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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IN RE INTUITIVE SURGICAL, INC. SECURITIES LITIGATION	No. 5:13-cv-01920-EJD CLASS ACTION **PLAINTIFFS' REPLY BRIEF IN FURTHER SUPPORT OF 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

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In re Seagate Tech. II Sec. Litig.,
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION[1]

Defendants' opposition to class certification rehashes arguments from their motion to dismiss and motion for reconsideration while asking this Court to disregard clear Supreme Court precedents established in *Amgen*, *Halliburton I*, and *Halliburton II* on the issues of materiality, loss causation, and price impact. Accepting Defendants' distorted rendering of those cases, as well as their extreme positions on the issues of adequacy and typicality, would preclude the certification of *any* securities class action. When applying the appropriate legal standards, it is clear that Defendants have not presented a cogent, let alone credible challenge to certification.

II. ARGUMENT

A. Plaintiffs Are Adequate Representatives of the Proposed Class

HIERS and Greater Penn are institutional investors who are invested in the litigation, understand their role as fiduciaries, and are actively supervising the prosecution of the case. Defendants, however, seek to disqualify these two institutions by cherry-picking deposition testimony to challenge their adequacy. In the Ninth Circuit, "[t]he threshold of knowledge required to qualify a class representative is low; a class representative will be deemed inadequate only if startlingly unfamiliar with the case." *Hodges v. Akeena Solar, Inc.*, 274 F.R.D. 259, 267 (N.D. Cal. 2011). All that is required of HIERS and Greater Penn is that they be "familiar with the basis for the suit and their responsibilities as lead plaintiffs." *Id.*; *see also, e.g., In re Cooper Cos. Inc. Sec. Litig.*, 254 F.R.D. 628, 636-37 (C.D. Cal. 2009) (representative found adequate where they were "familiar with the fact and theories" of the case, "supervised and monitored the progress of the litigation, including reviewing quarterly updates from the class counsel," and provided a deposition demonstrating knowledge of the relevant issues).[2]

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* Unless otherwise indicated, emphasis added is in bold italics and citations are omitted.

[1] Plaintiffs herein references Lead Plaintiff Hawaii Employees' Retirement System ("HIERS") and Named Plaintiff Greater Pennsylvania Carpenters' Pension Fund ("Greater Penn").

[2] *See also In re HiEnergy Techs., Inc. Sec. Litig.*, 2006 WL 2780058, at *5 (C.D. Cal. Sept. 26, 2006) (concluding that an adequate representative "understands the allegations and claims

Plaintiffs satisfy every factor cited by Defendants' principal case on the topic, *Monster*, and that courts in the Ninth Circuit find as supportive of adequacy. Opp'n at 8-11; *In re Monster Worldwide, Inc. Sec. Litig.*, 251 F.R.D. 132, 135 (S.D.N.Y. 2008). For example, the *Monster* Court found plaintiff inadequate only where the corporate designee did not know (1) the name of the stock at issue, (2) the name of the defendants, (3) whether plaintiff ever owned any of the stock at issue, (4) whether an amended complaint had been filed, (5) whether he had ever seen a complaint in the action, and (6) whether defendant had moved to dismiss. *Id.*; *see also Akeena Solar*, 274 F.R.D. at 267*; In re Cooper Cos*, 254 F.R.D. at 636. Both HIERS and Greater Penn testified competently on *all* of these topics.

	HIERS	**Greater Penn**
1	"Intuitive stock." Ex. 1, Aburano Dep. 35:24.	Discussing Fund's purchases of "Intuitive stock." Ex. 2, Klein Dep. 147:22-24.
2	"Gary Guthart . . . Marshall Mohr, Lonnie Smith." Aburano Dep. 183:3-5.	"Marshall Mohr . . . I think he was CFO . . . Gary Guthart . . . I believe he was CEO . . . And Lonnie Smith. I think former CEO and board of directors." Klein Dep. 260:10-19.
3	Correctly identified "ERS's transactions in Intuitive Surgical securities during the class period." Aburano Dep. 158:24-25.	Q: "Do you know which of the 15 equity managers held Intuitive Surgical shares in 2012 and 2013 for Greater Penn?" A: "Yes . . . Brown Advisory." Klein Dep. 124:4-11.
4 & 5	"I reviewed drafts of the amended complaint." Aburano Dep. 60:12-15.	Q: "Is there now some doubt in your mind that you [reviewed the amended complaint]?"A: "No." Klein Dep. 272:9-11.
6	Q: "Did you read the motion to dismiss papers?" A: "I did at one point." Q: "Did you read the motion to dismiss order?" A: "I… read the order partially granting and partially denying the motion to dismiss." Q: "Did you read the motion for reconsideration of that order?" A: "I did read it." Aburano Dep. 201:7-16.	"I've looked at a lot of documents, court filings." Klein Dep. 264:21-22. "[The Order on Defendants' motion to dismiss] might be one of the documents I've read through." Klein Dep. 264:14-17. "I believe I've seen [defendants' motion for reconsideration]" Klein Dep. 274:17-21.

Moreover, a class representative is not required to be intimately versed in every legal nuance and fact associated with the case. Even *Monster*, which ultimately certified one of the proposed class representative and the class, concedes that the standard for adequacy is not an

(continued)
asserted against Defendants, knows the contours of the proposed class, and has contemplated the fiduciary responsibilities he would bear as class representative.").

onerous one: "class representative status may be denied only 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." *Monster*, 251 F.R.D. at 135 (acknowledging that "in complex actions . . . a great deal of reliance on the expertise of counsel is to be expected.").

