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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

IN RE INTUITIVE SURGICAL SECURITIES LITIGATION

Case No. 5:13-cv-01920-EJD

CLASS ACTION

DEFENDANTS' OPPOSITION TO CLASS CERTIFICATION

Date: January 21, 2016
Time: 9:00 a.m.
Dept.: Courtroom 4
Judge: Honorable Edward J. Davila

Date Filed: April 26, 2013

Trial Date: None set

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I. INTRODUCTION

Plaintiffs' motion for class certification is premised on the assumption that private securities class actions are routinely certified, and that this is a run-of-the-mill case requiring little analysis. Not so. Even if it were true that class certification is routine in an ordinary securities case—at best an exaggerated claim—this is *not* an ordinary case. In the ordinary case a company has made statements that have turned out to be inaccurate, and the dispute is whether the inaccuracies were intentional. Here, the challenged statements were demonstrably never false at all, even with the benefit of hindsight. For at least the following three reasons—each of which independently justifies outright denial of class certification—Plaintiffs have failed to satisfy the requirements of Rule 23 and class certification should be denied.

First, Plaintiffs are atypical under Rule 23(a)(3) because they are subject to unique defenses and their claims are distinct from those of the putative class. Both Plaintiffs have testified that they have delegated all responsibility for their investment decisions to outside investment managers. These same investment managers, in turn, met directly with Intuitive Surgical personnel on multiple occasions during the proposed class period, where they discussed the precise issues that are the subject of this litigation. Thus, Defendants can show that these Plaintiffs, through their agents, relied on a different set of statements than the ones the class allegedly relied on. Moreover, Defendants can show that Plaintiffs' investment managers did not consider any of the allegedly concealed information to be material. Accordingly, these Plaintiffs are not typical of the class they seek to represent.

Second, these Plaintiffs are inadequate under Rule 23(a)(4). They have testified that they knew nothing of Intuitive [redacted], and that they know nothing [redacted] (and oftentimes, not even that). They also testified that they simply—and perhaps literally—[redacted]. They do not know whether they [redacted], whether they [redacted], or even what [redacted] (one named Plaintiff's corporate designee testified that he thought [redacted]). Nor could they explain why there are two proposed plaintiffs rather than the one the Court appointed as Lead

Plaintiff. Put simply, these Plaintiffs are plaintiffs in name only. This has been a lawyer-driven enterprise from the first, contrary to both the requirements of Rule 23(a) and the purposes of the Private Securities Litigation Reform Act.

Third, Plaintiffs cannot show that reliance can be proven on a classwide basis, as required by Rule 23(b)(3). There are two fatal flaws in Plaintiff's argument. The first is that the supposedly concealed information was publicly disclosed multiple times before and during the class period. It was contained in documents posted on government websites, in publicly filed lawsuits, and in a published U.S. patent application. As a result, a substantial number of putative class members likely knew some or all of the allegedly concealed information, necessitating individualized inquiries into each class member's reliance. The second fatal flaw is that the alleged misstatements or omissions had no effect on the stock price. Plaintiffs seek to invoke a presumption of classwide reliance based on the "fraud-on-the-market" theory, but the Supreme Court has made clear that where the supposed misstatements or omissions had no price impact, a class cannot be certified. *Halliburton Co. v. Erica P. John Fund, Inc.* (*Halliburton II*), 134 S. Ct. 2398 (2014). According to the expert analysis of Professor Kenneth Lehn, the supposed misstatements and omissions had no price impact, defeating the presumption of reliance. In other words, the decisions to buy and sell Intuitive stock reflected differing, individualized reactions to various disclosures—not a classwide reaction to any discrete event.

Finally, even if the Court were to reject all of the above arguments and certify a class, it cannot be the one that is proposed, which extends far past the date when all of the allegedly concealed information was indisputably disclosed to the public. No class should be certified, but if one is certified, the class period ought to end on a date that makes sense.

II. STATEMENT OF RELEVANT FACTS

By now, the Court is well acquainted with the history and claims in this case. Accordingly, Defendants highlight here only those facts and allegations that are most pertinent to the question of class certification. To the extent the Court seeks additional background, Defendants refer the Court to their briefing on their motion to dismiss (Dkt. 53, 62) and their motion for reconsideration (Dkt. 93, 97).

Plaintiffs' Amended Complaint originally claimed that Defendants violated § 10(b) of the Securities and Exchange Act of 1934—and Rule 10b–5 promulgated thereunder—by making a host of allegedly false and misleading statements. Dkt. 48 ("Compl.") ¶¶ 182-255. These statements fell into four categories: (1) statements regarding the general safety and efficacy of *da Vinci* surgery ("Category 1"); (2) statements regarding Intuitive's financial performance ("Category 2"); (3) warnings of the risks the company may face from product-liability lawsuits, product defects, and product recalls ("Category 3"); and (4) statements regarding the FDA regulations the company faces ("Category 4"). *See* Order Granting in Part and Denying in Part Defendants' Motion to Dismiss (Dkt. 83) ("Order") at 11. Plaintiffs further claimed that the "truth" about these alleged misstatements was revealed in a series of five "corrective disclosures": a *Bloomberg* article published on February 28, 2013; another *Bloomberg* article and a Janney Capital Markets report, both published on March 5, 2013; Intuitive's quarterly earnings calls on April 18, 2013; a July 8, 2013 Intuitive press release pre-announcing second-quarter financial results; and Intuitive's quarterly earnings call on July 18, 2013. Compl. ¶¶ 173-78. According to Plaintiffs, each of these disclosures was accompanied by a decline in Intuitive's stock price as the "artificial inflation" caused by the alleged misstatements and omissions was corrected. *Id.* ¶ 180.

On Defendants' motion, the Court dismissed the vast majority of Plaintiffs' allegations, holding that statements in Categories 2, 3, and 4 were, respectively, "literally true," "not plausibly misleading," and "literally accurate." Order at 15-18. The Court, however, determined that a few statements in Category 1—"statements made regarding da Vinci's safety and efficacy"—were actionable as potentially misleading. Order at 11-14. The Court identified the following statements as falling into this category:

- Intuitive's stated belief that *da Vinci* surgery "combines the benefits of minimally invasive surgery (MIS) for patients with the ease of use, precision and dexterity of open surgery." Order at 12. This statement appeared in the "Company Background" section in Intuitive's annual and quarterly SEC reports filed on February 6, 2012, April 19, 2012, July 23, 2012, October 18, 2012, February 4, 2013, and April 19, 2013.[1] Compl. ¶¶ 182, 188, 193, 198, 203, 213(a).

[1] These reports were submitted to the SEC after market close on, respectively, February 3, 2012, April 18, 2012, July 20, 2012, October 18, 2012, February 4, 2013, and April 19, 2013.

