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RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ANNA LERHAUPT AND BENJAMIN LERHAUPT,

Plaintiffs,

vs.

INTUITIVE SURGICAL, INC.,

Defendant.

C 12 5959 HRL

Case No.

COMPLAINT

JURY TRIAL DEMANDED

Plaintiffs, complaining of the defendant by their attorney, respectfully allege, upon information and belief, the following:

THE PARTIES

1. The plaintiff, ANNA LERHAUPT, is a resident of and domiciled Cincinnati Ohio.

2. The plaintiff, BENJAMIN LERHAUPT, is a resident of and domiciled in Cincinnati Ohio.

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3. The defendant INTUITIVE SURGICAL, INC. (hereinafter "INTUITIVE") is a foreign business corporation, duly organized and existing under and by virtue of the laws of the State of Delaware with a principle place of business in the State of California.

JURISDICTION AND VENUE

4. Jurisdiction for this action in the United States District Court arises under 28 U.S.C. Sections 1332(a)(1) and 1332(c)(2) as this is a civil action based on complete diversity of citizenship in that the surgery performed on ANNA LERHAUPT, a resident of Ohio but a machine sold and distributed under the laws of Delaware by a corporation with its principle place of business in the State of California. The amount in controversy exceeds $75,000 exclusive of costs and interest.

GENERAL ALLEGATIONS

5. Plaintiff ANNA LERHAUPT, was advised that she needed to have a hysterectomy performed and gall bladder removal.

6. Her physician presented her with information and materials promoting the benefit of da Vinci robotic hysterectomy and gall bladder surgery over all other methods of surgery. Specifically, her physicians told her that due to the da Vinci robotic approach she would heal faster, have a better outcome and have less pain.

7. Based on the representations made by her physicians and the written materials provided to her, the Plaintiff agreed to proceed with da Vinci robotic hysterectomy and gall bladder removal. Plaintiff ANNA LERHAUPT underwent surgery which resulted in damage including infection and vesicovaginal fistula.

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8. ANNA LERHAUPT continues to suffer from cramping and bladder problems. Through this time period ANNA LERHAUPT has been unable to maintain normal intimate relationships with BENJAMIN LERHAUPT and has suffered emotional distress.

9. Due to the injuries sustained during the da Vinci Robotic hysterectomy, and gall bladder surgery, Plaintiff ANNA LERHAUPT had to have multiple painful additional medical tests and procedures and physician consultations and additional surgery and has suffered pain, loss of function, emotional distress, and permanent injury. Plaintiff BENJAMIN LERHAUPT has suffered loss of Consortium.

10. Defendant INTUITIVE is a Delaware corporation with its principal place of doing business in Sunnyvale, CA.

11. Defendant INTUITIVE is a publically traded company on the NASDAQ exchange, with a current market value of more than two billion dollars.

12. Defendant designed, manufactured, tested, sold, promoted and labeled the da Vinci surgical robot.

13. On its website defendant asserts that it is the global technology leader in surgical robotic products.

14. The said robotic device is used in hospitals for a variety of surgeries, including gynecological, and including therein hysterectomies.

15. Defendant has promoted its device as (a) safe, and (b) safer than other comparative methods of surgery including, in the case of hysterectomies, laparoscopy, vaginal surgery and open surgery.

16. Defendant utilizes prominent websites aimed at consumers, seeking to

create demand for the use of its robotic device by patients who consult surgeons.

17. Defendant sold it device through a calculated program of intimidation and market management, forcing hospitals and physicians to purchase it in order to appear to be competitive, and creating a fear in their minds that if they did not have this technology they would lose business to competitors.

18. Defendant reinforced its calculated program, as stated in the preceding paragraph, by placing, on its website for potential patients, names of certain physicians who had performed 20 surgeries with the device.

19. The use of defendant's robotic device in surgery presents substantial risks of complications and injuries, including de-vascularization of the vaginal cuff impeding healing, partial thermal injury burns to bowel, post-surgical abscesses, tears, dehiscences, bleeding, hematomas, sepsis, and fistulas.

