. Cal. 2002) ("The predominant questions of law or fact at issue in this case are the alleged misrepresentation[s] Defendants made during the Class Period and are common to the class"); *Amchem*, 521 U.S. at 625 ("Predominance is a test readily met in certain cases alleging . . . securities fraud") (citing Rule 23(b)(3) advisory comm. notes).

Once the common questions underlying these claims are resolved, all that will remain is the purely mechanical act of computing the damages suffered by each Class member.[6,7] By contrast, there are no significant individual issues.

2. Plaintiffs Are Entitled to a Presumption of Reliance Under Both *Basic* and *Affiliated Ute*

In a Rule 10b-5 action involving false and misleading statements, courts look to the fraud-on-the-market presumption of reliance recently reaffirmed by the Supreme Court in *Halliburton II*, 134 S. Ct. at 2407–08. Furthermore, in "a mixed case of misstatements and omissions," a presumption of reliance pursuant to *Affiliated Ute*, 406 U.S. 128, is also applicable if "the case can be characterized as one that primarily alleges omissions." *Binder*, 184 F.3d at 1063–64; *see also Cartwright v. Viking Indus., Inc.*, 2009 WL 2982887, at *14 (E.D. Cal. Sept. 14, 2009) (reliance is presumed "where the plaintiffs have primarily alleged omissions, even though the plaintiffs allege a mix of misstatements and omissions.") (citing *Binder*, 184 F.3d at 1064) (internal quotations, alteration, and emphasis omitted). In a case "involving primarily a failure to disclose, positive proof of reliance is not a prerequisite to recovery. *All that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered them important in the making of this decision*." *Affiliated Ute*, 406 U.S. at 153–54 (emphasis added).

Here, plaintiffs have established that they are entitled to a presumption of reliance under both *Basic* and *Affiliated Ute*.

[6] Plaintiffs' expert, Chad Coffman, is fully capable of adequately calculating damages on a class-wide basis at a later stage of the litigation. Coffman Report, Ex. 2 at ¶¶ 72–73 (setting forth common methodology for calculating class wide damages).

[7] As the Ninth Circuit has repeatedly held "'the amount of damages is invariably an individual question and does not defeat class action treatment.'" *Levya v. Medline Indus.*, 716 F.3d 510, 513-14 (9th Cir. 2013) (alteration omitted); *see also Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 815 (7th Cir. 2012) ("It is well established that the presence of individualized questions regarding damages does not prevent certification under Rule 23(b)(3).").

a. Plaintiffs Are Entitled to a Presumption of Reliance Under *Affiliated Ute*

Because the claims stated (and upheld) in this case revolve around Defendants' material omissions of information that, if revealed, would have significantly altered the total mix of information available to investors at the time the information was concealed, Plaintiffs are entitled to a presumption of reliance under *Affiliated Ute*. The *Affiliated Ute* presumption applies to claims "involving primarily a failure to disclose." 406 U.S. at 153; *see also, e.g.*, *Stoneridge Inv. Partners v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 159 (2008); *Binder*, 184 F.3d at 1064 (the *Affiliated Ute* presumption applies to Ninth Circuit "cases that primarily allege omissions."). In such cases, "positive proof of reliance is ***not*** a prerequisite to recovery." *Affiliated Ute*, 406 U.S. at 153–54 (emphasis added); *see also Vervaecke v. Chiles, Heider & Co., Inc.*, 578 F.2d 713, 717 (8th Cir. 1978) (explaining that "reliance has little rational role in cases of nondisclosure, largely because of the difficulty of proving reliance on the negative") (internal quotations omitted). Instead, "[a]ll that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered them important in the making of [their] decision." *Affiliated Ute*, 406 U.S. at 153–54; *see also Plascencia v. Lending 1st Mortg.*, 259 F.R.D. 437, 447 (N.D. Cal. 2009) (same).