- Intuitive's stated belief that "*da Vinci* continues to be a safe and effective surgical method," despite recent negative press. Order at 12. This statement appeared in Intuitive's quarterly SEC report filed on April 19, 2013. Compl. ¶ 213(b).
- CEO Gary Guthart's statement that despite "a concerted effort by critics of robotic surgery[] to challenge the benefited range of patients, the value it brings to the medical community[,] and the quality of our organization," Intuitive remained "confident that those who invest their time in a serious review of the clinical literature on da Vinci will find ample evidence[of] the benefit it brings to patients, surgeons, hospitals, and the medical community." Order at 12. Dr. Guthart made this statement during Intuitive's quarterly earnings call on April 18, 2013. Compl. ¶ 211.
- Dr. Guthart's stated belief that "*da Vinci* Surgery has proven safety, efficacy, economic and ergonomic benefits when compared to the open surgical procedures it is replacing." Order at 12. This statement was also made during Intuitive's quarterly earnings call on April 18, 2013. Compl. ¶ 211(a).

The Court determined that these statements were potentially misleading because Defendants allegedly failed to disclose three items of information: (1) "the existence of . . . numerous unreported MDRs," (2) "the existence or the nature of the corrective letters sent out to da Vinci hospitals in October 2011," and (3) "the number and nature of products liability claims brought against the company during the Class Period." Order at 12-14.

Plaintiffs now seek to certify a class of all investors who purchased Intuitive common stock from February 6, 2012 through July 18, 2013. Pltfs.' Mot. Class Cert. ("Mot.") at 2. Plaintiffs' theory of damages is the same as it was before the Court dismissed over three-quarters of their Complaint—namely, that over the course of the five alleged corrective disclosures between February 28 and July 18, 2013, the "truth" was revealed and resulted in a decline in Intuitive's stock price. *Compare id.* at 4-5 *with* Compl. ¶¶ 173-80.

III. ARGUMENT

For their proposed class to be certified, Plaintiffs must meet their burden of proving that they have—in fact—satisfied the requirements of Rule 23 of the Federal Rules of Civil Procedure. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551-52 (2011). This is not a mere pleading burden—Plaintiffs must affirmatively demonstrate their compliance with the rule. *Id.* at 2551. In determining whether Plaintiffs have met their burden, the Court must conduct a "rigorous analysis" which "will entail some overlap with the merits of the plaintiff's underlying

claim." *Id.* Because the class determination "generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action," the Court may "probe behind the pleadings." *Id.* at 2551-52 (internal quotation marks omitted).

While conceding that Rule 23 requires a plaintiff to demonstrate compliance with all four elements of Rule 23(a)—numerosity, commonality, typicality, and adequacy—as well as with Rule 23(b), Plaintiffs attempt to portray the certification question in this case as an easy, run-of-the-mill matter. It is anything but.

A. Plaintiffs fail to demonstrate compliance with Rule 23(a)(3) and (4).[2]

1. Plaintiffs are not typical of the proposed class.

For at least two reasons, class certification should be denied here because Plaintiffs cannot demonstrate that their claims are "typical of the claims or defenses of the class," as required by Rule 23(a)(3).

First, Defendants will show at the merits stage that Plaintiffs—through their investment managers—heard and relied upon statements different than those alleged to have defrauded the market. As Plaintiffs have made clear, they themselves made no decisions regarding the purchase or sale of Intuitive securities, leaving all such decisions to the sole discretion of their investment managers. Declaration of Philip J. Tassin in Support of Defendants' Opposition to Class Certification ("Tassin Decl."), Ex. 1 at 8-9; Ex. 2 at 8-9; Ex. 3 ("Aburano Depo.") at 170:8-11; Ex. 4 ("Chattergy Depo.") at 46:14-19, 62:15-63:9; Ex. 5 ("Klein Depo.") at 136:18-22. Lead Plaintiff Hawaii Employees' Retirement System ("HIERS") delegated all investment decisions to Sands Capital Management LLC; Greater Pennsylvania Carpenters' Pension Fund ("Greater Penn") delegated its decisions to Brown Advisory LLC. Chattergy Depo. at 143:25-144:3; Klein Depo. at 142:8-10. Because Sands Capital and Brown Advisory were two of Intuitive's largest shareholders before and during the proposed class period, they regularly met with Intuitive executives—in person once a year at the investment managers' offices, and by phone once a

[2] Defendants do not here address the merits of Plaintiffs' arguments regarding the requirements of Rule 23(a)(1) and (2), focusing instead on Plaintiffs' inability to comply with Rule 23(a)(3) and (4). Failure to satisfy *any* of the elements constitutes sufficient grounds to deny class certification.

quarter at Intuitive's headquarters following earnings calls. Declaration of Marshall L. Mohr in Support of Defendants' Opposition to Class Certification ¶¶ 2-4. At those meetings, Sands Capital and Brown Advisory discussed with Intuitive executives all aspects of Intuitive's business, including the regulatory and product matters at issue in this case. *Id.* ¶ 6. They had the opportunity to ask questions (and actually did ask questions) of the named defendants in this case about anything they wanted to know. *Id.* ¶ 6. Thus, to the extent that Sands Capital and Brown Advisory—and, by extension, HIERS and Greater Penn—made any investment decisions in reliance on Intuitive's statements, they made those decisions in reliance on statements that are different than the statements that are alleged to have misled the class. Any trial of this action would necessarily focus heavily on what was said at these face-to-face meetings and phone calls, rather than what was said publicly. Such testimony would be irrelevant to other putative class members. The claims of both named Plaintiffs are therefore substantially—potentially radically—different from those of the putative class.

Second, Plaintiffs are both subject to "unique defenses which threaten to become the focus of the litigation." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). Defendants can show that Plaintiffs—through their investment advisors—were aware of the alleged misstatements and omissions, researched them, and ultimately considered them to be of no importance. For example, Brown Advisory, who traded on behalf of Greater Penn, wrote that the allegations about safety issues were baseless because:

[redacted]

Tassin Decl., Ex. 6. The same report from Brown Advisory dismisses the plaintiff lawsuits, saying, [redacted]." *Id.* Indeed, Brown Advisory openly mocked the very claims that Greater Penn advances, writing as follows:

[redacted]

[redacted].

Id., Ex. 7. Indeed, Brown Advisory went so far as to [redacted]." *Id.*, Ex. 8, at 0000010.