Plaintiffs attach the full transcript of each deposition here, which exposes Defendants' cherry-picked quotes as not representative and demonstrates both Plaintiffs' familiarity with and supervision of all relevant aspects of the litigation (Exs. 1-2)[3]:

HIERS representative Brian Aburano testified as follows:

- Testified to specifics of the case, including the Class Period, the SEC filings at issue, the securities at issue, and that the action is based on "statements made about the safety and efficacy of the da Vinci Surgical System. And while those were being made, there were adverse events involving injuries and even death as a result of either defects or problems with the da Vinci Surgical System." Ex. 1, Aburano Dep. 161:8-9; 178:11-179:10; 179:23-180:14; 193:14-19; 195:2-197:1.
- Identified each Individual Defendant's name and position. *Id.* 182:25-183:5.
- Demonstrated that HIERS stays up-to-date of developments and monitor counsel by, for example, regularly receiving updates from counsel which include "periodic" telephone conferences with counsel including at least one with the other named plaintiff in this action, Greater Penn. *Id.* 57:10-15; 138:8-16.
- That HIERS role as lead plaintiff includes supervising counsel and that "they have a fiduciary responsibility to the class they're seeking to represent, to maximize recovery for the class, and to direct and monitor the litigation." *Id.* 129:13-20.
- HIERS supervises counsel and oversees the litigation by reviewing filings, "provid[ing] comments and provid[ing] any corrections" that may be necessary and if something in the filing is incorrect that HIERS "will tell them it's incorrect and needs to be changed." *Id.* 60:22-61:13; 62:11-18.
- HIERS understands the state of discovery and testified to HIERS' active participation in it. *Id.* 121: 12-22; 122:14-19; 123:9-22; 124:18-24.
- That HIERS will direct the litigation and "to the extent that [HIERS] has any comments or thoughts about how things should go, [HIERS] will communicate that to counsel." *Id.* 59:14-15; 22-24.
- That HIERS reviewed and commented on filings in the case before they were filed including the amended complaint, oppositions to motions and responses to interrogatories, and sees all documents before they're filed. *Id.* 60:14-19; 168:6-11.

Greater Penn representative Jim Klein testified as follows:

- He knew the names and titles of each Individual Defendant. *Id.* Ex. 2, Klein Dep. 260: 5-19.
- Accurately described that the details behind the allegations in the case "have to do with the safety of the product." For example Mr. Klein knew that "the robotic surgical

[3] Plaintiffs also attach their objections to Defendants' 30(b)(6) notices so that the Court may understand how the bulk of Defendants' questions ran far afield of noticed topics, as objected to. Exs. 3-4. Of particular interest is the complete absence of any topic in Defendants' 30(b)(6) notice concerning Plaintiffs' supervision of this litigation. Defendants tactically chose to limit their topics to Plaintiffs' decision to sue and seek appointment as Plaintiffs.

arm" and the "tip cover on the arm" were at issue in the case. *Id.* 265:1-2; 265:20; 266:4-5.

- He testified correctly as to the Class Period: "I believe it was February 6th of '12 through July 18th of '13." *Id.* 186:9-10.
- He understood the state of discovery, and Greater Penn's active participation in it. *Id.* 171:12-18; 173:4-5.
- That Greater Penn and HIERS were in contact about jointly representing the class and that they will "work together" and as the case progresses they will continue to monitor it. *Id.* 298:7-8; 301:20-25.
- That as part of his duties to oversee counsel he would "discuss with counsel . . . updates on the case, review documents" and court filings. *Id.* 269:10-11; 271: 15-22.
- That Greater Penn has a fiduciary duty "to oversee the litigation and to make sure that the investor class gets as large a recovery as possible." *Id.* 269:2-11.
- That Greater Penn's objective in moving for appointment as class representative was to "help protect the investing class." *Id.* 268:2-10.
- Explained that he spends time on the Intuitive litigation "whenever counsel has an update to advise me of or review filings." *Id.* 270:8-9.

Furthermore, "one of the purposes of the [PSLRA] was to encourage institutional investors to oversee more securities actions." *Ross* v. *Abercrombie & Fitch Co.*, 257 F.R.D. 435, 449-50 (S.D. Ohio 2009). Plaintiffs aptly demonstrated that each Plaintiff was "familiar with the basis for the suit and their responsibilities as lead plaintiffs" and are the type of institutional investor the PSLRA intended to have serve as class representatives. *Akeena Solar*, 274 F.R.D. at 267.

In the absence of any deficiency in the testimony of the corporate representatives offered as 30(b)(6) witnesses, Defendants next turn to the testimony of Wesley Machida and Vijoy Chattergy of HIERS in an attempt to attack Hawaii's adequacy. Opp'n at 9-11. But this attack misconstrues the role that Mr. Machida and Mr. Chattergy play at HIERS and assumes that, by virtue of their titles, they *should* be personally overseeing the litigation. Both Mr. Machida and Mr. Chattergy were deposed by Defendants in their individual capacity and ***not*** in their capacity as a 30(b)(6) witness. This is significant because neither deponent was required to be knowledgeable about this litigation or the 30(b)(6) topics that Defendants noticed. *See, e.g.*, *In re E.I. du Pont de Nemours & Co.*, 2014 WL 1653158, at *2 (S.D. Ohio Apr. 24, 2014) ("fact witnesses [are] . . . under no duty to educate themselves about all information available to the corporation [and] fact witnesses' testimony does not bind the corporation.").

Mr. Machida is the current Director of Finance for the State of Hawaii. In that position, among many responsibilities to the State of Hawaii and the Governor, he is responsible for "formulat[ing] the statewide budget," has responsibility over "all of the funds of the State of

Hawaii," and is, by virtue of his position, an *ex officio* member of the HIERS board of trustees. Ex. 5, Machida Dep. 62:19, 23-24. Given his vast responsibilities over budgetary and finance matters for the State at large, he devotes "5 percent or less" of his time to HIERS matters specifically. *Id*. 71:20-21. During the Class Period, Mr. Machida was the Administrator of the HIERS until his title changed to Executive Director in which position he stayed until December 2014. *Id.* 167:17-18; 62:2-6. During this time, Mr. Machida did not sit on the HIERS board or have a vote in board decisions and was not responsible for keeping up with the day to day of litigation. As such, it is unsurprising that Mr. Machida does not recall certain facts of this litigation and, as detailed above, Mr. Machida was not designated as a 30(b)(6) witness and so there was no obligation that he be prepared to testify on behalf of HIERS as to all information reasonably available to the organization. This does not equate to Defendants' assertion that "Mr. Machida confirmed that he, and the HIERS board of trustees, have ceded all control over the litigation to their attorneys." Opp'n at 9. Indeed, as Mr. Machida and Mr. Aburano (Hawaii's 30(b)(6) designee) testified, the opposite is true. HIERS delegated to the equivalent of its in-house counsel, Mr. Aburano,[4] the responsibility to oversee the litigation and report to the board on any developments.[5] And, in securities class actions, courts *routinely* find Plaintiffs adequate where oversight of the class counsel is delegated to Plaintiffs' counsel. *See, e.g.*, *Wallace v. IntraLinks*, 302 F.R.D. 310, 316 (S.D.N.Y. 2014).