The *Affiliated Ute* doctrine arises out of the pragmatic reality that "as a practical matter [reliance on an omission] is impossible to prove." *In re Facebook, Inc., IPO Sec. & Derivative Litig.*, 986 F. Supp. 2d 428, 469 (S.D.N.Y. 2013). This is because, "[w]hen a defendant's fraud consists primarily of omissions, requiring a plaintiff to show a speculative set of facts, *i.e.*, how he would have behaved if omitted material information had been disclosed, places an unrealistic evidentiary burden on the 10(b) plaintiff." *In re Smith Barney Transfer Agent Litig.*, 290 F.R.D. 42, 47 (S.D.N.Y. 2013) (alteration and internal quotations omitted). "Accordingly, reliance is presumed when it would be impossible to prove." *Id.*

Furthermore, as with the fraud-on-the-market presumption of reliance, a plaintiff need not prove materiality in order to invoke the *Affiliated Ute* presumption at the class certification stage; it need only be alleged. *See Amgen*, 133 S. Ct. at 1195 ("[B]ecause the question of

materiality is an objective one, involving the significance of an omitted or misrepresented fact to a reasonable investor, materiality can be proved through evidence common to the class.") (alteration, ellipsis, and quotations omitted); *In re Sadia, S.A. Sec. Litig.*, 269 F.R.D. 298, 308 (S.D.N.Y. 2010) ("Demonstrating materiality under the fraud on the market and *Affiliated Ute* presumptions presents essentially the same inquiry."); *Fogarazzo v. Lehman Bros., Inc.*, 232 F.R.D. 176, 187 (S.D.N.Y. 2005) ("[T]he *Affiliated Ute* presumption is simply the fraud on the market presumption applied to material omissions. Both presumptions depend on the materiality of the undisclosed or misstated information."); *Plascencia*, 259 F.R.D. at 447 (granting class certification in a case "involving primarily a failure to disclose" because, at trial, "a jury may find that the [undisclosed] initial interest rate and negative amortization features of the loans were material in the sense that a reasonable person would have wanted to know about them. The jury thus may presume that class members would not have agreed to purchase their loans if Defendants had clearly disclosed that the initial one percent rate was ephemeral and that negative amortization was certain to occur if only the minimum payments were made.").

Here, there can be no dispute that "the case can be characterized as one that primarily alleges omissions," *Binder*, 184 F.3d at 1064, and that materiality has been adequately alleged. In its Order Granting in Part and Denying in Part Defendants' Motion to Dismiss, this Court held that the Complaint successfully alleged that Defendants' Class Period statements regarding da Vinci's safety and efficacy "were false and misleading *because*, in making them, Defendants *failed to disclose* [i] various regulatory violations, [ii] da Vinci's defects regarding the monopolar scissors and faulty tip covers, and [iii] the material rise in da Vinci adverse events and products liability suits that resulted from these defects." Order at 11–12 (emphasis added). This Court then went on to "address the *classes of omissions* in turn," finding, in each case, that taking Plaintiffs' contentions as true, "it is plausible that the reasonable investor would find the existence of [each of] these [omissions] to significantly alter the total mix of information available and that Defendants' statements created an impression of da Vinci's safety that *materially differed from reality*." *Id.* at 12–14 (emphasis added). Finally, this Court held that, *in light of these material omissions*, "the statements made regarding da Vinci's safety and benefits

are sufficient to state a claim under the PSLRA." *Id.* at 14. The same analysis applies here, and thus there is no doubt that Plaintiffs are entitled to rely on the *Affiliated Ute* presumption to establish reliance.

b. Plaintiffs Are Also Entitled to a Presumption of Reliance Under *Basic*'s Fraud-on-the-Market Theory

Class-wide reliance is also established in this action through the "fraud-on-the-market" presumption of reliance—that "the market price of shares traded on well-developed markets reflects all publicly available information, and, hence, any material misrepresentations" and that investors in such markets transact "in reliance on the integrity of that price"—which the Supreme Court set forth in *Basic*, 485 U.S. at 247, and recently reaffirmed in *Halliburton II*, 134 S. Ct. 2398. Application of *Basic* dispenses with the requirement that each Class member prove individual reliance on Defendants' alleged misstatements and/or omissions. *See id.* at 241–42. To invoke the *Basic* presumption of reliance, Plaintiffs must establish that "(1) the alleged misrepresentations were publicly known, (2) the stock traded in an efficient market, and (3) the relevant transaction took place between the time the misrepresentations were made and the time the truth was revealed." *In re Diamond Foods*, 295 F.R.D. at 247 (citing *Halliburton I*, 131 S. Ct. at 2185).