Sands Capital, who invested for HIERS, had very much the same view, stating both before and after the class period that [redacted]." *Compare id.*, Ex. 9 at 24 *with id.*, Ex. 10 at 36. Indeed, as HIERS's Chief Investment Officer testified, HIERS was fully aware that [redacted]. Chattergy Depo at 147:25-148:12. Given this evidence, the litigation going forward will focus not on whether the class relied on the alleged misstatements and omissions, but rather on whether these particular Plaintiffs in fact relied on them. This unique defense will distract from the claims of the class, making class certification inappropriate here. *See Hanon*, 976 F.2d at 508.

In sum, these Plaintiffs are not typical of the proposed class both because they heard, and relied on, different statements from other plaintiffs *and* because they are subject to unique defenses. Thus, Plaintiffs' interests do not align with the interests of the proposed class, making class certification inappropriate under Rule 23(a)(3). *See Hanon*, 976 F.3d at 508.

2. Plaintiffs are inadequate representatives of the proposed class.

Plaintiffs' motion also fails for the independent reason that they cannot demonstrate that they will "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). To determine whether Plaintiffs' representation meets the standard of Rule 23(a)(4), the Court must ask 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?" *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998). Plaintiffs fail on both counts.

First—and as already explained above with respect to the typicality requirement—Plaintiffs face unique defenses, so there is a real danger that they will become preoccupied and

distracted from representing the interests of other, unnamed class members. Indeed, Greater Penn's corporate representative admitted at his deposition that it appears that its own advisor appears to disagree with its fraud claims:

[redacted]

Klein Depo. at 249:24-250:3 (form objection omitted). Crucially, Greater Penn has never bothered to ask [redacted]. *Id.* at 246:20:24. Sands Capital's view of the allegedly omitted information was much the same as Brown Advisory's. *See* Tassin Decl., Ex. 39 (describing the criticisms of da Vinci's safety as "[redacted]"). Consequently, neither Plaintiff can serve as an adequate representative. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625-26 (1997); *see also id.* at 626 n.20 (explaining that the adequacy requirement of Rule 23(a)(4) "tends to merge" with the typicality requirement).

Second, and more fundamentally, the named Plaintiffs have shown themselves to be completely uninformed and unconcerned with both the prosecution of this litigation and its underlying allegations. "A class representative must not simply lend his name to a suit controlled entirely by the class attorney, as the class is entitled to an adequate representative, one who will check the otherwise unfettered discretion of counsel in prosecuting the suit." *In re Monster Worldwide, Inc. Sec. Litig.*, 251 F.R.D. 132, 135 (S.D.N.Y. 2008) (internal quotation marks and brackets omitted). Thus, the Court should not certify a class "where the class representatives have so little knowledge of and involvement in the class action that they would be unable or unwilling to protect the interests of the class against the possibly competing interests of the attorneys." *Id.* at 135.

This case bears striking resemblances to *Monster*, where the same attorneys representing Plaintiffs here put forward an institutional investor as a class representative. *Id.* at 133. After the institutional investor's first deposition witness testified that he knew almost nothing about the

litigation, counsel put forward a new witness who—though he "seemingly knew substantially more about the case"—still "admitted that he had mostly learned about the substance of the litigation only in the week before his deposition, and had devoted almost no time to the case before then." *Id.* at 135-36. The Court rejected the institutional investor as a class representative, finding that it had "no interest in, genuine knowledge of, and/or meaningful involvement in this case and is simply the willing pawn of counsel." *Id.* at 136. The court summed up its decision by saying that it refused to "be a party to this sham." *Id.*

In this case, as in *Monster*, the named Plaintiffs are nothing more than the "willing pawn[s] of counsel." *Id.* In his deposition, Wesley Machida—who was the executive director of HIERS when this lawsuit was filed, and now sits on its board of trustees—did not know even the most basic facts about the litigation. *See* Tassin Decl., Ex. 11 ("Machida Depo."). He testified that he did not know whether [redacted], did not know who [redacted], was unaware of any [redacted],[3] and was unaware that [redacted]. *Id.* at 118:20-22, 136:5-24, 145:19-146:2. He does not even know what [redacted]—he believed that the company was [redacted]. *Id.* at 113:6-15. He also testified that he did not know whether an [redacted] or whether he ever [redacted] (*Id.* at 116:15-19), even though he certified under penalty of perjury that he had done so. Compl., Ex. C. He further testified that he did not [redacted], did not remember the [redacted], and did not know what [redacted]. Machida Depo. at 120:22-122:18, 123:19-124:24, 125:14-20, 129:8-16, 136:2-4, 138:17-22, 146:3-13. Mr. Machida could not even remember if he [redacted]—he testified that he did not [redacted], and that it may have literally been [redacted]. *Id.* at 121:9-12, 132:6-133:25. In short, Mr. Machida confirmed that he, and the HIERS board of trustees, have ceded all control over the litigation to their attorneys. *See id.* at 142:8-13, 146:24-147:5, 148:1-5, 150:5-15, 151:7-11.

The testimony of Vijoy Chattergy, the chief investment officer of HIERS, further confirms that HIERS has done nothing more than lend its name to this lawsuit's caption page. He

[3] He's never even [redacted]. Machida Depo. at 163:17-25.

testified that HIERS makes no investment decisions of its own, but rather delegates to its investment managers all responsibility for purchasing and selling securities. Chattergy Depo. at 46:14-19, 62:22-63:9, 161:14-21. He also testified that he did not know if [redacted]. *Id.* at 118:11-16. He further testified that he has never [redacted] *Id.* at 98:10-15, 111:18-112:5, 194:3-12, 195:23-24, 198:25-199:24. And like Mr. Machida, Mr. Chattergy did not know who [redacted] *Id.* at 199:21-24, 209:9-16. Indeed, Mr. Chattergy made clear that he thought [redacted]. *Id.* at 112:1-5.

Brian Aburano, the designated deponent for HIERS, fared no better than Mr. Machida and Mr. Chattergy. To begin with, Mr. Aburano is not [redacted]. Aburano Depo. at 48:23-49:2; Machida Depo. at 48:3-8. And even though he was designated as the most knowledgeable person to testify about this case, he testified that [redacted]" Aburano Depo. at 197:7-9.) Like Mr. Chattergy, Mr. Aburano confirmed that HIERS makes no investment decisions and that he does not know when [redacted]. *Id.* at 157:12-15, 165:15-23, 170:8-11. He also testified that [redacted]. *Id.* at 176:10-24, 177:2-16, 186:6-187:24, 187:25-188:24, 192:18-24. HIERS admits it has never [redacted]. *Id.* at 60:1-4.

Remarkably, HIERS's lack of knowledge and interest in this case is surpassed by that of Greater Penn. Testifying on behalf of the fund, James Klein, the fund's administrator, confirmed that, like HIERS, Greater Penn makes no investment decisions of its own. Klein Depo. at 136:18-137:7. He testified that [redacted]

[redacted]. *Id.* at 126:2-127:3, 157:21-25, 158:2-159:1, 178:12-179:2, 181:5-13, 253:2-4, 256:6-10, 264:23-265:12. He knows [redacted]. *Id.* at 259:2-4, 263:18-264:6, 266:13-23, 267:14-22. And like Mr. Aburano, Mr. Klein testified that [redacted]. *Id.* at 269:12-20.