20. More specifically, defendant's robotic device can cause damage to the bowel, blood vessels, arteries, ureters, bladder and vaginal cuff.

21. In addition, due to lengthened time of surgery, patients are unnecessarily exposed to anesthesia for a dangerous period of time.

22. On occasion these complications and injuries cause and/or contribute to infectious processes from thermal injury causing abscess formation and can lead to the untimely and premature death of the patient.

23. Defendant is aware of the aforesaid risks and complications associated with the use of the said robotic device.

24. Defendant does not provide adequate warnings to physicians and patients about the risks and complications associated with the use of its robotic device.

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25. Defendant has not done, nor sponsored, adequate testing on its said device before and after marketing it to determine whether in random tests its said device is either safer or more effective or otherwise superior to other surgical and laparoscopic methods to which it compares itself.

26. Defendant has not done adequate post marketing surveillance of complications and injuries that have occurred in actual practice.

27. Defendant has not done, nor sponsored, any testing as to long-term outcomes, in comparison to other surgical and laparoscopic methods.

28. Defendant has not revealed, through publications or reports to the Food and Drug Administration and other governmental bodies, the true extent of complications and injuries, which have occurred in actual practice.

29. Defendant has suppressed reports and complaints of complications and performance errors due to the use of its said device.

30. Defendant does not adequately train physicians nor proctor them properly on the use of its device, thereby inducing them to cause complications and injuries, which would be avoided in the hands of properly trained physicians.

31. Defendant represents that they will have skilled technicians in the operating room or on emergency call in the event of problems arising with its said device, but often has neglected to do so.

32. Defendant has over-promoted its device to hospitals, physicians and the public, including potential consumers, combined with minimizing the risks and complications associated with its use.

33. The device is defective in that it relies upon the use of monopolar

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energy to cut, burn and cauterize tissue, whereas safer methods are available such as bipolar energy and ultrasonic energy, which would reduce substantially the risk of complications.

34. The device has inadequate insulation for its arms thereby allowing electrical current to pass into tissue outside of the operative field.

35. The insulation on the shafts of the said device becomes torn and worn in places, without the awareness of the physician user, allowing electrical current to pass into tissue outside of the operative field, causing damage.

36. Defendant has failed to warn users and consumers of the said robotic device about the inadequate insulation on the arms and the potential for electrical current to pass into tissue outside of the operative field.

37. Due to design defects, defendant's devices have malfunctioned during the course of operative use causing injury, including the necessity of converting the procedure into open surgery, or often requiring subsequent surgeries to deal with complications of robotic use.

38. Defendant has failed to warn users and consumers of its said device of the design flaws stated in the preceding paragraphs, although it has reached out directly to consumers to promote its asserted advantages.

39. Defendant had specific knowledge and awareness of the dangers of monopolar current and that there were safety modalities commercially available that could have greatly diminished or eliminated some of these risks, yet the Defendant elected not to include these safety features on the da Vinci Robotic Hysterectomy platform.

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40. Defendant has obtained and continues to maintain approval of the uses of its device from the Food and Drug Administration by failing to fully inform them of its knowledge of risks and complications associated with the use of its device.

FIRST CAUSE OF ACTION – PRODUCT LIABILITY

41. Plaintiffs incorporate by reference each and every paragraph of this Complaint as though set forth in full in this cause of action.

42. Defendant placed into the stream of commerce its aforesaid device which was defective in design, as previously pleaded.

43. Defendant owed Plaintiffs a duty to exercise reasonable care when designing, testing, manufacturing, marketing, advertising, promoting, distributing, and/or selling da Vinci Robots for hysterectomy.

44. At all relevant times to this action, Defendant owed a duty to properly warn Plaintiff, the medical community, and the Public of the risks, dangers and adverse side effects of the da Vinci Robotic hysterectomy platform.