Mr. Chattergy became HIERS' Chief Investment Officer during the Class Period. Beyond sitting in on a few board meetings during which the litigation was discussed and assisting with document discovery, Mr. Chattergy has no connection to the litigation. Ex. 6, Chattergy Dep. 89:20-21; 90:12-14. While Mr. Chattergy testified extensively as to the structure of the HIERS and its investment philosophy and policies, he was not knowledgeable about this litigation

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[4] Mr. Aburano is a deputy attorney general assigned to the ERS to oversee all of their litigation: Q: "You're H[I]ERS's lawyer and you advise them on litigation, correct?" A: "Correct." Ex. 1, 148:17-19.

[5] "It would have been the board of trustees taking the action, and then Mr. Aburano would have been taking the lead on behalf of the trustees." Ex. 5, Machida Dep. 151:16-19. "[I]f the board approved any action, we would then get direction from Mr. Aburano to determine what was needed." *Id.* at 153:1-4.

because he is not involved in its prosecution or supervision. Defendants' selective use of testimony from both Mr. Machida and Mr. Chattergy does nothing to undermine the testimony of the actual 30(b)(6) deponent, Brian Aburano, or the adequacy of HIERS.[6]

Greater Penn is no different. Defendants claim that Greater Penn will somehow fail to adequately represent the class, arguing that Plaintiffs have failed to identify a reason for Greater Penn's involvement.[7] Defendants are wrong. Greater Penn has been actively involved in this litigation since prior to the filing of the amended complaint. It purchased Intuitive common stock during the Class Period and suffered losses as a result. *See* ECF No. 48-4. As to why Greater Penn is involved in this litigation, Plaintiffs have testified and responded to Defendants' interrogatories, further supporting Greater Penn's adequacy. Ex. 7, Resp. to Interrog. No. 7 ("Greater Penn believes that it is important for institutional investors to step forward as . . . Class Representative, to keep corporations and executives accountable. Greater Penn has been and will

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[6] It also bears noting that rarely, if ever, does a proposed class representative get burdened with deposition notices for multiple current and former members of its organization. This is because it is typical that one contact at the fund is sufficient to testify on behalf of the fund as to issues regarding adequacy and typicality. Further, many pension funds outsource investment responsibilities to subject matter experts – *i.e.* third party investment managers, who are more appropriate to answer questions concerning the fund's investments. Despite Plaintiffs' counsel advising Defense counsel that this case would be no different and that many of the HIERS witnesses called to testify in their individual capacities would not have relevant testimony to offer, Defense counsel insisted on noticing/subpoenaing four different witnesses from HIERS alone – including former and current employees – while neglecting to subpoena any of the outside investment managers. In the interest of the class, HIERS went beyond what *should be* asked of a public pension fund seeking to be a proposed class representative and made available three of those witnesses, and facilitated the deposition of the fourth deponent (a former employee who Defendants ultimately decided not to depose). Far from not taking its obligations seriously as a Lead Plaintiff and proposed class representative, HIERS exemplifies the type of organization that the PSLRA has sought to lead securities class actions.

[7] Defendants have raised a purported concern about Greater Penn's lack of a retainer agreement with counsel here. Opp'n at 12. This concern is both irrelevant and inaccurate. In fact, Greater Penn has a monitoring agreement with class counsel, produced in this action, which addressed the contingent fee arrangements in litigation in which Greater Penn moves to be a representative party and which complies with Pennsylvania law, a fact that Defendants conveniently choose to ignore. Further "such discovery [is] irrelevant to the issue of class certification . . . except to obtain information regarding resources to maintain [a] class." *In re Front Loading Washing Mach. Class Action Litig.*, 2010 WL 3025141, at *4 (D.N.J. July 29, 2010); *see also In re Cavanaugh*, 306 F.3d 726, 733-34 (9th Cir. 2002) (noting that securing the services of a lawyer likely to obtain an excellent result is more important than written fee agreement, because fees will be subject to close judicial scrutiny.)

continue to represent the interests of the putative Class members, act as a fiduciary for the putative Class, and work with Lead Counsel to secure best results for the putative Class.").[8]

Moreover, there is nothing unusual about having two class representatives protect the interests of the class. Indeed, it is common practice to recognize a "group" as "most adequate" under the Exchange Act, 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I), and the benefits of having a group of sophisticated institutional investors serve as Lead Plaintiff are manifest, as 91 of the top 100 recoveries (by dollar value) under the PSLRA have involved institutional Lead Plaintiffs and fully 53 of these (just under 60%) have involved groups of multiple institutional investors.[9]

B. Plaintiffs' Claims Are Typical of Those of the Proposed Class

Defendants next argument comes perilously close to suggesting that they conveyed material non-public information to "two of Intuitive's largest shareholders" in an attempt to argue Plaintiffs' claims are somehow atypical because their investment advisors occasionally met with Intuitive. Opp'n at 4-7. This argument is unconvincing because "communicat[ing] directly with the company in which they are investing . . . . does not disqualify an investor from representing a class of defrauded investors or from relying on the presumption of reliance." *In re WorldCom, Inc. Sec. Litig.*, 219 F.R.D. 267, 282 (S.D.N.Y. 2003). The appropriate test is whether Plaintiffs received material non-public information from a corporate officer. *See id.* Allegations that a Lead "[P]laintiff has received information from company insiders that confirms, reflects, repeats, or even digests publicly available market information" does not render such Lead Plaintiff atypical of the proposed class. *Beach v. Healthways, Inc.*, 2010 WL 1408791, at *4 (M.D. Tenn. Apr. 2, 2010); *WorldCom*, 219 F.R.D. at 282 (collecting cases).

[8] Furthermore, neither Greater Penn, nor HIERS' 30(b)(6) deponents testified they lacked knowledge as to why they were seeking to be Co-Class Representatives. Instead, they were directed by counsel not to answer questions that would implicate the attorney client privilege – they therefore were unable to testify as to the substance of their communications with counsel on that issue. *See, e.g.*, Ex. 1 at 141:7-22; Ex. 2 at 331:2-22.

