

1
2 SUPERIOR COURT OF THE STATE OF CALIFORNIA
3 IN AND FOR THE COUNTY OF SAN MATEO

4 PUBLIC SCHOOL TEACHERS' PENSION
5 AND RETIREMENT FUND OF
6 CHICAGO,

7 Plaintiff,

8 v.

9 GARY S. GUTHART, LONNIE M.
10 SMITH, ERIC H. HALVORSON, ALAN J.
11 LEVY, CRAIG H. BARRATT, AMAL M.
12 JOHNSON, MARK J. RUBASH, GEORGE
13 STALK, JR., MARSHALL L. MOHR,
14 SALVATORE J. BROGNA, AUGUSTO V.
15 CASTELLO, JEROME J. MCNAMARA,
16 MARK MELTZER, COLIN MORALES,
17 DAVID J. ROSA,

18 Defendants

19 -and-

20 INTUITIVE SURGICAL, INC.

21 Nominal Party.

Case No. CIV-526930

**NOTICE OF HEARING AND PROPOSED
DERIVATIVE SETTLEMENT**

22 **TO ALL CURRENT SHAREHOLDERS OF INTUITIVE SURGICAL, INC.**

23 (“Intuitive” or the “Company”): If you are a record holder and/or beneficial owner of the common
24 stock of Intuitive Surgical, Inc. as of August 9, 2017, please read this notice carefully and in its
25 entirety. Your rights may be affected. This notice relates to a proposed settlement and dismissal
26 of shareholder derivative litigation and contains important information regarding your rights.

27 Your rights may be affected by legal proceedings in this action (the “State Action”).

28 If the Court approves the settlement and dismissal of the State Action, Intuitive
Stockholders may be forever barred from contesting the proposed settlement and from pursuing
the Released Claims (defined below). The State Action is not “class action” litigation. Thus,
there is no common fund upon which you can make a claim for a monetary payment.

The Court has made no findings or determinations respecting the merits of the State
Action. The summary of the background and circumstances of the settlement below does not

1 constitute the findings of the Court. It is based on representations made to the Court by counsel
2 for the Settling Parties.

3 **PLEASE TAKE NOTICE** that the State Action, as well as certain related shareholder
4 derivative actions, are being settled on the terms set forth in a Stipulation of Settlement dated
5 August 8, 2017 (the “Settlement”).¹

6 **I. SUMMARY OF THE ACTIONS**

7 The proposed Settlement resolves multiple shareholder derivative actions pending in
8 California state court, California federal court, and Delaware state court, as explained below.

9 On February 21, 2014, the Public School Teachers’ Pension and Retirement Fund of
10 Chicago (“State Plaintiff”) filed the State Action, *Public School Teachers’ Pension and*
11 *Retirement Fund of Chicago v. Gary S. Guthart, et al.*, Case No. 526930, in this court (“State
12 Court”) on behalf of Intuitive (as a nominal defendant) and against various defendants. Those
13 Defendants, all current or former Officers and/or Directors of Intuitive, are: Gary S. Guthart,
14 Lonnie M. Smith, Eric H. Halvorson, Alan J. Levy, Floyd D. Loop, Craig H. Barratt, Amal M.
15 Johnson, Mark J. Rubash, George Stalk, Jr., Marshal M. Mohr, Salvatore J. Brogna, Augusto V.
16 Castello, Jerome J. McNamara, Mark Meltzer, Colin Morales, and David J. Rosa (collectively,
17 “Defendants”).

18 On February 3, 2014, Robert Berg filed a stockholder derivative action, *Berg v. Guthart,*
19 *et al.*, Case No. 14-cv-00515 (N.D. Cal.), in the United States District Court for the Northern
20 District of California (“Federal Court”) on behalf of Intuitive (as a nominal defendant) and
21 against the Defendants. On March 21, 2014, City of Birmingham Relief and Retirement System
22 filed a similar stockholder derivative action, *City of Birmingham Relief and Ret. Sys. v. Guthart,*
23 *et al.*, No. 14-cv-1307 (N.D. Cal.), in Federal Court on behalf of Intuitive (as a nominal
24 defendant) and against the Defendants. On July 30, 2014, the Federal Court entered an order
25 consolidating *Berg v. Guthart* and *City of Birmingham v. Guthart* into a single action, *In re*

26
27 ¹ This notice should be read in conjunction with the Settlement, which has been filed with the
28 Court and is available on its website, <https://odyportal-ext.sanmateocourt.org/portal-external>. All
capitalized terms in this notice have the same definitions as those in the Settlement (provided that,
in the event of any inconsistency, the definitions in the Settlement control).

1 *Intuitive Shareholders Derivative Litigation*, No. 14-cv-05151 (N.D. Cal.) (“Federal Action”),
2 and appointing Mr. Berg the lead plaintiff in that action (the Federal Plaintiff).