Here, the *Basic* prerequisites of publicity, market efficiency, and market timing are easily met. Plaintiffs have alleged that Defendants made material public misrepresentations and omissions that artificially inflated (or artificially maintained) the market price of Intuitive's stock. *See, e.g.,* CAC ¶¶ 37, 172–73. Because Plaintiffs bought Intuitive common stock during the Class Period and suffered losses when the truth was disclosed, *see supra*, "the relevant transaction took place between the time the misrepresentations were made and the time the truth was revealed." *In re Diamond Foods*, 295 F.R.D. at 247 (internal quotations and citation omitted).

Finally, Intuitive's common stock traded on the NASDAQ, which is an efficient market. *In re Diamond Foods*, 295 F.R.D. at 250 (finding market efficiency after observing that defendant had failed to "identif[y] any authority, binding or otherwise, that has held that

common shares traded on the NASDAQ are not traded in an efficient market."); *In re Juniper Networks*, 264 F.R.D. at 591 ("Plaintiffs made a *prima facie* showing that the fraud-on-the-market presumption of reliance applied because . . . stock was actively traded on an efficient market—the NASDAQ."); *In re Groupon, Inc. Sec. Litig.*, 2014 WL 5245387, at *2 (N.D. Ill. Sept. 23, 2014) ("Here, Groupon's stock was traded on the NASDAQ, and so it is undeniably a frequently traded stock in an efficient market."); *Lumen v. Anderson*, 280 F.R.D. 451, 459 (W.D. Mo. 2012) ("It would be remarkable for a court to conclude NASDAQ is not an efficient market[.]").

Accordingly, the predominance prong is satisfied.

i. Intuitive Common Stock Traded In an Efficient Market

Courts, including the Ninth Circuit, consider the factors set forth in *Cammer v. Bloom*, 711 F. Supp. 1264 (D.N.J. 1989), when evaluating market efficiency. *In re Diamond Foods*, 295 F.R.D. at 247. The five *Cammer* factors are "[1] whether the stock trades at a high weekly volume; [2] whether securities analysts follow and report on the stock; [3] whether the stock has market makers and arbitrageurs; [4] whether the company is eligible to file [a short form registration statement]; and [5] whether there are 'empirical facts showing a cause and effect relationship between unexpected corporate events or financial releases and an immediate response in the stock price.'" *Binder*, 184 F.3d at 1065 (quoting *Cammer*, 711 F. Supp. at 1286–87); *see also, e.g.*, *Nguyen v. Radient Pharm. Corp.*, 287 F.R.D. 563, 571 (C.D. Cal. 2012) (same); *Hodges v. Akeena Solar, Inc.*, 274 F.R.D. 259, 268 n.16 (N.D. Cal. 2011) (same). Some courts, including certain district courts in the Ninth Circuit, have found that four additional factors can weigh in favor of finding market efficiently: (i) large market capitalization; (ii) narrow bid-ask spread; (iii) large public float; and (iv) the presence of institutional investors. *See, e.g.*, *Nguyen*, 287 F.R.D. at 574–75; *Smilovits v. First Solar, Inc.*, 295 F.R.D. 423, 432 n.3 (D. Ariz. 2013).

Here, each of the above-listed factors supports a finding of market efficiency:

a. Intuitive Stock Experienced High Trading Volume

Under the first *Cammer* factor, "[a] high average trading volume supports a finding of market efficiency, because it 'implies significant investor interest in the company,' and that interest 'implies a likelihood that many investors are executing trades on the basis of newly available or disseminated corporate information.'" *Nguyen*, 287 F.R.D. at 571 (quoting *Cammer*, 711 F. Supp. at 1286). In addition, courts have recognized that turnover, "measured by average weekly trading of 2% or more of the outstanding shares would justify a strong presumption that the market for the security is an efficient one; 1% would justify a substantial presumption." *Id.* (quoting *Cammer*, 711 F. Supp. at 1286).

Here, throughout the Class Period, Intuitive common stock traded on the NASDAQ regularly and actively, with an average *daily* trading volume of 375,000 shares, representing an average weekly turnover of *4.8%* of shares outstanding, more than doubling the turnover that would support a strong presumption that the market for the security is an efficient one. *See* Coffman Report, Ex. 2 at ¶¶ 23, 26.