These candid admissions reveal that this is an attorney-driven lawsuit through and through, with the named Plaintiffs simply lending their names to the caption and giving counsel unfettered discretion to run the show.[4] *See Monster*, 241 F.R.D. at 135-36. "One of the primary purposes of the Reform Act was to eradicate 'lawyer-driven' litigation." *Bowman v. Legato Sys., Inc.*, 195 F.R.D. 655, 658 (N.D. Cal. 2000). The Reform Act was intended to create a new model for securities fraud litigation where a strong lead plaintiff would *actively* manage the litigation on behalf of the class. *See In re Nice Systs. Sec. Litig.*, 188 F.R.D. 206, 214 (D.N.J. 1999) (stating that "Congress enacted the [PSLRA] . . . to remedy perceived abuses in the securities class action litigation" and identifying the use of professional plaintiffs and control by attorneys as two of the chief abuses); *Chill v. Green Tree Fin. Corp.*, 181 F.R.D. 398, 407 (D. Minn. 1998) ("This grant of authority to the Courts . . . was intended to . . . 'empower investors so that they, not their lawyers, control private securities litigation. . . .' By this provision, 'Congress sought to eliminate figurehead plaintiffs who exercise no meaningful supervision of the litigation.'" (quoting Sen. Rep. No. 104–98, 104th Cong., 1995 U.S.C.C.A.N. 679, 683, 685 (Conference Report); *Ravens v. Iftikar*, 174 F.R.D. 651, 661 (N.D. Cal. 1997)). Due to their complete lack of interest or involvement in this case, Plaintiffs cannot serve as adequate representatives under Rule 23(a)(4).

3. Plaintiffs have provided no reason why Greater Penn should be involved in this case.

On top of all the deficiencies discussed above, Greater Penn has failed to demonstrate that

[4] The Court should look with skepticism at any reply declaration submitted by these named Plaintiffs, who have admitted to signing declarations prepared by counsel that they did not fully read or understand. If Plaintiffs present new reply evidence, Defendants respectfully suggest that, at the hearing on this motion, the Court order Plaintiffs to appear and be examined either by counsel or the Court.

it will be an adequate and typical representative for another reason—its presence in this lawsuit is a complete mystery. The Court appointed HIERS as the sole Lead Plaintiff, Dkt. 50,[5] and none of HIERS's witnesses have indicated that HIERS needs additional resources or support. Aburano Depo. at 143:25-144:3; Chattergy Depo. at 212:11-21. But for reasons never explained to either Defendants or the Court, Plaintiffs are now moving to appoint Greater Penn as a co-class representative. Mot. at 1. Despite repeated requests for clarification, Plaintiffs have studiously avoided revealing why they want Greater Penn as a second representative. Indeed, it appears that even *Plaintiffs* are unsure what Greater Penn's role is. Mr. Machida [redacted]. *See* Machida Depo. at 163:17-19; Aburano Depo. at 142:7-23, 147:3-6, 149:24-150:3. Greater Penn itself can shed no light on the mystery—its representative testified that [redacted]. Klein Depo. at 297:17-301:16. Furthermore, Greater Penn [redacted] The failure to enter into a binding attorney-client relationship with its counsel raises substantial questions about whether Greater Penn is actually committed to pursue this case, as it may have no legal obligation to do so. An entity that has so little commitment to this case cannot be an adequate representative of the putative class.

B. Plaintiffs fail to demonstrate compliance with Rule 23(b)(3).

In addition to failing to satisfy the requirements of Rule 23(a), Plaintiffs also fail to satisfy the requirements of Rule 23(b). Plaintiffs seek certification under Rule 23(b)(3), which requires that "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). But for the following three reasons, individualized questions about reliance and damages—essential elements of the § 10(b) cause of

[5] The Court's Order on Defendants' motion to dismiss also referred to only one Plaintiff—HIERS. *See* Order at 1.

action—predominate over common questions. ***First,*** individual issues of knowledge predominate because the allegedly concealed information was publically available throughout the class period. ***Second***, the alleged misrepresentations and corrections had no impact on the stock price. ***Third***, Plaintiffs have not (as they are required to do) presented a classwide method for computing damages that is consistent with their theory of liability.

1. Individualized questions of knowledge predominate over common questions.

Deciding whether common questions of law or fact predominate begins with the elements of the underlying cause of action. *Erica P. John Fund, Inc. v. Halliburton Co.* (*Halliburton I*), 131 S. Ct. 2179, 2184 (2011). To prove their § 10(b) claim, Plaintiffs must prove (among other things) the essential element of reliance, which "establishes the causal connection between the alleged fraud and the securities transaction." *Desai v. Deutsche Bank Sec. Ltd.*, 573 F.3d 931, 939 (9th Cir. 2009). Because questions of reliance are necessarily individualized, proving reliance directly on a classwide basis is impossible. *Halliburton I*, 131 S. Ct. at 2185. Therefore, Plaintiffs can proceed with their class only if reliance is presumed. *Id.*

To show that reliance can be proven on a classwide basis, Plaintiffs seek to invoke the "fraud-on-the-market" presumption of reliance recognized in *Basic v. Levinson*, 484 U.S. 224 (1988). Mot. at 17-22. The Supreme Court has explained, however, that even once the presumption of reliance is invoked, it can be rebutted by "[a]ny showing that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price." *Basic*, 484 U.S. at 248.

Defendants can make just that showing because a substantial number of class members had actual knowledge of the allegedly omitted information, making reliance impossible to prove classwide. As the court explained in *In re IPO Securities Litigation*, "a section 10(b) claimant must allege and prove that the claimant traded in ignorance of the fact that the price was affected by the alleged manipulation." 471 F.3d 24, 43 (2d Cir. 2006) (internal quotation marks and citation omitted). Accordingly, where a substantial number of putative class members likely knew of the allegedly omitted information, "[t]he claim that lack of knowledge is common to the

class is thoroughly undermined" and "the predominance requirement is defeated." *Id.*[6] As discussed in Section A.1 above, Defendants will prove at the merits stage that Plaintiffs did not in fact rely on any of the alleged misrepresentations or omissions. In addition, the evidence and Plaintiffs' own allegations show that each of the three classes of allegedly omitted information was actually reported to a substantial number of the putative class members, both before and during the class period. Indeed, unlike the typical securities action, the evidence in this case shows that the allegedly concealed information was widely known.