45. Defendant breached its duty by failing to exercise ordinary care in the preparation, design, research, testing, development, manufacturing, inspection, labeling, marketing, promotion, advertising and selling of da Vinci Robotic Surgery, as set forth below:

a. Failing to test da Vinci Robotic Hysterectomy properly and thoroughly before promoting the robotic surgical platform using monopolar current to the market;

b. failing to analyze properly and thoroughly the data resulting from the pre-

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marketing tests of monopolar current used in the da Vinci Robotic Hysterectomy;

c. failing to report to the FDA, the medical community, and the general public those data resulting from pre- and post-marketing tests of the da Vinci Robotic Hysterectomy platform which indicated risks associated with its use;

d. failing to conduct adequate post-market monitoring and surveillance of post-surgical complications associated with the da Vinci Robotic Hysterectomy platform using monopolar current;

e. failing to conduct adequate analysis of adverse event reports;

f. designing, manufacturing, marketing, advertising, distributing and promoting the da Vinci Robotic Hysterectomy directly to consumers, including Plaintiff, without adequate warning of the significant and dangerous risks of monopolar current and the da Vinci Robotic Hysterectomy Platform and without proper instructions to avoid the harm which could foresee ably occur as a result of using monopolar energy on the existing da Vinci Robotic Hysterectomy platform;

g. failing to exercise due care when advertising and promoting da Vinci Robotic Hysterectomy;

h. negligently continuing to manufacture, market, advertise, and promote da Vinci Robotic Hysterectomy after Defendant knew or should have known of the risks of serious injury and/or death associated with using monopolar current to perform certain aspects of the surgery including the colpotomy incision;

i. failing to use due care in the preparation and development of the da Vinci Robotic Hysterectomy to prevent the aforementioned risk of injuries to individuals through the use of monopolar current;

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j. failing to use due care in the design of the da Vinci Robotic Hysterectomy platform with special regard to the insulation of the robotic arms and instruments to prevent the aforementioned risk of injuries to individuals during the routine course of surgery;

k. failing to conduct adequate pre-clinical testing and research to determine the safety of the use of monopolar current and the insulation of the robotic instruments to be used in robotic hysterectomy, with special regard to the reusing of the instruments up to ten times in ten different patients;

l. failing to conduct adequate intra-operative surveillance and post operative complication studies to determine the safety of the use of monopolar energy during the surgical robotic hysterectomy procedure taught by INTUITIVE SURGICAL INC., while defendant knew or should have known that intra-operative surveillance and post-operative complication analysis would be the only means to determine the relative risk of using monopolar during important surgical steps when performing a robotic hysterectomy with specific attention to the risks of performing a colpotomy incision or an amputation of the uterus, causing severe thermal injury to bladder, ureter, bowel, vaginal cuff, and blood vessels, in the absence of clinical trials which cannot be conducted for this purpose, and that such surveillance would be necessary for a due diligence program that would alert defendant to the need to change the technique for the use of monopolar current or to withdraw it from the market altogether;

m. failing to completely, accurately and in a timely fashion, disclose the results of the pre-marketing testing of issues with monopolar energy and post-marketing

surveillance of monopolar energy related injuries and complications to Plaintiff, consumers, the medical community, and the FDA;

n. failing to accompany marketing materials promoting the da Vinci Robotic Hysterectomy platform using monopolar current with proper warnings regarding all possible adverse side effects associated with the use of the same;

o. failing to use due care in the manufacture, inspection, and safety evaluation of the da Vinci Robotic Hysterectomy platform to prevent the aforementioned risk of injuries to individuals who underwent a da Vinci Robotic Hysterectomy;

p. failing to use due care in the promotion of da Vinci Robotic Hysterectomy to prevent the aforementioned risk of injuries to individuals when the drugs were ingested;

q. failing to use due care in the sale and marketing of the da Vinci Robot to prevent the aforementioned risk of injuries to individuals who were to undergo robotic hysterectomy;

r. failing to use due care in the selling of the monopolar scissors to prevent the aforementioned risk of injuries to individuals who underwent da Vinci Robotic Hysterectomy;

s. failing to provide adequate and accurate training and information to the sales representatives who sold the da Vinci Robot;

t. failing to provide adequate and accurate training and information to healthcare providers for the appropriate use of the da Vinci Robot for hysterectomy;

u. failing to conduct or fund research into the development of safer robotic surgical instruments which would pose the least risk of causing severe thermal injury