3 Finally, on June 3, 2014, the City of Plantation Police Officers’ Employees’ Retirement
4 System (“Delaware Plaintiff”) filed an action, *City of Plantation Police Officers’ Employees’*
5 *Retirement System v. Guthart, et al.*, CA No., 9726-CB (“Delaware Action”), in Delaware
6 Chancery Court (“Delaware Court”) on behalf of Intuitive (as a nominal defendant) and against
7 the Defendants for alleged violations of state law. Collectively, these derivative lawsuits are
8 referred to as the “Actions” and the plaintiffs in the Actions are referred to as the “Plaintiffs.”

9 In each of the Actions, Plaintiffs sought to recover, on Intuitive’s behalf, damages
10 purportedly sustained by the Company for the period between 2011 and 2014 in connection with
11 alleged breaches of fiduciary duty by Defendants, allegedly misleading statements and/or
12 omissions by Defendants, and certain stock transactions by Defendants. Following motion
13 practice, the Federal Action and Delaware Action were stayed, while the State Action proceeded
14 to discovery and trial.

15 During discovery in the State Action, State Plaintiff and Defendants served requests for
16 production and other written discovery on each other and on non-parties. More than 720,000
17 pages of documents were produced, and more than 30 depositions were conducted, including
18 depositions of experts on the FDA, corporate governance, and damages. Federal Plaintiff’s
19 Counsel assisted State Plaintiff’s Counsel with depositions and other discovery. After a number
20 of depositions in the State Action, Plaintiffs and Defendants reached an agreement that Federal
21 Plaintiff and Delaware Plaintiff would intervene in the State Action. The State Court approved
22 this intervention, but Delaware Plaintiff subsequently dismissed its action in the State Case.

23 Following discovery, Defendants and State Plaintiff filed motions for summary judgment
24 and/or adjudication. A hearing on the motions was held before Judge Buchwald in the State
25 Court on August 24, 2016. The Actions settled the day before trial was scheduled to begin in the
26 State Action.

II. SUMMARY OF SETTLEMENT NEGOTIATIONS AND TERMS

A. Settlement negotiations

Starting in 2015, Plaintiffs, Defendants, and Intuitive (collectively, the “Settling Parties”) engaged in settlement discussions and exchanged various proposals regarding the possible terms for a settlement. On September 18, 2015, the State Court held a settlement conference before Judge Dylina, which was unsuccessful. On December 18, 2015, private mediation occurred, which also was unsuccessful. On July 25, 2016, the State Court held another settlement conference before Judge Foiles, which again was unsuccessful. The Settling Parties met for final settlement conference with Judge Foiles on September 12, 2016. Although a settlement was not reached, private negotiations continued, and one day before trial in the State Action was to begin, the Settling Parties agreed on the terms of a settlement and entered into a Memorandum of Understanding, which embodied the basic terms of their agreement. Under the MOU, the parties attempted to negotiate privately attorneys’ fees and expenses. When unsuccessful, they then mediated the issue of attorneys’ fees and expenses before Hon. Daniel Weinstein (Ret.). Afterwards, the parties arbitrated the issue before a three-arbitrator panel at JAMS, consisting of Robert Meyer, Esq., Hon. Read Ambler, and Hon. James Lambden (Ret.).

B. Settlement terms

The Settlement includes both non-monetary and monetary components. Specifically, Intuitive will adopt certain corporate governance measures, which shall remain in place for at least three years, and the Defendants will pay money and return certain stock options to Intuitive. In addition, Intuitive will pay attorneys’ fees and litigation expenses to Plaintiffs’ Counsel in the amount of \$16,733,008.15. Intuitive believes that, prior to the Actions, it had in place robust corporate governance measures.

1. Corporate governance measures

a. Insider Trading Policy compliance

Intuitive will evaluate the Company’s current Insider Trading Policy and make recommendations to the Board of Directors for its improvement, including evaluation of provisions to ensure compliance with insider trading regulations by the Company’s Officers and

1 Directors. Prior to the Company submitting the revised Insider Trading Policy to the Board,
2 Plaintiffs shall have seven (7) days to review and, if desired, recommend suggested changes to the
3 revised Insider Trading Policy. To the extent there are any disagreements concerning Plaintiffs'
4 suggested changes, after a good faith effort to resolve them, any such disagreements shall be
5 submitted to the State Court. Intuitive will ensure that the revised Insider Trading Policy
6 designates one or more senior members of Intuitive's executive management to be responsible for
7 implementing the new Insider Trading Policy.

8 Intuitive will ensure that, in the event that any Officer or Director of the Company is
9 subject to a final judgment in an enforcement action taken by the United States Department of
10 Justice or the United States Securities and Exchange Commission for violation of insider trading
11 laws, the Company has the right to claw back the proceeds of such insider trading from the
12 Officer or Director against whom the final judgment was issued.