October 2011 Letters. Far from being "secret recalls"—as the Plaintiffs inaccurately dub them—the October 2011 customer letters were in fact widely publicized. Indeed, the letters themselves were immediately posted on the websites of regulatory agencies in some of the largest markets for the *da Vinci* system:

- No later than November 14, 2011, the letters were posted on a weekly list of "Field Safety Notices" on the website of the Medicines and Healthcare Product Regulatory Agency ("MHRA")—the United Kingdom's equivalent of the FDA. Tassin Decl., Ex. 12.
- No later than November 16, 2011, the letters were posted on the website of Germany's FDA-equivalent, the Federal Institute for Drugs and Medical Devices ("BfArM"). *Id.*, Ex. 13, at 22-32.
- No later than April 16, 2012, the letters were posted on a list of "recalls and other field safety corrective actions" on the website of Switzerland's FDA-equivalent, the Swiss Agency for Therapeutic Products ("Swissmedic"). *Id.* at 47-48, 68-74.

Because the letters were posted on the Internet, accessible to anyone with a computer and a network connection, the allegedly "secret" customer letters were anything but. Accordingly, it takes no leap to conclude that many putative class members were aware of the letters.

Besides being posted on the European regulatory agency websites, the October 2011 letters would have been known to a substantial number of investors for an additional reason—

[6] To say that individualized questions of knowledge predominate is not the same as asserting a "truth-on-the-market" defense, which the Supreme Court has held is improper at the class certification stage. *See Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1203-04 (2013). A "truth-on-the-market" defense asserts that *no* investor may recover because *all* investors necessarily knew of the allegedly omitted information. *See id.* at 1196, 1203. At this stage, Defendants argue only that *some* class members—not necessarily all class members—likely knew the "truth," and that consequently the Court cannot presume that the whole class was ignorant of, and relied upon, the alleged omissions. *See IPO*, 471 F.3d at 43.

they were sent multiple times to *every hospital in the world* using the *da Vinci* surgical system. Compl. ¶¶ 51-54. In 2011, that would have been well over *2,000* hospitals. *See id.* ¶ 39. At each of those over 2,000 hospitals, at least one person—though likely many more—would have reviewed or learned of the letters. This is a poor way to keep a secret, and anyone who became aware of this information would be unable to prove reliance, requiring the Court to conduct individualized inquiries into class members' knowledge. *See IPO*, 471 F.3d at 43-44.

Product-Liability Lawsuits. Like the October 2011 letters, the number and nature of product-liability lawsuits against Intuitive was no secret—by definition, any product-liability lawsuit is public as soon as it is filed. Indeed, Plaintiffs themselves admitted as much in their Complaint, which states that Plaintiffs determined the number and nature of product-liability claims by "analyz[ing] *publicly available* data concerning lawsuits filed against Intuitive between March 2010 and August 2013." Compl. at 18 n.3 (emphasis added). There is no allegation that this data was somehow unavailable during the proposed class period, so any investor or investment manager could have accessed it. Moreover, throughout the proposed class period news outlets continuously and contemporaneously reported on the number of lawsuits and the nature of the allegations facing the company. *See, e.g.*, Tassin Decl., Exs. 14-23. Of particular interest to news outlets was a petition to consolidate the product-liability actions before the U.S. Judicial Panel on Multidistrict Litigation. *Id.*, Exs. 24-25.

Medical Device Reports. According to Plaintiffs' own Complaint, MDRs are publicly available on the FDA's MAUDE database. Compl. at 24 n.8. Also according to the Complaint, any of Intuitive's allegedly unreported or misclassified MDRs were uploaded to MAUDE by September 2012, immediately following the Company's meeting with the FDA. *Id.* at 24 n.8, ¶ 72. Thus, by September 2012—well before the Company's March 2013 press release announcing the changes in MDR procedures, and well before the end of the proposed class period—anyone in the proposed class could have known about the increase in MDRs. In addition, several news outlets and stock analysts analyzed MAUDE data and concluded that there had been unreported MDRs and that there had been an unusual increase in MDRs reported in late 2012. *See* Tassin Decl., Exs. 26-30.

In addition to information about the October 2011 letters, product-liability lawsuits, and unreported MDRs, general information about the tip cover and arcing issues was also publicly available. On January 12, 2012—*before* the proposed class period—the U.S. Patent and Trademark Office published a patent application for the redesigned tip cover. *Id.*, Ex. 31. The patent application—which was assigned to Intuitive Surgical and discussed the electrosurgical instruments of the *da Vinci* surgical system—described in detail the user-created safety issues associated with the first-generation tip cover. *Id.* at 1-2. In particular, the patent application explained that "problems can arise when a tool cover does not provide sufficient electrical insulation, thereby posing a risk of burning and/or conducting electricity to the patient or conducting electricity to undesired locations (e.g., via direct contact or arcing)." *Id.* at 4. The patent application also explained that damage to the tip cover could result from collisions with the instrument cannula or from intrasurgical collisions with other instruments, such as from surgeons scraping tools together. *Id.* "Such undesired contact and/or impact" could increase the overall risk to the patient. *Id.* To address these user-created risks, the claimed invention created a more durable tip cover using a new material. *Id.* at 15-16.

This patent application, and its discussion of the user-created safety issues that had developed regarding the original tip cover, was a publicly available government publication. Thus, any putative class members who were monitoring the Company's prospects would have learned this information as well.

Because the October 2011 customer letters, the product-liability lawsuits, and the existence of previously unreported MDRs were widely reported and discussed, it is likely that a substantial number of class members learned of them. Those investors will never be able to recover under § 10(b) because they cannot prove reliance. *See IPO*, 471 F.3d at 42-43. Therefore, individualized inquiries into class members' knowledge will be necessary to determine whether each class member in fact relied on the alleged misrepresentations and omissions. *See id.* at 43-44. Because of the necessity of these individualized questions, Plaintiffs fail the predominance requirement of Rule 23(b)(3). *Id.*; *Basic*, 485 U.S. at 248.

2. Any presumption of reliance is rebutted because the alleged misrepresentations and omissions had no impact on the stock price.

Another way that a defendant may "sever the link" created by the presumption of reliance is by presenting evidence that, even in an efficient market, "an alleged misrepresentation did not actually affect the market price of the stock." *Halliburton II*, 134 S. Ct. at 2417. Put simply, if either the alleged misrepresentations or the alleged corrective disclosures have no impact on the stock price, then the "Rule 10b–5 suit cannot proceed as a class action." *Id.* at 2416. Here, there was no price impact with respect to *either*.

a. The alleged misrepresentations had no positive price impact.