[9] *See* Securities Class Action Services, "Top 100 for 1H 2015" (Sept. 28, 2015), http://www.issgovernance.com/file/publications/securities-class-action-services-top-100-for-1h-2015.pdf.

Nevertheless, Defendants allege that Plaintiffs are atypical of the proposed class because two (out of five)[10] investment managers to whom Plaintiffs delegated investment authority are alleged to have met with Defendants on a handful of occasions. This argument is without merit. The fact that investment managers met with company management in person once a year and by phone once a quarter following earnings calls is a typical industry practice. Opp'n at 5-6. Indeed, Defendants' own submissions show that Intuitive's management met with numerous other managers on the days surrounding its meetings with both Sands Capital and Brown Advisory. *See* Ex. 2 to Decl. of Marshal Mohr ("Mohr Decl."). There is no evidence that any non-public information was shared during any of these meetings. [11] Defendants' premise, taken to its logical conclusion, would effectively preclude ***any*** pension fund from acting as class representatives based on the fact that their investment managers met with company executives – an absurd result that contravenes the express purpose of the PSLRA to "increase the likelihood that institutional investors will serve as lead plaintiffs." *In re Providian Fin. Corp. Sec. Litig.*, 2004 WL 5684494, at *3 (N.D. Cal. Jan. 15, 2004); *Wallace,* 302 F.R.D. at 315-16 (finding typicality notwithstanding "several conferences" with corporate insiders, absent evidence of disclosure of non-public information).

Finally, Defendants' arguments that statements from Brown and Sands regarding the product liability cases against Intuitive somehow opens Plaintiffs to unique defenses here is also without merit. *See* Opp'n at 6-7. Investment managers are tasked with making determinations as to how a Company's securities are going to perform and not with rooting out fraud.

[10] Defendants fail to levy the same conclusory allegations of access to material non-public information against the majority of Plaintiffs' investment advisors. *See In re Pfizer Inc. Sec. Litig.*, 282 F.R.D. 38, 45 (S.D.N.Y. 2012) (evidence insufficient to defeat Plaintiff's showing of typicality where only two out of fourteen managers presented potential typicality concerns).

[11] Defendants' declaration from Mr. Mohr attesting to his discussions with Sands and Brown (Mohr Decl. ¶6) is far from proof of non-public information being conveyed to these managers. If Defendants seriously advance such a contention, then Mr. Mohr is effectively admitting to criminal behavior in violation of Regulation Fair Disclosure, 17 C.F.R. §§243.100-243.103, and insider trading laws. If instead Defendants are advancing the unremarkable suggestion that Mr. Mohr discussed public information with these managers then this argument again is intended merely to distract the Court from the merit of Plaintiffs' motion.

1 [redacted] The fact that they may not have understood the magnitude of the problems at Intuitive
2 only demonstrates the significance of Defendants' omissions. Thus, Defendants' threadbare
3 arguments concerning a minority of Plaintiffs' investment managers falls well short.[12]

4 **C. Plaintiffs Have Put Forth Sufficient Evidence of Predominance**

5 Predominance under Rule 23(b)(3) is an inquiry that traditionally has focused on liability
6 and is generally met in securities cases where the elements of a cause of action each relate to the
7 same acts or omissions of the defendants. *See, e.g., In re Mills Corp. Sec. Litig.*, 257 F.R.D. 101,
8 109 (E.D. Va. 2009); *see also* Fed. R. Civ. P. 23(b)(3) advisory committee's note to 1966
9 amendment ("a fraud perpetrated on numerous persons by the use of similar misrepresentations
10 may be an appealing situation for a class action, and it may remain so despite the need, if liability
11 is found, for separate determination of the damages"). Here, scienter, loss causation, materiality,
12 control person liability, and falsity, among others, are all *undisputed* common issues.
13 Defendants' limited challenge to predominance focuses on the assertion that there are
14 individualized issues as to reliance and damages. Each of these arguments should be rejected.

15 **1. Plaintiffs Are Entitled to a Presumption of Class-Wide Reliance.**

16 In their opening brief, Plaintiffs set forth sufficient evidence to demonstrate that the
17 market for Intuitive's NASDAQ traded common stock was efficient during the Class Period.
18 Mot. for Class Cert. at 18-22. Plaintiffs' expert, Mr. Coffman ("Coffman"), based on extensive
19 analysis and testing, found that each factor accepted by courts as evidence of market efficiency
20 were satisfied here. Ex. 10, Coffman Rebuttal ¶4. Defendants conceded that Plaintiffs have
21 satisfied their burden of showing market efficiency. *Id.* ¶¶4, 10-11. Instead, they try to rebut this
22 showing by asserting that (1) individualized issues of knowledge destroys class-wide reliance;
23 and (2) the omissions here had no price impact on the stock price. Both challenges lack merit.

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27 [12] Two of HIERS's investment managers – Mellon Capital and Gateway – were index traders,
28 supporting HIERS's typicality. *See, e.g.*, *In re Countrywide Fin. Corp. Sec. Litig.*, 273 F.R.D. 586, 602 (C.D. Cal. 2009) ("[I]ndex purchases pose no typicality concern.").

a. No Truth-on-the-Market

Defendants' argument that a substantial number of class members had actual knowledge of the "omitted information" making class-wide reliance inapplicable here is premature and speculative. The thrust of Defendants' argument is that questions of law or fact common to the class do not predominate because "the allegedly concealed information ***was publically available***." Opp'n at 13. First, this truth-on-the-market defense cannot be used to rebut the presumption of reliance at this stage because the defense 'is a method of refuting an alleged representation's ***materiality***' and it is well established that 'a plaintiff need not prove materiality at the class certification stage to invoke the presumption."' *In re Bridgepoint Educ., Inc. Sec. Litig.*, 2015 WL 224631, at *7 (S.D. Cal. Jan. 15, 2015) (quoting *Conn. Ret. Plans & Trust Funds* v. *Amgen Inc.,* 660 F.3d 1170, 1177 (9th Cir. 2011) (affirming the district court's refusal to consider a truth-on-the-market defense at the class certification stage), *aff'd,* 133 S. Ct. 1184 (2013)). "*Halliburton* did not change that." *Bridgepoint,* 2015 WL 224631, at *7 (citing *Halliburton Co. v. Erica P. John Fund, Inc.,* 134 S. Ct. 2398, 2416 (2014) ("*Halliburton II*") ("[M]ateriality . . . should be left to the merits stage, because it does not bear on the predominance requirement of Rule 23(b)(3)."). As *Amgen Inc. v. Conn. Ret. Plans & Trust Funds,* held, the truth-on-the-market defense is not a barrier to class certification because it raises a question whose resolution "is common to the class." 133 S. Ct. 1184, 1197 (2013).