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to bowel, bladder, ureter, and blood vessels;

v. failing to educate healthcare providers and the public about the safest use of the monopolar scissors in da Vinci Robotic surgery;

w. failing to give healthcare providers adequate information to weigh the risks of serious injury and/or death for a given patient using the da Vinci Robotic Hysterectomy platform and technique featuring the use of monopolar current; and,

x. being otherwise reckless, careless and/or negligent.

46. Defendant placed into the stream of commerce its aforesaid device, which was defective in its labeling and warnings, as previously pleaded.

47. Defendant placed into the stream of commerce its aforesaid device, which was defective in its testing and approval, as previously pleaded.

48. At the time the device left the possession of defendant it was in an unreasonably dangerous and defective condition for application for robotic hysterectomy using monopolar energy.

49. Despite the fact that Defendant knew or should have known that the da Vinci Robotic Hysterectomy platform using monopolar current had increased the risk of serious injury and/or death, Defendant continued to promote and market the da Vinci Robotic Hysterectomy to consumers, including Plaintiff, when safer and more effective methods of treatment were available.

50. The Defendant designed, tested, manufactured, packaged, marketed, distributed, promoted, and sold the da Vinci Robot, placing the da Vinci Robotic Hysterectomy into the stream of commerce.

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51. The da Vinci Robot was designed, tested, inspected, manufactured, assembled, developed, labeled, sterilized, licensed, marketed, advertised, promoted, sold, packaged, supplied and/or distributed by Defendant in a defective and unreasonably dangerous condition to consumers, including the Plaintiff.

52. The da Vinci Robot was expected to reach, and did reach, users and/or consumers, including Plaintiff, without substantial change in the defective and unreasonably dangerous condition in which it was manufactured and sold.

53. Plaintiff's surgeon used the da Vinci robotic Hysterectomy platform including monopolar current as instructed by and certified by and in the foreseeable manner normally intended, recommended, promoted, and marketed by Defendant. Plaintiff's surgeons, attended a surgical lab for hands-on initial training and were proctored for by a proctor employed by INTUITIVE SURGICAL.

54. The da Vinci Robotic Hysterectomy platform was unreasonably dangerous in that, as designed, it failed to perform safely when used by ordinary consumers, including Plaintiff's surgeon, including when it was used as intended and in a reasonably foreseeable manner.

55. The da Vinci Robotic Hysterectomy was unreasonably dangerous in that, as designed, the risks of serious injury and/or death, including bowel, bladder, ureteral, vaginal cuff, abscess formation, permanent scarring, or vascular injury, posed by its monopolar current risks exceeded any benefit the Robotic approach was designed to or might in fact bestow.

56. The da Vinci Robotic Hysterectomy platform was unreasonably dangerous in that, as designed, it was dangerous to an extent beyond that contemplated

by the medical community, and ordinary regulars, including the Plaintiff.

57. The da Vinci Surgical Robot was defective in its design in that it neither bore, nor was packaged with, nor accompanied by, warnings adequate to alert the medical community, including Plaintiff's surgeon, to the risks described herein, including, but not limited to, the risk of serious injury and/or death, including bowel, bladder, ureteral, vaginal cuff devascularization, or vascular injury, posed by its monopolar current risks. The da Vinci Robot was not accompanied by adequate labeling, instructions for use and/or warnings to fully apprise the medical, hospital, operating room and/or scientific communities, and potential patients, including Plaintiff, of the potential risks and serious side effects associated with its use, thereby rendering Defendant liable to the Plaintiff.