Thus, the first *Cammer* factor supports a strong presumption that Intuitive common stock traded in an efficient market during the Class Period.

b. A Sufficient Number of Financial Analysts Covered Intuitive

Under the second *Cammer* factor, "[c]overage by securities analysts indicates market efficiency because the price of a company's stock is often affected by analyst reports of information they learn about that stock." *Nguyen*, 287 F.R.D. at 571 (quoting *Cammer*, 711 F. Supp. at 1286).

Here, at least 190 analyst reports were issued during the Class Period by 18 separate equity analysts, including major firms such as JP Morgan, Morgan Stanley, and Piper Jaffray. Coffman Report, Ex. 2 at ¶ 32; RFA Responses, Ex. 1 at 23. Thus, the second *Cammer* factor supports a finding of market efficiency. *See, e.g.*, *Cammer*, 711 F. Supp. at 1283 n.30 (fifteen analyst reports issued in a one year period surrounding the class period supported plaintiff's prima facie showing of an efficient market for the company's stock); *In re Diamond Foods*, 295 F.R.D. at 248 (coverage by 13 analysts supported finding of market efficiency); *Levine v.*

SkyMall, Inc., 2002 WL 31056919, at *5-6 (D. Ariz. May 24, 2002) (coverage by four firms weighed in favor of concluding that the market for the stock was efficient, despite absence of "big name" firms).

c. Intuitive Common Stock Traded on the NASDAQ

According to the third *Cammer* factor, "market makers . . . further provide a mechanism through which the market could be expected to receive information and fully incorporate it into the stock price of a security, as these individuals 'would react swiftly to company news and reported financial results by buying or selling stock and driving it to a changed price level.'" *In re Diamond Foods*, 295 F.R.D. at 248 (quoting *Cammer*, 711 F. Supp. at 1286-87). "A market-maker is one who helps establish a market for securities by reporting bid-and-asked quotations (the price a buyer will pay for a security and the price a seller will sell a security) and who stands ready to buy or sell at these publicly quoted prices." *In re Countrywide Fin. Corp. Sec. Litig.*, 273 F.R.D. 586, 613-14 (C.D. Cal. 2009) (citation omitted).

Here, Intuitive common stock traded on the NASDAQ, which—unlike the type of over-the-counter markets considered in *Cammer*, which rely on decentralized market makers to provide liquidity for trading—relies on a computerized system to match orders and provide quotes in a highly developed network of brokers, virtually guaranteeing a liquid market for the security. Coffman Report, Ex. 2 at ¶ 38. Nonetheless, there were still *122* market makers for Intuitive Surgical common stock during the Class Period, *id.* at ¶ 39, more than fulfilling both the letter and spirit of this factor. *See In re Diamond Foods*, 295 F.R.D. at 248 (finding that just *19* brokers fulfilled this Cammer factor for a stock trading on the NASDAQ).

d. Intuitive Appears Eligible for Short Form Registration

The fourth *Cammer* factor, eligibility to file a short form registration statement (Form S-3) is "based on the assumption that the market has sufficient information about an issuer," which, in turn, is indicative of market efficiency. *See Countrywide*, 273 F.R.D. at 613 (citing *Cammer*, 711 F. Supp. at 1284). The SEC only permits the use of an S-3 short form Registration Statement by issuers whose securities are presumed to be actively traded and widely followed, as demonstrated by a history of making the required SEC filings and a market capitalization of

more than $75 million. 17 C.F.R. §239.13. Here, Intuitive filed Forms S-3s in 2001 and 2003, Coffman Report, Ex. 2 at ¶ 42, demonstrating a history of eligibility to make the required SEC filings, and the Company's market capitalization during the Class Period averaged *$20.7 billion*. *Id.* at ¶ 63. The bases underlying this factor are clearly satisfied.

e. The Price of Intuitive Common Stock Reacted to New Information

The fifth *Cammer* factor is also the most important, because a causal connection between new information and stock price movement is "the essence of an efficient market and the foundation for the fraud on the market theory." *Nguyen*, 287 F.R.D. at 574 (quoting *Cammer*, 711 F. Supp. at 1287); *Countrywide*, 273 F.R.D. at 614 (the fifth *Cammer* factor is the "most important" in the analysis). As explained in *Countrywide*:

> Event studies are by far the most common test for a causal connection. An event study attempts to determine whether new information correlates with a price movement—including the price movement's direction and, perhaps, magnitude. Causation may be inferred from this correlation. Naturally, the inference that the new information has caused the price movement is stronger under some circumstances. For example, the inference will be stronger: (1) the more statistically significant the correlation; (2) the more objectively defined the event is; (3) the better the study controls for nonfraud factors; and (4) the larger and more representative the sample.