In an attempt to evade the clear edict of the Supreme Court in *Amgen,* which precludes consideration of the truth-on-the-market defense at the class certification stage, Defendants assert that only "some" or "many" or "a substantial number" of class members "had actual knowledge of the allegedly omitted information." Opp'n at 13-14. Unfortunately, the judicious use of adjectives does not render a truth-on-the-market argument permissible at class certification. Moreover, these same truth on the market arguments were raised and rejected at the motion to dismiss stage. *See* Opp'n to Mot. to Dismiss at 17-19; Order on Mot. to Dismiss at 12-13. Even if the Court were to reconsider these recycled arguments now (which it should not), Defendants cannot make a showing that the truth was on the market because they cannot "***prove*** that the information that was withheld or misrepresented was transmitted to the public with a degree of

intensity and credibility sufficient to effectively counterbalance any misleading impression created by insider's one-sided representations." *Provenz v. Miller*, 102 F.3d 1478, 1492-93 (9th Cir. 1996) ("The defendants bear a heavy burden of proof. [Even] [s]ummary judgment is proper only if they show that no rational jury could find that the market was misled."). Reviewing Defendants' scattering of news articles, it is clear that they fail to meet this burden.

The Secret Recalls: Defendants argue that letters to hospitals describing how to properly use the tip covers somehow revealed omitted safety information. Opp'n at 14-15. As Plaintiffs explained in their opposition to the motion to dismiss, "Defendants' argument misses the critical distinction between sending letters to hospitals, whether it be 2 or 2,000, and making the letters [and the broader safety implication associated with the letter], public such that the information is disseminated to shareholders, analysts, and media and incorporated into Intuitive's stock price." *See Basic v. Levinson*, 485 U.S. 224 (1989)." Opp'n to Mot. to Dismiss at 19. Just like the letters were concealed from the appropriate authorities within the FDA, there are no analyst reports or contemporaneous news articles publicly disclosing the existence of the letters or their contents.[13]

Unreported MDRs: Defendants next claim that MDRs were sufficiently conveyed to the market because they appear on the FDA MAUDE database. Opp'n at 15-16. Again, Defendants miss the point. Plaintiffs' allege that thousands of MDRs were improperly kept secret by Defendants by failing to report them at all, and even those that were filed on the MAUDE database were misclassified as "other" instead of "serious injury," thereby misleading the market as to the safety of da Vinci. Opp'n to Mot. to Dismiss at 17. As analyst reports clearly demonstrate, the full truth concerning the safety of da Vinci, and Defendants' concealment and misreporting of MDRs, was not revealed until the final day of the Class Period. *See, e.g.*, "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 it hasn't adequately reported on issues concerning the devices." Compl. ¶124. In addition, a "review of [FDA]

[13] Defendants' contention that the secret recalls were on foreign websites does not alter the clear edict of *Amgen*. Opp'n at 14; *see Amgen,* 133 S. Ct. at 1203 (holding that it was appropriate for district court not to consider discussion of concealed safety issues in Federal Register and other public sources at class certification).

records ***now shows*** the reports of injuries involving robot procedures have doubled ***in the first six months of 2013***, compared with a year earlier." *Id.* ¶¶124, 122-26; Ex. 10 at ¶¶84-95.

Tip Cover Patent Application: Defendants also claim that "general information about the tip cover and arcing issues" was publicly available because a patent for a redesigned tip cover was published by the USPTO prior to the Class Period. Opp'n at 16. First, patent updates are an innocuous and routine industry practice that raises no red flags.[14] Second, no reasonable reading of that highly technical document, which simply repeats the Instructions for Use of the older, defective tip cover, can be interpreted as a revelation that (1) the older tip cover was defectively designed, (2) the older tip cover was causing a substantial number of deaths and severe injuries, and (3) the patent application was meant to remedy these safety concerns. *See Amgen,* 133 S. Ct. at 1203 (publication of 'truth' in Federal Register insufficient). While discovery is not complete in this action, [redacted][15]

Growing Number and Severe Nature of Product-Liability Suits: Finally, Defendants claim that the market knew about the product liability lawsuits and somehow this fully conveyed the safety issues with da Vinci. Opp'n at 15. Defendants conveniently ignore that starting at least in 2012, Intuitive entered into secret tolling agreements with plaintiffs alleging injuries resulting from da Vinci. Intuitive is currently suing its former products liability insurer, Ironshore, for coverage of more than 1,700 claims made *before* and *during* the Class Period.[16] These claims were not contemporaneously disclosed to the investing public or even to Illinois Union and Navigators Insurance, who provided coverage for the period ***after*** Ironshore. These insurers are

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[14] Indeed, a search of USPTO records reveals that Intuitive Surgical Operations, Inc. is the assignee of no less than 413 patents.

[15] [redacted] "transmitted to the public with a degree of intensity and credibility sufficient to effectively counterbalance any misleading impression" in a garden variety patent application. *Provenz*, 102 F.3d at 1492-93.

[16] Ironshore's policy covers claims made from March 1, 2011 to March 1, 2013. *See Ill. Union Ins. Co. v. Intuitive Surgical, Inc.*, No. 13-cv-4863, Compl. ¶10 (N.D. Cal. Oct. 21, 2013).

now denying coverage because "had [they] been informed of the tolling agreements and increasing number of claimants during the application process, [they] would . . . never have issued [the Policy] to Defendant." *See* Ill. Union Compl. ¶17.[17] The proposed class is similarly situated – they were denied information as to the thousands of legal claims related to injuries sustained from da Vinci being secretly tolled;[18] indeed, Defendants have earmarked close to $100,000,000 to cover these claims. *See* n.17, *supra*.