58. There were safer alternative energy modalities available including bipolar energy and ultrasonic energy.

59. Monopolar energy, as used and taught on the da Vinci Robotic Hysterectomy platform, was unsafe for normal or reasonably anticipated use in performing the colpotomy incision or the amputation of the uterus.

60. In light of the potential and actual risk of harm associated with the use of monopolar energy so close to bowel, bladder, ureter, vaginal cuff, and blood vessels, a reasonable person who had actual knowledge of this potential and actual risk of harm would have concluded that the da Vinci Robotic Hysterectomy platform should not have been marketed in that condition.

61. Although Defendant knew or should have known of the defective nature of its da Vinci Robotic Hysterectomy platform using monopolar current, it

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continued to design, manufacture, market, and promote the use of it's da Vinci Robotic Hysterectomy platform so as to maximize sales and profits at the expense of the public health and safety. Defendant thus acted with conscious and deliberate disregard of the foreseeable harm caused by the continued use of monopolar energy on its robotic platform.

62. Plaintiff could not, through the exercise of reasonable care, have discovered the risk of serious injury and/or death associated with and/or caused by the da Vinci Robotic Hysterectomy platform featuring monopolar current. Plaintiff, if aware of these additional risks, could have chosen surgical procedures with similar efficacies but without these additional risks. As a result, Plaintiff suffered the personal injuries described herein.

63. Information given by Defendant to the medical community and to the consumers concerning the safety and efficacy of the da Vinci Robotic Hysterectomy platform, especially the information contained in the advertising and promotional materials, did not accurately reflect the serious and potentially fatal side effects.

64. Had adequate warnings and instructions been provided, Plaintiff's surgeon would not have suggested a robotic approach, and Plaintiff would have had at a much lower risk of the harmful side effects described herein.

65. As a direct and proximate consequence of Defendant's negligence, willful, wanton, and/or intentional acts, omissions, misrepresentations and/or otherwise culpable acts described herein, the Plaintiff, ANNA LERHAUPT, sustained injuries and damages alleged herein.

66. That by reason of the foregoing and defendant's aforesaid conduct,

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among other things, the plaintiff ANNA LERHAUPT suffered injuries which caused her to undergo additional surgery and medical procedures, endured pain and suffering and will continue to do so in the future, has suffered mental anguish and will continue to do so in the future, has loss the pleasure of sexual activity, and has incurred medical expenses.

67. Plaintiff has incurred and Defendant is liable for certain expenses, including hospital, surgical and medical treatment, transportation costs to University Centers, as a result of, among other things, defendant's conduct.

68. As a result of its said conduct, Defendant has become strictly liable to plaintiff.

69. Defendant's conduct in continuing to market, sell and distribute the aforesaid devices after obtaining knowledge they were defective and not performing as represented and intended, showed complete indifference to and/or a conscious disregard for the safety of others justifying an award of punitive damages for aggravating circumstances in such a sum which will serve to deter defendant and others from similar conduct in the future.

WHEREFORE, Plaintiffs, demands judgment against Defendant and seeks compensatory damages, and exemplary and punitive damages together with interest, the costs of suit and attorneys' fees and such other and further relief as this Court deems just and proper.

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SECOND CAUSE OF ACTION – GENERAL NEGLIGENCE & NEGLIGENT TRAINING & PROCTORING & NEGLIGENT CERTIFICATION

70. Plaintiff repeats, reiterates and realleges each and every allegation and cause of action contained herein as if the same were set forth more fully at length herein.

71. Defendant was careless in the design, testing, manufacturing, labeling and promotion of its aforesaid device, as pleaded in previous paragraphs.