Id.; *see also* Coffman Report, Ex. 2 at ¶¶ 43–45.

Here, Plaintiffs' expert Chad Coffman has conducted a thorough event study, *see* Coffman Report, Ex. 2 at ¶¶ 46–60, setting forth "empirical facts showing a cause and effect relationship between unexpected corporate events or financial releases and an immediate response in the stock price." *In re Diamond Foods*, 295 F.R.D. at 248 (quoting *Cammer*, 711 F. Supp. at 1287).

Thus, the fifth *Cammer* factor supports a finding of market efficiency.

f. Other Market Efficiency Considerations also Support Efficiency

Some courts, including certain district courts in the Ninth Circuit, have found that four additional factors can weigh in favor of finding market efficiently: (i) large market capitalization; (ii) narrow bid-ask spread; (iii) large public float; and (iv) the presence of institutional investors. *See, e.g.*, *Nguyen*, 287 F.R.D. at 574–75; *Smilovits*, 295 F.R.D. at 432

n.3; *see also Lumen*, 280 F.R.D. at 460 (*Cammer* does not provide a checklist but rather factors to be considered).

Here, each of these additional factors was present during the Class Period. First, the market value of Intuitive common stock averaged $20.7 billion over the Class Period, which is larger than at least 94% of all companies publicly traded on the combined NYSE and NASDAQ markets during the same period. Coffman Report, Ex. 2 at ¶ 63. Second, the average bid-ask spread for Intuitive common stock ranged from 0.04% to 0.02%, with the higher figure of 0.04% nevertheless representing the 6th lowest spread when compared against a random sample of 100 other common stocks trading on the NYSE and NASDAQ in November 2012; compared to Intuitive's 0.04% spread on that date, the average spread for these 100 companies was 0.21%. *Id.* ¶ 66. Significantly, courts have found a spread as high as 2.44% to weigh in favor of market efficiency. *See Nguyen*, 287 F.R.D. at 574 (noting this fact and consequently finding that a spread of 0.58% supported efficiency). Third, public float averaged more than $21.4 billion. Coffman Report, Ex. 2 at ¶ 67 n.77. Fourth, institutional investors held, on average, 87% of the public float for the quarters spanning the Class Period. *Id.* ¶ 67.

Finally, additional factors considered by economists, such as a low level of autocorrelation, *Nguyen*, 287 F.R.D. at 575, and a high level of option trading, support the existence of an efficient market here. Coffman Report, Ex. 2 at ¶¶ 68-70.

Thus, the Court should find that Intuitive common stock traded in an efficient market during the Class Period.

* * *

Each factor discussed above supports a finding of market efficiency. Accordingly, the Class is entitled to a presumption of reliance. *See Halliburton I*, 131 S. Ct. at 2184–85 (citing *Basic Inc.*, 485 U.S. at 243).

3. Superiority is Established

Rule 23(b)(3) also requires the Court to determine that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Courts recognize the class action device as superior to other methods for fairly and efficiently adjudicating large-scale

securities class actions, which assert claims on behalf of numerous individuals. The Supreme Court has explained that class actions "permit the plaintiffs to pool claims which would be uneconomical to litigate individually" and that "most of the plaintiffs would have no realistic day in court if a class action were not available." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985); *accord In re Wells Fargo Home Mortg. Overtime Pay Litig.*, 571 F.3d 953, 958 (9th Cir. 2009) ("A principal purpose behind Rule 23 class actions is to promote 'efficiency and economy of litigation.'") (citation omitted).

In assessing the superiority prong, Rule 23(b)(3) sets forth four factors:

(a) the class members' interests in individually controlling the prosecution of separate actions;

(b) the extent and nature of any litigation concerning the controversy already commenced;

(c) the desirability of concentrating the litigation of the claims in one forum; and

(d) the likely difficulties in managing a class action.

Here, each factor weighs strongly in favor of class certification.