Finally, nothing Defendants have put forth as "publicly" reported considers the bigger picture here: the Complaint alleges that Defendants doctored and omitted nearly every piece of information that raised questions about da Vinci's safety. Compl. ¶¶38-126. Collectively, the omissions conveyed an image of a product that was safe and working as expected when the opposite was true. There is no evidence suggesting that this truth was known. As such, there is no viable argument here as to individualized questions about reliance predominating over common questions.

b. Defendants Effectively Concede Price Impact, Thereby Ending the Narrow Inquiry Permitted by *Halliburton II*

Having conceded an efficient market (Coffman Rebuttal ¶¶4, 10-11), Defendants attempt to rebut the fraud on the market presumption by claiming that the alleged omissions and corrective disclosures had no "price impact" on Intuitive's stock price. This argument fails for several reasons. Principally, ***Defendants' expert concedes that at least two of the corrective disclosures had a statistically significant impact on Intuitive's stock price***.[19] This effectively concedes price impact on these dates and ends the inquiry. *See* Coffman Rebuttal, ¶¶65, 81.[20]

[17] Defendants have engaged in "confidential mediation efforts" that have seen at least 3,000 product liability claims filed both during and shortly after the Class Period. SEC Form 10-Q, filed Apr. 25, 2014. To date, Defendants have recorded more than $95,000,000 in pre-tax charges related to settlement of these claims. *See* SEC Form 10-Q at 12 filed Oct. 21, 2015.

[18] The growing number and severe nature of these tolling agreements was partially disclosed on April 19, 2013 (Ill. Union Compl. ¶12), eliciting a 3% drop in stock price (Compl. ¶176).

[19] Using Dr. Lehn's results for March 5, 2013, (the actual date on which the corrective information was released *before* market hours) as opposed to the following trading day, Defendants effectively concede *three* statistically significant price impacts. *See* Coffman Rebuttal ¶¶6ii; 55-63.

[20] Coffman Rebuttal ¶74 (regarding July 8, 2013, Mr. Coffman opines, "There is no dispute in the Lehn Report that there was new, Company-specific news released after-market on July 8,

Regardless of whether there is a dispute as to certain additional corrective disclosures, for at least two dates, Defendants have conceded market efficiency ***and*** effectively conceded that there was price impact. *See In re Goldman Sachs Grp., Inc. Sec. Litig*., 2015 WL 5613150, at *6 (S.D.N.Y. Sept. 24, 2015) (finding predominance satisfied after concluding that "[d]efendants have failed to demonstrate a ***complete*** lack of price impact"); Coffman Rebuttal ¶¶ 74-95. Accordingly, the narrow inquiry permitted by *Halliburton II* cannot serve to rebut the presumption of reliance.

As for the remaining dates on which Dr. Lehn did not concede that there was a statistically significant impact on Intuitive's stock price, Dr. Lehn's report should be disregarded as suffering from at least the following material flaws (Coffman Rebuttal ¶5):

- **February 28, 2013**: Inappropriately specifies an event window that includes nearly a full day prior to the event occurring improperly inflating the measure of variance by incorporating high volatility events *after* the event of interest. Coffman Rebuttal ¶¶6i, 31-54.
- **March 5, 2013**: Misrepresents the date of publication of an article and analyzes the *wrong* day. *Id*. ¶¶6ii, 55-66.
- **April 19, 2013**: Incorrectly asserts that the corrective disclosure did not result in a statistically significant price impact, when, in fact, there was a price impact at the 90% confidence level.[21] *Id.* ¶¶6iii; 67-73.

Applying the appropriate methodology, as Mr. Coffman does, it is clear that there are statistically significant price impacts on all the corrective disclosures.[22] Coffman Rebuttal ¶6.

(continued)
2013 related to sales of and procedures using the da Vinci system, and there is no dispute that this news caused a statistically significant abnormal negative price impact on ISRG Common Stock."); Coffman Rebuttal ¶89 (regarding July 18, 2013, Mr. Coffman opines, "Dr. Lehn's event study shows a statistically significant negative price reaction to this news, with a large abnormal return . . . The Coffman Report event study also finds a statistically significant abnormal negative price reaction to the news. These event study statistics combined with new, Company-specific news in the form of the FDA warning letter are highly supportive of price impact. Dr. Lehn offers no alternative explanation . . .").

[21] Confidence levels of 1, 5, or 10 percent have all been treated as benchmark measures of reliability by statistics experts. *See In re High–Tech Emp. Antitrust Litig.,* 2014 WL 1351040, at *15 (N.D. Cal. Apr. 4, 2014) ("*High–Tech*") (collecting authorities); *see also Madani v. Equilon Enters. LLC,* 2009 WL 2148664, at *11 (C.D. Cal. July 13, 2009) ("The 'generally accepted' rates in the economic community [are] 5–10 %[.]").

[22] Defendants also argue that the alleged omissions had no positive price impact. Opp'n at 17. This argument does nothing more than advance Plaintiffs' position that this case is predicated on omissions and cannot serve to rebut the presumption of reliance: "There is general acceptance in the courts that a misstatement that maintains expectations, and thus prevents a price from falling, inflates price in a way that can be compensable in a fraud-on-the-market action, and that a price drop ***at the time of the corrective disclosure*** is evidence of this inflation." Merritt B. Fox,

c. Defendants' Attempts to Masquerade Arguments of Loss Causation as Price Impact Is Impermissible and Premature

Defendants next advance a loss causation argument – contrary to the Supreme Court's decision in *Halliburton I* – under the guise of "price impact." *Halliburton II*; *see, e.g.*, Coffman Rebuttal ¶¶74-95. While Defendants concede that Plaintiffs need not prove loss causation at the class certification stage, they proceed to attempt *exactly* that, complaining that "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 [fraud].** . . . **Because they are unrelated to the alleged misrepresentations and omissions**, the July 8 and July 18 announcements cannot demonstrate price impact." Opp'n at 18 n.9, 19 (citing *Flag Telecom* and *Moody's*).[23] But as Defendants' own language makes clear, this is a class wide loss causation argument that *Halliburton I* does not permit and that the Court should disregard here. *Carpenters Pension Trust Fund of St. Louis v. Barclays PLC*, 2015 WL 5000849, at *18 (S.D.N.Y. Aug. 20, 2015) ("[C]ontentions about what can or cannot cause a price drop are arguments about loss causation, which under *Halliburton I* is not an element of market efficiency.").

d. Defendants' Attempts to Masquerade Arguments of Truth-On-The-Market as Price Impact Is Impermissible and Premature

Defendants also attempt to disguise arguments of truth-on-the-market as price impact,

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(continued)
Halliburton II: It all Depends on What Defendants Need to Show to Establish No Impact on Price, 70 BUS. LAW. 437, 441 n.16 (2015); *Goldman Sachs*, 2015 WL 5613150, at *6 ("that the misstatements had no impact on the stock price when made is insignificant."). Defendants cannot prove lack of price impact in an omissions case, as is the case here (*see* Sect. II.E. *infra*), unless they can show that no such impact on upon the corrective disclosures, which they have not. *See, e.g.*, *McIntire v. China MediaExpress Holdings, Inc.*, 38 F. Supp. 3d 415 (S.D.N.Y. 2014).