72. In specific, defendant failed to warn users and consumers of the risk of complications associated with the use of its said device, risks of monopolar current use, including the damage to the bladder, bowel, ureter, vaginal cuff, and blood vessels; the bladder and ureter which was a proximate cause of Plaintiff's ANNA LERHAUPT 'S additional surgery and medical treatments resulting in long term pain and suffering.

73. Defendant took it upon itself to "train" and "certify" Plaintiff's surgeon on the use of the da Vinci Robotic Hysterectomy platform using monopolar current. Upon belief the Defendant specifically trained Plaintiff's surgeon on the use of monopolar current via operative endoshear scissors during the dissection of the bladder and the colpotomy incision causing thermal injury and devascularization of the vaginal cuff leading to increased tissue damage, abscess, and chronic inflammatory changes.

74. Defendant did not properly proctor and/or properly instruct Plaintiff's surgeons and attending staff as to the safe use of its device nor how to detect

complications which its said device causes and is known to cause.

75. Defendant had a financial incentive to promptly train, proctor, and certify Plaintiff's surgeon without regard to whether or not Plaintiff's surgeon was truly skilled and competent on the da Vinci Robotic Hysterectomy platform.

THIRD CAUSE OF ACTION – FRAUD

76. Plaintiff repeats, reiterates and realleges each and every allegation and cause of action set forth herein as if the same were set forth more fully at length herein.

77. Defendant misrepresented the safety and comparative efficacy of its device, upon which decedent's surgeons relied, to decedent's detriment.

78. Defendant misrepresented the safety and comparative efficacy of its device, upon which the hospital and surgery department where decedent was operated on relied, in purchasing and using the device, to Plaintiff's detriment.

79. Defendant was aware, or should have been aware, of the known dangers of monopolar current in regard to unsuspected current leaving the shaft of a poorly insulated instrument. Furthermore, Defendant suggested to Hospitals that multiple uses of the robotic instruments could be done yet Defendant did so without regard to re-testing of the insulation along the shaft of their robotic instruments or at the wrist of the robotic instrument.

80. Defendant was aware, or should have been aware, of the known dangers of monopolar current in regard to capacitive coupling, which like insulation

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failure can cause a thermal injury to occur in adjacent structures like bowel, bladder, ureter, vaginal cuff, or blood vessel. Defendant was aware, or should have been aware, of the known increased incidence of vaginal cuff dehiscence, de-vascularization and abscess formation due to the use of monopolar current while performing the colpotomy portion of the da Vinci Robotic total laparoscopic hysterectomy.

81. Defendant was aware that there were safer energy modalities including ultrasonic energy and bipolar energy, yet maintained teaching the use of monopolar current in the da Vinci Robotic Hysterectomy. Defendant did so based on not wanting to pay for the cost of having to license these safer energy technologies.

82. Defendant was also aware, or should have been aware, of the Active Electrode Monitoring System, or AEM Technology, which shields and monitors instruments continuously directing stray energy, the cause of stray electrosurgical burns, away from the patient. With the AEM system, the patient is never at risk for stray electrosurgical burns due to insulation failure and capacitive coupling. Despite having specific knowledge of this safety system the Defendant choose not to purchase it for it's da Vinci Robotic Hysterectomy platform using monopolar current.

83. Further, defendant concealed from consumers and users, including those mentioned in the preceding paragraphs, the risks of complications of which it was aware, which would have been material to consumers and users in making the decision to use the said device.

84. Further, defendant suppressed reports of adverse outcomes with the use of its device, which would have been material to consumers and users in making the

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decision to use the said device.

85. Further, defendant over-promoted its device and minimized its risks, for the purpose of making sales of its device, its maintenance, and the use of replaceable parts, and skewed the cost-benefit ratio inaccurately in its favor.

86. The said conduct was so willful, wanton, malicious and reckless that it merits the imposition of punitive damages.

FOURTH CAUSE OF ACTION - BREACH OF EXPRESS WARRANTY

87. Plaintiff repeats, reiterates and realleges each and every allegation and cause of action set forth herein as if the same were set forth more fully at length herein.