13 Finally, Intuitive shall ensure that all Directors and Officers at the level of Executive Vice
14 President or above enter into Rule 10b5-1 plans.

15 **b. FDA compliance oversight**

16 Intuitive will ensure that during each quarterly meeting of the Board of Directors, the
17 Company's senior-most quality officer (or an appointed designee) presents to the Board a
18 summary of product quality matters and complaint trends derived from the Company's Quarterly
19 Review Board meeting or other appropriate data sources regarding product quality and complaint
20 trends. The senior-most quality officer will be responsible for ongoing compliance with product
21 quality matters and complaint trends at the organizational level.

22 Intuitive also will ensure that during each quarterly meeting of the Board, the Company's
23 senior-most regulatory officer (or an appointed designee) presents to the Board a summary of
24 regulatory compliance matters, including compliance with FDA regulations and procedures. The
25 senior-most quality officer will be responsible for ongoing regulatory compliance, including
26 compliance with FDA regulations and procedures at the organizational level.

27 **c. Whistle-Blower Policy/Ethics Hotline**

28 Intuitive will maintain and publicize a formal whistle-blower policy for its employees,

1 including references to its ethics hotline. Intuitive also will engage an independent third-party
2 supplier to provide and monitor its ethics hotline for Intuitive employees and other stakeholders.
3 The contact information for this hotline will be posted by the Company in its Code of Business
4 Conduct and Ethics, as well as in prominent locations within the Company.

5 **2. Cash payment and stock option return**

6 The Defendants will pay \$15,000,000 to Intuitive, comprised of a cash payment to the
7 Company of \$5,000,000 and the return to the Company of Intuitive stock options such that the
8 number of shares returned multiplied by the market price of the shares as of the close of trading
9 on September 15, 2016 (the date the Settling Parties executed the Memorandum of
10 Understanding) equals \$10,000,000. The price of a share of Intuitive stock as of the close of
11 trading on September 15, 2016 was \$684.19.

12 **III. REASONS FOR THE SETTLEMENT**

13 **A. Why did the Plaintiffs agree to settle?**

14 Plaintiffs believe that the Actions have merit, and Plaintiffs' entry into the Settlement is
15 not an admission concerning the relative merit of the claims and defenses in the Actions.
16 However, Plaintiffs and Plaintiffs' Counsel recognize the significant risk, expense, and time
17 necessary to prosecute the Actions through trial and possible appeals. Plaintiffs and Plaintiffs'
18 Counsel also have taken into account the uncertain outcome and the risk of any litigation,
19 especially in complex cases such as the Actions, as well as the difficulties and delays inherent in
20 such litigation. Plaintiffs and Plaintiffs' Counsel also are mindful of the inherent problems of
21 proving their claims at trial, and the possible defenses to the claims alleged in the Actions.

22 **B. Why did the Defendants agree to settle?**

23 Defendants deny all the allegations of wrongdoing and claims of liability made by
24 Plaintiffs and assert that at all times they acted in good faith and in a manner that was in the best
25 interests of Intuitive and its stockholders. However, Defendants have concluded that further
26 litigation of the Actions would be protracted and expensive and that fully and finally settling the
27 Actions is desirable. Defendants also have taken into account the uncertainty and risks inherent
28 in any litigation, especially in complex cases like the Actions. Defendants have, therefore,

determined that it is beneficial that the Actions be settled.

IV. YOUR RIGHTS AS A SHAREHOLDER

If you are a current Intuitive Stockholder, YOUR RIGHTS MAY BE AFFECTED BY PROCEEDINGS IN THE STATE ACTION.

As detailed in the Settlement at ¶ 12(y), the Settlement, once approved by the Court, provides for the release of certain claims. These claims are defined in the Settlement as follows:

“Released Claims” means any and all claims or causes of action (including Unknown Claims), including, but not limited to, any claims for damages, injunctive relief, interest, attorneys’ fees, expert, or consulting fees, and any and all other costs, expenses, or liabilities whatsoever that were or could have been asserted by Plaintiffs derivatively on behalf of Intuitive, Intuitive, or Intuitive’s Stockholders, or any of them, against the Released Persons based upon or arising out of the facts, transactions, events, occurrences, disclosures, statements, acts, omissions, failures to act, alleged mismanagement, misconduct, concealment, misrepresentations, violation of law, sale of stock, or other matters that were or could have been alleged in or encompassed by the Actions. For purposes of clarity, and without narrowing the scope of the releases provided herein, “Released Claims” only include those claims that can be released under applicable law and specifically does not release claims in the pending Securities Class Action. Nothing set forth herein shall constitute a release by the Settling Parties of any rights or obligations to enforce the terms of the Settlement.