For a class to be certified, the alleged misstatements must have impacted the price of Intuitive's stock. *See, e.g.*, *Erica P. John Fund, Inc. v. Halliburton Co.* (*Halliburton III*), — F.R.D. —, 2015 WL 4522863, at *16-24 (N.D. Tex. 2015); *In re Moody's Corp. Sec. Litig.*, 274 F.R.D. 480, 492-93 (S.D.N.Y. 2011). Here, there was no impact from *any* of those statements.

Defendants' expert, Professor Kenneth Lehn, conducted an event study[7] to analyze the movements in Intuitive's stock price on the seven dates of the alleged misrepresentations. Tassin Decl., Ex. 32 ("Lehn Report") ¶ 38. From this event study, Professor Lehn concluded that there were no statistically significant price increases on six of the seven dates on which the Court found that Defendants may have made false or misleading statements—namely, February 6, 2012, April 19, 2012, July 23, 2012, February 4, 2013, April 18, 2013, and April 19, 2013. *Id.* ¶¶ 40-41; *id.*, Ex. E.[8] In fact, on some of the dates, there was a statistically significant *decline* in Intuitive's stock price—the *opposite* of what would be expected from alleged fraudulent misrepresentations.

[7] An event study is a regression analysis that determines whether a change in the price of a company's stock at a particular time is due to company-specific factors, as opposed to market- or industry-wide movements. Tassin Decl., Ex. 32 ("Lehn Report"), App'x A; *see also Halliburton II*, 134 S. Ct. at 2415; *Moody's*, 274 F.R.D. at 492. If fraud is committed in an efficient market, then the event study would show a statistically significant price increase immediately after an alleged misrepresentation, or a statistically significant price decline immediately after an alleged corrective disclosure. *See Moody's*, 274 F.R.D. at 493.

[8] Although the Court did not include it in its list of actionable statements, *see* Order at 12, Plaintiffs allege that Intuitive's March 13, 2013 press release contained fraudulent misrepresentations. Compl. ¶¶ 208-10. But as with the other alleged misrepresentations, both Professor Lehn's and Mr. Coffman's event studies found no statistically significant price increase associated with the press release. Lehn Report ¶ 41; *id.*, Ex. E; Coffman Report, App'x C, at 12.

Id., Ex. E; *see Moody's*, 274 F.R.D. at 493.

Indeed, even Plaintiffs' expert, Chad Coffman, found no inflationary price impact from the alleged misrepresentations. Like Professor Lehn, Mr. Coffman's event study shows no statistically significant price increases on the same six alleged misrepresentation dates. *See* Declaration of Jonathan Gardner, Ex. 2 (Dkt. 126-2) ("Coffman Report"), App'x C, at 1, 3, 5, 11-13. And like Professor Lehn, Mr. Coffman found *declines* in the stock price on several of the dates. *See id.* at 5 (July 23, 2012), 13 (April 19, 2013).

The one date on which Professor Lehn and Mr. Coffman found a statistically significant increase in price was October 19, 2012, the day after Intuitive filed its October 18 10-Q report. Lehn Report at 25 n.79; Coffman Report, App'x C, at 8. But, as Professor Lehn explains, the alleged misstatement in the October 18 10-Q was *identical* to the alleged misstatements in the SEC filings on February 6, 2012, April 19, 2012, and July 23, 2012, none of which was associated with a significant increase in price. Lehn Report at 25 n.79; *id.*, Ex. E; Coffman Report, App'x C, at 1, 3, 5. Thus, there is no basis to conclude that the alleged misstatement in the October 18 10-Q impacted Intuitive's stock price. Lehn Report at 25 n.79.

In sum, Defendants' evidence—and even *Plaintiffs'* evidence—demonstrates that "the alleged misrepresentation[s] did not actually affect the stock's market price." *Halliburton II*, 134 S. Ct. at 2416. This, alone, is fatal to Plaintiffs' motion.

b. The alleged corrective disclosures had no negative price impact.

Independently, Plaintiffs' motion fails because the alleged corrective disclosures had no impact on the stock price. *See Halliburton II*, 134 S. Ct. at 2417. If investors had been deceived, the revelation of the "truth" ought to have caused Intuitive Surgical's stock price to decline. It did not. Professor Lehn specifically examined whether any of the alleged "corrective disclosures" had a negative impact on Intuitive's stock price and found no such impact. Lehn Report ¶¶ 42-74.[9]

[9] In presenting evidence showing no price impact from the alleged corrective disclosures, Defendants are not demanding that Plaintiffs prove loss causation at this point. *See Halliburton I*, 131 S. Ct. at 2185-86 (holding that plaintiffs need not prove loss causation at the class certification stage). Defendants will bring that argument forward at the appropriate time. Here, Defendants seek only to rebut the presumption of reliance by putting forward their *own* evidence showing no price impact from the revelation of the allegedly omitted information—exactly what

Plaintiffs claim that there were five separate "corrective" disclosures in this case: on February 28, March 5, April 18, July 8, and July 18, 2013. Mot. at 4-5; Compl. ¶¶ 173-78. Professor Lehn concluded that there were no statistically significant price decreases with respect to the first three alleged corrective disclosures—February 28, March 5, and April 18. Lehn Report ¶¶ 43-51, 53, 62; *id.*, Ex. F. This lack of price impact rebuts any presumption that investors relied on whatever new information might have been disclosed on February 28, March 5, and April 18. *See Halliburton II*, 134 S. Ct. at 2415; *Halliburton III*, 2015 WL 4522863, at *19.[10]

The only two alleged disclosures that are contemporaneous with a statistically significant price decline are the July 8, 2013 press release and the July 18, 2013 quarterly earnings call. But even with the price drop, neither of these disclosures demonstrates price impact because they were both announcements of the Company's financial results, which have *nothing* to do with the alleged concealment of MDRs, the October 2011 customer letters, or the number of product-liability lawsuits. Lehn Report ¶¶ 68-69, 72; *compare* Tassin Decl., Ex. 35 (July 8 press release) *and* Ex. 36 (July 18 Earnings Call Tr.) *with* Order at 11-14. Indeed, it is puzzling why Plaintiffs continue to consider the announcement of financial results to be a corrective disclosure when the Court dismissed these allegations because the statements were "literally true." *See* Order at 15. Because they are unrelated to the alleged misrepresentations and omissions, the July 8 and July 18 announcements cannot demonstrate price impact. *See Flag Telecom*, 574 F.3d at 40-41; *Moody's*, 274 F.R.D. at 487-88, 493.

To the extent Plaintiffs allege that the Warning Letter was itself a corrective disclosure, there was still no price impact. The only disclosure in the Warning Letter concerning any of the allegedly omitted information was the fact that Intuitive had sent the October 2011 letters to *da*

Halliburton I permits. *See id.* at 2187 n.*.