[23] Defendants' citation to *Flag Telecom* and *Moody's* is perplexing as both cases pre-date *Halliburton I*, *Amgen*, and *Halliburton II*. "Defendants' reliance on *[Moody's]* . . . is misplaced. In th[at] case[], there was no evidence of a statistically significant movement in the stock price on **any** of the dates of the alleged misrepresentations and omissions or the dates of corrective disclosures," a point which Defendants concede is not applicable here. *In re SLM Corp. Sec. Litig.*, 2012 WL 209095, at *5 (S.D.N.Y. Jan. 24, 2012). "[T]he precedential value of *Flag Telecom* . . . is questionable in light of the Supreme Court's recent decision in *[Halliburton I]*, holding that it is unnecessary to establish loss causation in order to obtain class certification." *S.E.C. v. Razmilovic*, 822 F. Supp. 2d 234, 266 n.27 (E.D.N.Y. 2011), *aff'd in part, vacated in part*, 738 F.3d 14 (2d Cir. 2013).

which, similar to their loss causation arguments, should be disregarded. *See, e.g.*, Coffman Rebuttal ¶¶74-95. This is impermissible and premature as set forth in *Amgen*. In a desperate attempt to exclude the conceded statistically significant price declines of July 8, 2013, and July 18, 2013, Defendants go so far as to argue that a Warning Letter from the FDA revealed nothing new to the market that was not disclosed previously in the FDA's Form 483. Opp'n at 20. This argument lacks credibility and is contrary to well accepted judicial understandings of Warning Letters as distinct disclosures from Form 483s. *See, e.g.*, *In re Omnicare, Inc. Sec. Litig.*, 2013 WL 1248243, at *12 (E.D. Ky. Mar. 27, 2013), *aff'd*, 769 F.3d 455 (6th Cir. 2014) ("Unlike a Form 483, an FDA warning letter communicates the agency's position that a violation of regulatory significance has occurred."). Notably, a Warning Letter communicates to the market that Defendants' responses to the Form 483, and thus their handling of, among other things, MDR reporting, were inadequate. *Mulligan v. Impax Labs., Inc.*, 36 F. Supp. 3d 942, 947 (N.D. Cal. 2014) ("If the FDA finds a company's responses to a Form 483 to be inadequate, it may issue a Warning Letter."); *Goldman Sachs*, 2015 WL 5613150, at *6 ("this speaks to the statements' materiality and not price impact"); *Aranaz v. Catalyst Pharm. Partners Inc.*, 302 F.R.D. 657, 671 (S.D. Fla. 2014) ("for purposes of determining at this early stage in litigation whether the alleged misrepresentation had any impact on the price of Catalyst stock, the Court must disregard evidence that the truth was known to the public."); *see also* Coffman Rebuttal ¶¶74-95.

D. Plaintiffs Need Not, at this Stage of the Litigation, Propose a Specific Damages Model to Demonstrate Predominance

Defendants concede that the "out of pocket" damages methodology that Plaintiffs will use in this case is the most common methodology used in cases alleging Section 10(b) violations. *See* Coffman Rebuttal ¶¶96-109.[24] Defendants instead focus on detailed aspects of loss causation

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[24] Plaintiffs' damages methodology has been overwhelmingly approved by courts in securities fraud actions, and nothing in *Comcast* has changed that. *Affiliated Ute Citizens of Utah v. U.S.*, 406 U.S. 128, 155 (1972) ("the correct measure of damages . . . is the difference between the fair value of all that the mixed-blood seller received and the fair value of what he would have received had there been no fraudulent conduct . . . ."); *Acticon AG v. China Ne. Petroleum Holdings Ltd.*, 692 F.3d 34, 38 (2d Cir. 2012) (securities fraud cases traditionally use an "'out-

to argue that this commonly used method does not meet the standard articulated in *Comcast* because it (1) is incapable of measuring damages attributable to the remaining theory of liability in this case, (2) is incapable of isolating the effects of each omission and misrepresentation on Intuitive's stock price, and (3) cannot reliably disaggregate the effects of confounding information from the alleged corrective disclosures. These arguments fail.

Initially, the "scrutiny required under *Comcast* and Rule 23(b)(3)" is "minimal." *Carpenters Pension Trust*, 2015 WL 5000849, at *21. "Issues and facts surrounding damages have rarely been an obstacle to establishing predominance in section 10(b) cases." *Id.* at *2; *see also id. at* *2 n.17 (citing *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 514 (9th Cir. 2013) (interpreting *Comcast* to hold only that class-action plaintiffs "must be able to show that their damages stemmed from the defendant's actions that created the legal liability"); *Roach v. T.L. Cannon Corp.*, 778 F.3d 401, 407 (2d Cir. 2015) (holding that there is no requirement that plaintiffs provide a class-wide damages model at class certification); *Fosbre v. Las Vegas Sands Corp.*, 2015 WL 3722496, at *3 (D. Nev. June 15, 2015) ("Comcast does not require that every plaintiff seeking to certify a class must present a method of calculating damages on a class-wide basis."); *Neale v. Volvo Cars of N. Am. LLC,* 794 F.3d 353, 374 (3d Cir. 2015) ("the text [of *Comcast*] makes it clear that the predominance analysis was specific to the antitrust claim at issue," and not meant to break any new ground with respect to class-certification principles.).[25]

Furthermore, Defendants' argument that there is no basis to conclude that Plaintiffs' model can measure damages attributable to the theory of liability can be dismissed out of hand. Opp'n at 21-22. Dr. Lehn's criticism is founded on the assumption that "Plaintiffs are required at this stage of the litigation to describe with precision how inflation would be calculated across all

(continued)
of-pocket' measure for damages."); *In re Seagate Tech. II Sec. Litig.*, 843 F. Supp. 1341, 1347-50 (N.D. Cal. 1994) (same).