First, the interest of Class members in asserting individual claims is limited. The proposed Class consists of a large number of purchasers of Intuitive stock who are geographically dispersed and whose individual damages likely are small enough to keep individual litigation from being economically worthwhile. Absent certification, the burden and expense of litigating would not be distributed among the Class, one of the advantages afforded by the class action mechanism. *See Siemers v. Wells Fargo & Co.*, 243 F.R.D. 369, 376 (N.D. Cal. 2007) ("The amounts involved are modest per investor. No single investor could hope to recover more than it would cost to prosecute an individual suit.").

Second, Lead Counsel is not aware of other pending §10(b) litigation commenced by any Class member in the United States that tracks the allegations set forth in the Complaint. The absence of other matters further confirms the limited interest individual Class members have in prosecuting separate actions.

Third, concentrating the litigation in this Court has many benefits, including eliminating the risk of inconsistent adjudication and promoting the fair and efficient use of the judicial

system. *See Erikson v. Cornerstone Propane Partners LP*, 2003 WL 22232387, at *2 (N.D. Cal. Sept. 15, 2003). This factor thus weighs in favor of class certification.

Lastly, Plaintiffs do not foresee any management difficulties that will preclude this action from being maintained as a class action. Consistent with Rule 23(b)(3), certification of the case as a class action would not only be superior to other available methods for fairly and efficiently adjudicating the controversy, but also appears to be the sole method for fairly and efficiently litigating the claims of all members of the proposed Class. *See, e.g.*, *Nguyen*, 287 F.R.D. at 575 ("If united by a common core of facts, and a presumption of reliance on an efficient market, class actions are the superior way to litigate a case alleging violations of securities fraud.")

Accordingly, under the Rule 23(b)(3) factors, the class action mechanism is superior to any other method to secure the just, speedy, and efficient determination of Class members' claims.

D. Plaintiffs' Counsel Should Be Appointed Class Counsel

Rule 23(g)(1) provides that "a court that certifies a class must appoint class counsel." Plaintiffs respectfully request that the Court appoint its chosen Lead Counsel, Labaton Sucharow LLP, as Class Counsel. In appointing class counsel, the court should consider counsel's work "in identifying or investigating potential claims in the action," "counsel's experience in handling class actions," "counsel's knowledge of the applicable law," and "the resources that counsel will commit to representing the class." Rule 23(g)(1)(A)(i)-(iv). Lead Counsel is well-qualified to prosecute this case on behalf of Plaintiffs and the other members of the Class.

Labaton Sucharow attorneys have extensive securities litigation experience and have successfully prosecuted numerous securities fraud class actions on behalf of injured investors. *See* Labaton Sucharow Firm Biography Ex. 3. Lead Counsel has already undertaken a vigorous prosecution of this action, including conducting an extensive investigation of the claims, developing a detailed plan for the prosecution of the case, defeating Defendants' motion to dismiss, engaging in discovery, and pursuing class certification. Accordingly, Labaton Sucharow fulfills the requirements of Rule 23(g) and the Court should appoint Labaton Sucharow as Class Counsel.

V. CONCLUSION

Plaintiffs respectfully request that the Court: (i) certify this action as a class action pursuant to Rules 23(a) and 23(b)(3); (ii) appoint Plaintiffs Hawaii ERS and Greater Pennsylvania as Class Representatives pursuant to Rules 23(a) and 23(b)(3); (iii) appoint Labaton Sucharow LLP as Class Counsel pursuant to Rule 23(g); and (iv) grant Plaintiffs any such further relief as the Court deems just and proper.

Dated: September 1, 2015

LABATON SUCHAROW LLP

/s/ Jonathan Gardner
JONATHAN GARDNER *(pro hac vice)*
SERENA P. HALLOWELL (*pro hac vice*)
CAROL C. VILLEGAS (*pro hac vice*)
SAMUEL B. C. DE VILLIERS (*pro hac vice*)
140 Broadway
New York, NY 10005
Telephone: 212/907-0700
212/818-0477 (fax)

Counsel for Plaintiffs and the Proposed Class

ROBBINS GELLER RUDMAN
& DOWD LLP
SHAWN A. WILLIAMS
Post Montgomery Center
One Montgomery Street, Suite 1800
San Francisco, CA 94104
Telephone: 415/288-4545
415/288-4534 (fax)

ROBBINS GELLER RUDMAN
& DOWD LLP
ARTHUR C. LEAHY
DANIELLE S. MYERS
SUSANNAH R. CONN
655 West Broadway, Suite 1900
San Diego, CA 92101
Telephone: 619/231-1058
619/231-7423 (fax)

Liaison Counsel for Plaintiffs and the Proposed Class

CERTIFICATE OF SERVICE

I hereby certify that on September 1, 2015, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I caused to be mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on September 1, 2015.