[10] Furthermore, these three disclosures reported nothing relating to the allegedly misrepresented or omitted information. Lehn Report ¶¶ 47-49, 54-58, 63; *compare* Tassin Decl., Ex. 33 (February 28 *Bloomberg* article), Exs. 22-23 (March 5 *Bloomberg* and Janney articles), *and* Ex. 40 (April 18 Earnings Call Tr.) *with* Order at 11-14 (describing actionable alleged misrepresentations and omissions). Accordingly, even if they *had* been associated with significant price drops, they still would not demonstrate price impact from the alleged misrepresentations. *See In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 574 F.3d 29, 40-41 (2d Cir. 2009); *Moody's*, 274 F.R.D. at 487-88, 493.

Vinci users. *See* Order at 13; Compl., Ex. A. But everything that the Warning Letter said about those October 2011 letters and the tip cover had already been reported in the Form 483, which was posted to the FDA's website no later than June 25, 2013 and reported on in the press. *See* Compl. ¶¶ 94-100; Lehn Report ¶¶ 30-31, 72; Tassin Decl., Exs. 37-38. Indeed, the Warning Letter merely repeated a subset of the observations listed in the Form 483. *Compare* Compl., Ex. A *with id.*, Ex. B. The only new "information" in the Warning Letter was the FDA's legal conclusions, and Plaintiffs do not allege that Defendants concealed those conclusions from anyone—nor could they, as they were disclosed almost immediately. Because there was no statistically significant price reaction of any kind on June 25, 2013, there was no price impact from relevant information disclosed in the Form 483 and the Warning Letter. *See* Coffman Report, App'x C, at 15; *Halliburton III*, 2015 WL 4522863, at *20, *22 (holding that the defendant had "rebutted the *Basic* presumption with respect to the corrective disclosure" because it had "shown that the information alleged by the Fund to be corrective was *both* already disclosed *and* caused no statistically significant price reaction").

c. The *Affiliated Ute* presumption is inapplicable.

Plaintiffs alternatively seek to invoke the presumption of reliance afforded to pure omissions cases under *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128 (1972). Mot. at 15-17. But *Affiliated Ute* does not apply here because this case involves a *mix* of alleged misrepresentations and omissions. *Binder v. Gillespie*, 184 F.3d 1059, 1064 (9th Cir. 1999); *see also Moody's*, 274 F.R.D. 480 at 494. Throughout their Complaint, Plaintiffs allege that Defendants made "false and misleading *statements* and omissions." *See, e.g.*, Compl. at 64 (emphasis added). The Court also understood this case as alleging a mix of misstatements and omissions. *See, e.g.*, Order at 5 ("In the [Complaint], Plaintiff alleges that during the Class Period, Defendants made numerous materially false and misleading statements and omissions . . . . These statements spanned fourteen months and arose within Intuitive's public filings with the SEC, press releases, and quarterly earnings calls with investors."). Any alleged omissions serve merely to "exacerbate or bolster" the misrepresentation claims, so *Affiliated Ute* cannot serve to establish reliance on a classwide basis. *See Moody's*, 274 F.R.D. at 494.

Ultimately, however, the distinction is academic, because like *Basic*, *Affiliated Ute* establishes only a *rebuttable* presumption. *See Stoneridge Inv. Partners v. Scientific Atlanta*, 552 U.S. 148, 159 (2008); *Kramas v. Sec. Gas & Oil, Inc.*, 672 F.2d 766, 771 n.5 (9th Cir. 1982). For the same reasons that Defendants rebut the *Basic* presumption, they rebut the *Affiliated Ute* presumption.

* * *

In sum, Defendants' evidence—and even *Plaintiffs'* evidence—shows that there was no price impact from either the alleged misrepresentations or the alleged corrective disclosures. This lack of price impact sets this case apart from the typical securities action, where a misrepresentation is followed by a clear price spike while an eventual revelation of the "truth" is followed by a price decline. Accordingly, any presumption of reliance is rebutted, and Plaintiffs' suit may not proceed as a class action. *See Halliburton II*, 134 S. Ct. at 2415; *Basic*, 484 U.S. at 248; *Moody's*, 274 F.R.D. at 492-93.

3. Plaintiffs fail to propose a method for measuring classwide damages that is consistent with their theory of liability.

In addition to failing to show that questions of reliance can be proven on a classwide basis, Plaintiffs also fail to show that damages are "susceptible of measurement across the entire class for purposes of Rule 23(b)(3)." *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1433 (2013). It is Plaintiffs' burden to put forward a damages methodology that is both "sound" and "produce[s] commonality of damages." *Id.* at 1434. Furthermore, Plaintiffs' damages model must "measure only those damages attributable" to the theory of liability remaining in the case. *Id.* Plaintiffs' cursory damages analysis fails to carry this burden, for four reasons.

First, Plaintiffs' motion fails to even *mention* classwide damages, while their expert, Mr. Coffman, spends barely a page on the topic, essentially telling the Court to trust that Plaintiffs will come up with a workable damages model at some point in the future. *See* Coffman Report ¶¶ 72-73. Such a perfunctory and superficial treatment can hardly qualify as a "sound" methodology for measuring classwide damages. *See Comcast*, 133 S. Ct. at 1434.

Second, Mr. Coffman's generic damages methodology is incapable of "measure[ing] only

those damages attributable" to the theory of liability remaining in the case. *Id.* From what little can be gleaned from Mr. Coffman's report, it appears that Plaintiffs intend to propose the "out-of-pocket" method, which measures the price declines on the days of the alleged corrective disclosures and uses those declines to estimate the "artificial inflation" at the time of purchase—the idea being that the "artificial inflation" is the amount of damages. Coffman Report ¶¶ 72-73. But a crucial premise of the "out-of-pocket" method is that the alleged disclosure is related to the alleged misrepresentation or omission that inflated the price on the day of purchase. As already explained, many of the alleged corrective disclosures have nothing whatsoever to do with the alleged misstatements or omissions. *See supra* Section B.2. Indeed, it appears that Plaintiffs neglected to adjust the alleged corrective disclosures to reflect the fact that the Court dismissed three-quarters of their allegations. *See* Order at 15-18. Accordingly, any price declines accompanying those disclosures cannot be used to estimate price "inflation" at the time of purchase. *See* Lehn Report ¶ 76.