Each Intuitive Stockholder is hereby placed on notice that the Settlement, if approved, is intended to foreclose his or her ability to seek legal or equitable relief from Defendants or Intuitive (and certain defined affiliated persons) relating to the issues alleged or the facts and circumstances set forth in the Actions, subject to the qualifications above. If you are an Intuitive Stockholder and have questions concerning the scope of the release, or its impact, you are encouraged to seek independent legal advice.

If you are an Intuitive Stockholder, you have certain rights in connection with the approval of the Settlement, as explained below.

A. Your right to attend the Settlement Hearing

On October 20, 2017 at 9:00 a.m., a hearing (the “Settlement Hearing”) will be held before the Superior Court, San Mateo County, the Honorable Gerald J. Buchwald, Department 10, Courtroom 8D, located at 400 County Center, Redwood City, CA 94063 to determine, among other things: (i) whether the Settlement should be approved as fair, reasonable, and adequate; (ii) whether the State Action should be dismissed and with prejudice; and (iii) whether Plaintiffs’

1 Counsel's application for an award of attorneys' fees and reimbursement of litigation expenses, in
2 the amount of \$16,733,008.15 to be paid by Intuitive, should be granted.

3 Any current Intuitive Stockholder may, but is not required to, appear in person at the
4 Settlement Hearing. **CURRENT INTUITIVE STOCKHOLDERS WHO HAVE NO**
5 **OBJECTION TO THE SETTLEMENT DO NOT NEED TO APPEAR AT THE**
6 **SETTLEMENT HEARING OR TAKE ANY OTHER ACTION.**

7 The Court has the right to change the Settlement Hearing date or time without further
8 notice. If you are planning to attend the Settlement Hearing, you should confirm the date and
9 time before going to the Court.

10 **B. Your right to object to the settlement**

11 You have the right to object to any aspect of the proposed Settlement. You must object in
12 writing, and you may request to be heard at the Settlement Hearing. **IF YOU OBJECT, THEN**
13 **YOU MUST COMPLY WITH THE PROCEDURES BELOW.**

14 **1. You must make detailed objections in writing.**

15 Any objections must be submitted in writing and must contain the following information:

- 16 1. your name, legal address, and telephone number;
- 17 2. proof of ownership of Intuitive common stock, currently and throughout the relevant
18 period, including the number of shares of Intuitive common stock and the date of purchase;
- 19 3. a detailed statement of your specific position with respect to the matters to be heard at
20 the Settlement Hearing, including a statement of each objection being made;
- 21 4. the grounds for each objection or the reasons for your desiring to appear and to be
22 heard;
- 23 5. written notice of whether you intend to appear at the Settlement Hearing; and
- 24 6. copies of any papers you intend to submit to the Court.

25 The Court will not consider any objection that does not substantially comply with the
26 above requirements.

27 **2. You must timely deliver your written objections.**

28 You must timely deliver the written objections described above to the Court, Plaintiffs'

Counsel, Defendants' Counsel, and Intuitive's Counsel.

Your written objections and any associated materials must be on file with the Clerk of the Court no later than October 6, 2017. The Clerk's address is:

Clerk of the Court
SUPERIOR COURT OF CALIFORNIA
400 County Center
Redwood City, CA 94063

Your written objections and any associated materials also must be delivered to Plaintiffs' Counsel, Defendants' Counsel, and Intuitive's Counsel so they are received no later than October 6, 2017. Counsel's addresses are:

Mark C. Molumphy, Esq.
COTCHETT PITRE & MCCARTHY LLP
840 Malcolm Road, Suite 200
Burlingame, CA 94010
Counsel for State Plaintiff

Michael D. Celio
KEKER, VAN NEST & PETERS LLP
633 Battery Street
San Francisco, CA 94111
Counsel for Defendants

Richard A. Speirs, Esq.
COHEN MILSTEIN SELLERS & TOLL
PLLC
88 Pine Street, 14th Floor
New York, NY 10005
Counsel for State Plaintiff

Ismail Ramsey
RAMSEY & EHRLICH LLP
803 Hearst Avenue, Berkeley, CA 94710
Counsel for Intuitive

The Court will not consider any objection that is not timely filed with the Court or not timely delivered to Plaintiffs' Counsel and Defendants' counsel. If you fail to object or otherwise request to be heard in the manner prescribed above, you will waive the right to object to any aspect of the Settlement or otherwise request to be heard (including the right to appeal), and you will be forever barred from raising such objection or request to be heard in this or any other related action or proceeding, but shall otherwise be bound by the judgment entered and the releases given.

**PLEASE DO NOT CONTACT THE COURT OR THE CLERK'S OFFICE REGARDING
THIS NOTICE**