/s/ Jonathan Gardner
JONATHAN GARDNER
LABATON SUCHAROW LLP
140 Broadway
New York, NY 10005
Telephone: 212/907-0700
212/818/0477 (fax)
E-mail: jgardner@labaton.com

Mailing Information for a Case 5:13-cv-01920-EJD

In re Intuitive Surgical Securities Litigation

Electronic Mail Notice List

The following are those who are currently on the list to receive e-mail notices for this case.

- **Eric J. Belfi**
  ebelfi@labaton.com,ElectronicCaseFiling@labaton.com
- **Mary K. Blasy**
  mblasy@rgrdlaw.com,e_file_sd@rgrdlaw.com
- **Michael D. Celio**
  mdc@kvn.com,gpeterson@kvn.com,efiling@kvn.com,ehrlich@kvn.com
- **Susannah Ruth Conn**
  SConn@rgrdlaw.com
- **Jennifer Rae Crutchfield**
  jcrutchfield@cpmlegal.com,mkeilo@cpmlegal.com,jacosta@cpmlegal.com
- **Samuel De Villiers**
  sdevilliers@labaton.com
- **Alexander Barnes Dryer**
  adryer@kvn.com,efiling@kvn.com,dxc@kvn.com
- **Jonathan Gardner**
  jgardner@labaton.com,jjohnson@labaton.com,cvillegas@labaton.com, cfox@labaton.com,tdubbs@labaton.com,lmehringer@labaton.com, acoquin@labaton.com,fmalonzo@labaton.com,acarpio@labaton.com, agreenbaum@labaton.com
- **Michael M. Goldberg**
  mmgoldberg@glancylaw.com,csadler@glancylaw.com,info@glancylaw.com, rprongay@glancylaw.com
- **Jo W. Golub**
  jgolub@kvn.com,efiling@kvn.com,SHarmison@kvn.com,sgiminez@kvn.com, jah@kvn.com
- **Serena Hallowell**
  shallowell@labaton.com,lmehringer@labaton.com,acoquin@labaton.com, fmalonzo@labaton.com,acarpio@labaton.com
- **Cody Shawn Harris**
  charris@kvn.com,jsmith@kvn.com,efiling@kvn.com
- **Kate Ellis Lazarus**
  klazarus@kvn.com,dfox@kvn.com
- **Arthur Charles Leahy**
  artl@rgrdlaw.com,e_file_sd@rgrdlaw.com
- **Jeremy A Lieberman**
  jalieberman@pomlaw.com,disaacson@pomlaw.com,lpvega@pomlaw.com
- **Reid Patrick Mullen**
  rmullen@kvn.com,efiling@kvn.com,sharmison@kvn.com,pal@kvn.com
- **Danielle Suzanne Myers**
  dmyers@rgrdlaw.com,e_file_sd@rgrdlaw.com,sconn@rgrdlaw.com, e_file_sf@rgrdlaw.com
- **Jonathan M. Plasse**
  jplasse@labaton.com,electroniccasefiling@labaton.com
- **Ekaterini Maria Polychronopoulos**
  katerinap@rgrdlaw.com
- **Philip James Tassin**
  ptassin@kvn.com,adryer@kvn.com,efiling@kvn.com,sharmison@kvn.com, sgiminez@kvn.com

- **Carol C. Villegas**
  cvillegas@labaton.com,lmehringer@labaton.com,acoquin@labaton.com,
  fmalonzo@labaton.com,acarpio@labaton.com
- **Shawn A. Williams**
  shawnw@rgrdlaw.com,e_file_sd@rgrdlaw.com,e_file_sf@rgrdlaw.com

Manual Notice List

The following is the list of attorneys who are **not** on the list to receive e-mail notices for this case (who therefore require manual noticing).

☐ (No manual recipients)