[25] In *Comcast*, the plaintiffs alleged four theories of antitrust liability, only one of which was sustained. However, the model there was incapable of measuring "damages resulting specifically from the [single remaining] theory of liability that the district court had determined was appropriate for class treatment." *In re Diamond Foods, Inc., Sec. Litig.*, 295 F.R.D. 240, 251 (N.D. Cal. 2013).

the possible permutations of Plaintiffs' eventual merits showing." Coffman Rebuttal ¶102. But no such showing is required by *Comcast* and would be purely speculative at this stage of the litigation. As Mr. Coffman has made clear, this damages model will be adjusted based on what the facts establish. *See* Coffman Rebuttal ¶¶96-109. But, "[t]here is simply no genuine dispute in this matter about the general methodology or the primary inputs . . . for calculating damages." *Id.* at ¶99.

Defendants' next argue that Mr. Coffman has not yet proposed a damages model that isolates the effect of each misrepresentation or omission on Intuitive's stock price or disaggregates the effects of confounding information. Opp'n at 22.[26] Again, these are pure speculative questions of loss causation that are not appropriately addressed at class certification because they apply in the same manner for all class members and thus the class would rise or fall together. *See Erica P. John Fund, Inc. v. Halliburton Co.,*131 S. Ct. 2179, 2186-87 (2011)("*Halliburton I*"); Coffman Rebuttal ¶¶96-109. However, even if they were required to be addressed at this stage, Mr. Coffman has provided a common and well accepted methodology for calculating the inflation attributable to Defendants' misrepresentations and omissions and disaggregating any alleged confounding information. *See id*. Further, Mr. Coffman's proposed model has been used successfully in a number of instances, and will be used successfully here, at the correct stage. *See, e.g.*, *Liberty Media Corp. v. Vivendi Universal, S.A.*, 923 F. Supp. 2d 511, 518 (S.D.N.Y. 2013).

E. The *Affiliated Ute* Presumption of Reliance Applies

Defendants claim that the *Affiliated Ute* presumption of reliance is not applicable in this case because it's a case of mixed false and misleading statements and omissions. Opp'n at 20-21. This is belied by Defendants' own brief on class certification, the allegations made in Plaintiffs' Complaint, and the Court's decision on the motion to dismiss. In the Ninth Circuit, the presumption of reliance articulated in *Affiliated Ute Citizens of Utah v. U.S.*, 406 U.S. 128

[26] Defendants argue that the model is "incapable" of doing so. Opp'n at 22. However, Defendants sole basis for so arguing is the opinion of Dr. Lehn—who clearly does not opine that the model is "incapable" of disaggregating or isolating damages. Lehn Report ¶¶76-77.

(1972) applies to cases that "primarily allege[] omissions." *Binder v. Gillespie*, 184 F.3d 1059, 1064 (9th Cir. 1999). The presumption applies here because the Complaint principally alleges omissions, a fact that (1) this Court acknowledged in its opinion on the motion to dismiss (*see, e.g.*, Mot. to Dismiss Order at 13); (2) Defendants' conceded in their motion to dismiss briefing (*see* Mot. to Dismiss at 9); and (3) that Defendants' expert analyzed in his report in opposition to certification (*see* Expert Report of Kenneth M. Lehn ("Lehn Report") ¶12); *see also* Opp'n at 17-20. Other than Defendants' unsupported assertion that the omissions serve only to bolster the misrepresentations – they concede that Plaintiffs have satisfied their *Affiliated Ute* burden, and any price impact argument thereafter fails for the same reasons discussed above. *See* Sec. C.1.a-d *supra*.

F. The Class Period Is Proper

To advance their argument that the Class Period should be abridged, Defendants once again argue that the "omitted information" was fully disclosed before the end of the proposed class period. Opp'n at 23. In support, Defendants again rely on case law that predates *Amgen*, *Halliburton I*, and *Halliburton II*. In addition, because Defendants have effectively conceded price impact for the July 8, 2013, and July 18, 2013 disclosures (after the date on which Defendants seek to end the class period), there is no basis to shorten the proposed Class Period. Defendants' argument is yet another variation on their loss causation and truth-on-the-market arguments that are not proper at this stage. Courts throughout the Ninth Circuit have made clear, even before *Amgen* and *Halliburton I*, that "whether or not a particular release or disclosure actually cured a prior misrepresentation is a sensitive issue to rule on at this early stage of the proceedings because it comes so close to assessing the ultimate merits in the case, and courts therefore decline to find reliance thereafter unreasonable, as a matter of law, unless there is 'no substantial doubt as to the curative effect of the announcement.'" *In re LDK Solar Sec. Litig.*, 255 F.R.D. 519, 529 (N.D. Cal. 2009) (declining to adopt short class period); *In re WorldCom, Inc.,* 219 F.R.D. at 307 ("a class period should not be cut off if questions of fact remain").

In re Bridgepoint Educ., Inc. Sec. Litig., 2015 WL 224631, at *7 (S.D. Cal. Jan. 15, 2015) is instructive as one of the few cases addressing the argument post-*Halliburton II*. The

Bridgepoint court refused to shorten the class period, finding that "Halliburton did not change" that the "truth-on-the-market defense cannot be used to rebut the presumption of reliance." *Id.* Even if the Court here were to consider these arguments, given the overwhelming evidence that these disclosures were curative, Defendants' request to shorten the proposed Class Period should be denied. *See* Sect. II.C.1.a *supra*; Coffman Rebuttal ¶¶6iv, 6v; 70-87.

III. CONCLUSION

Based on the forgoing, Plaintiffs respectfully request that the Court grant Plaintiffs motion for class certification and all the relief sought therein.

Dated: November 16, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on November 16, 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 November 16, 2015.

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In re Intuitive Surgical Securities Litigation

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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).

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