Third, Plaintiffs' suggested damages model is incapable of isolating the effect of each alleged misrepresentation or omissions on Intuitive's stock price. *Id.* ¶ 77. As a result, Plaintiffs will be unable to adjust their damages estimate in the event that the Court (or a jury) concludes that Defendants are liable for only some of the alleged misrepresentations or omissions. *Id.*

Fourth, Plaintiffs' suggested damages model cannot reliably disaggregate the effects of confounding information from the effects (if any) from the alleged corrective disclosures. *Id.* ¶¶ 78-80. For example, on several of the alleged corrective disclosure dates, negative information about Intuitive unrelated to this case was disclosed. *Id.* The simplistic "out-of-pocket" method cannot assess what portion of the price declines was due to these unrelated disclosures. *Id.* Similarly, Plaintiffs' methodology cannot parse the effects of the disclosures on April 18, 2013—when Plaintiffs have alleged both a misrepresentation *and* a corrective disclosure. *Id.* ¶ 81.

In short, the damages issues in this case are unique—over three-quarters of Plaintiffs' allegations have been dismissed, yet Plaintiffs have failed to adjust their damages theory accordingly. Plaintiffs cannot remedy the disconnect between the alleged corrective disclosures and the alleged misstatements and omissions—the error is baked into their damages methodology

itself. Without a way to measure damages resulting only from the alleged misstatements or omissions—as opposed to other factors or other alleged misstatements that have been dismissed from the case—Plaintiffs cannot meet their burden of showing that damages can be measured classwide as required by Rule 23(b)(3). *See Comcast* 133 S. Ct. at 1434.

C. If any class is certified, the class period must end no later than June 25, 2013.

Because Plaintiffs fail to satisfy the Rule 23(a) and 23(b)(3) requirements, their motion for certification must be denied. If, however, the Court concludes otherwise, then the class period for any certified class must end no later than June 25, 2013, when all of the allegedly omitted information was fully disclosed to the market.

The Court may not blindly accept Plaintiffs' proposed class period; instead, it must conduct a "rigorous analysis" and ensure that the proposed class period has a rational, non-arbitrary basis. *Dukes*, 131 S. Ct. at 2551. As part of this rigorous analysis, the Court must determine the date at which to close the class period. *Lerch v. Citizens First Bancorp, Inc.*, 144 F.R.D. 247, 254 (D.N.J. 1992). "In determining the duration of a securities fraud class based on a fraud-on-the-market theory, the Court must determine whether a curative disclosure had been made so as to render it unreasonable for an investor, or the market, to continue to be mislead by the defendants' alleged misrepresentations." *In re Fed'l Nat'l Mortg. Ass'n Sec. Litig.*, 247 F.R.D. 32, 38 (D.D.C. 2008); *see also In re UTStarcom, Inc. Sec. Litig.*, 2010 WL 1945737, at *10 (N.D. Cal. May 12, 2010); *In re LTV Sec. Litig.*, 88 F.R.D. 134, 147-48 (N.D. Tex. 1980). Once all of the allegedly omitted information is disclosed to the market, investors can no longer invoke the "fraud-on-the-market" presumption of reliance, and the class period must end. *Fed'l Nat'l Mortg.*, 247 F.R.D. at 38-39; *LTV*, 88 F.R.D. at 147; *In re Memorex Sec. Cases*, 61 F.R.D. 88, 97 & n.6 (N.D. Cal. 1973).

As already explained, the MDR issue, the product-liability lawsuits, and the October 2011 customer letters were all public before and during the proposed class period. *See supra* Section B.1. But even putting those earlier disclosures aside, each of the categories of allegedly concealed information was also fully disclosed to the market through a series of events between March 13, 2013 and June 25, 2013.

First, Intuitive addressed the "existence of numerous unreported MDRs" in the March 13, 2013 press release, which announced that Intuitive had reported previously unreported MDRs and had reclassified other MDRs. Compl. ¶¶ 67-68; Lehn Report ¶¶ 32-33. Likewise, Plaintiffs' original complaint in this case—filed on April 26, 2013—alleged that Intuitive had underreported MDRs to the FDA. Dkt. 1 ¶ 57(b). Thus, even putting aside the many earlier disclosures regarding Intuitive's MDRs, the fact that there was a reporting change and that many previously unreported MDRs had been submitted was fully disclosed by March 13, 2013, and certainly no later than April 26, 2013, when Plaintiffs initiated this lawsuit.

Second, the exact "number and nature" of product-liability claims against the company was fully disclosed in Intuitive's first-quarter 10-Q, which was filed with the SEC on April 19, 2013. *See* Tassin Decl., Ex. 34; Lehn Report ¶¶ 35-37. In that 10-Q, Intuitive announced that "the Company [was] currently the defendant in approximately 26 individual product liability lawsuits filed in various state and federal courts." Tassin Decl., Ex. 34 at 9.[11] The 10-Q further explained that "[t]he cases raise a variety of allegations including, to varying degrees, that their injuries resulted from purported defects in the *da Vinci* Surgical System." *Id.* Plaintiffs also addressed the threat of product-liability lawsuits in their original complaint, which alleged that Intuitive was exposed to hundreds of millions of dollars in potential liability from product-liability suits. Dkt. 1 ¶ 57(e). Thus, by April 19, 2013, and no later than April 26, 2013, the "number and nature" of product-liability claims facing the Company was fully disclosed.

Finally, the "existence and nature" of the October 2011 customer letters was fully addressed in the Form 483, which was posted to the FDA's website on June 25, 2013 and widely reported in the media the same day. Tassin Decl., Exs. 37-38. Specifically, the Form 483 concluded that Intuitive had sent the October 2011 product notifications to hospitals in response to a concern for patient safety, but had failed to report them to the San Francisco District Recall Coordinator. Compl., Ex. B. As explained above, the July 16, 2013 Warning Letter simply repeated these observations. *Compare id.*, Ex. A *with id.*, Ex. B. In short, everything in the July

[11] According to Plaintiffs' own Complaint, this number was accurate. *See* Compl. at 18 n.3 (estimating 25 lawsuits filed against Intuitive between March 2010 and August 2013).

16 Warning Letter concerning the October 2011 letters was already disclosed in the Form 483—their contents, who they were sent to, the reasons they were sent, and the fact that they were not reported to the San Francisco District Recall Coordinator. *See* Lehn Report ¶¶ 30-31, 72. Therefore, even ignoring the fact that the October 2011 letters had—from the beginning—been posted on the Internet, the "existence and nature" of the letters was indisputably disclosed by June 25, 2013.

In sum, there can be no dispute that all of the allegedly omitted information identified by the Court was fully disclosed no later than June 25, 2013. Accordingly, investors who purchased after June 25, 2013 cannot rely on the "fraud-on-market" presumption. *See Fed'l Nat'l Mortg.*, 247 F.R.D. at 38-39; *LTV*, 88 F.R.D. at 147; *Memorex*, 61 F.R.D. at 97. The class period—if there is to be a class—must therefore end no later than June 25, 2013.

IV. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court deny Plaintiffs' motion for class certification. Alternatively, if a class is certified, Defendants respectfully request that the Court define the class period to end no later than June 25, 2013.

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