88. Defendant made express warranties of safety to the buyers and consumers of the device utilized during Plaintiff's ANNA LERHAUPT surgery, upon which the buyers and users, as agents of Plaintiff ANNA LERHAUPT, relied, to her detriment. Defendant expressly represented to the Plaintiff ANNA LERHAUPT (and to other consumers and the medical community) that the da Vinci robotic hysterectomy was safe, efficacious and fit for its intended purposes that it was of merchantable quality, that it did not produce any unwarned-of dangerous side effects, and that it was adequately tested.

89. Defendant breached expressed warranties with respect to the da Vinci robotic hysterectomy in the following ways:

a) Defendant represented through its labeling, advertising, marketing

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materials, detail persons, seminar presentations, surgeon training sessions, publications, notice letters, and regulatory submissions that the da Vinci Robotic hysterectomy was safe, and fraudulently withheld and concealed information about the substantial risks or serious injury and/or death associated with using monopolar current on the existing da Vinci robotic platform;

b) Defendant represented that the da Vinci Robotic Hysterectomy was as safe and/or safer than alternative surgical methods, and fraudulently concealed information which demonstrated that the da Vinci robotic hysterectomy approach was not safer than alternatives available on the market; and,

c) defendant represented that the da Vinci Robotic Hysterectomy was more efficacious than other alternative surgical methods, and fraudulently concealed information that it was not more efficacious than alternative surgical methods.

90. Da Vinci Robotic Hysterectomy does not conform to Defendant's express representations, because it is not safe, efficacious, has numerous serious unwarned-of side effects, causes severe and permanent injuries including death, and was not adequately tested.

91. The da Vinci Robotic Hysterectomy platform including the use of monopolar current did not perform as safely as an ordinary physician, as an agent of the patient, would have expected when used as intended or in a reasonably foreseeable manner.

92. Plaintiff ANNA LERHAUPT, her surgeons and other in the medical community, relied upon Defendant's express warranties, resulting in the Plaintiff's da Vinci Robotic Hysterectomy.

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93. Plaintiff, after ascertaining through her own injuries that the da Vinci Robotic Hysterectomy violated express warranties, hereby supply notice to Defendant INTUITIVE SURGICAL INC. of same through the filing of this lawsuit.

94. As a direct and proximate consequence of Defendant's breach of express warranty and/or intentional acts, omissions, misrepresentations and/or otherwise culpable acts described herein, the Plaintiffs sustained injuries and damages alleged herein.

95. By selling the said device, defendant made implied warranties of safety, merchantable quality, and fitness for use, which was breached when plaintiff ANNA LERHAUPT was injured during surgery.

96. As a further direct and proximate result of the acts of Defendant, Plaintiff's suffered emotional distress.

WHEREFORE, Plaintiffs demand judgment against Defendant and seeks compensatory damages, and exemplary and punitive damages together with interest, the costs of suit and attorneys' fees and such other and further relief as this Court deems just and proper.

FIFTH CAUSE OF ACTION – BREACH OF IMPLIED WARRANTY

97. Plaintiffs incorporate by reference each and every paragraph of this complaint as though set forth in full in this cause of action.

98. At all relevant and material times, Defendant manufactured, distributed, advertised, promoted, and sold the da Vinci Robot.

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99. At all relevant times, Defendant intended that the da Vinci Robot be used in the manner that the Plaintiff's surgeon in fact used it and Defendant impliedly warranted the product to be of merchantable quality, safe and fit for such use, and was adequately tested.

100. Defendant breached various implied warranties with respect to the da Vinci Robot including the particulars:

a. Defendant represented through its labeling, advertising, marketing materials, detail persons, seminar presentations, publications, notice letters, and regulatory submissions that the da Vinci Robotic Hysterectomy platform was safe and fraudulently withheld and concealed information about the substantial risks of serious injury and/or death associated with using the da Vinci Robot with monopolar current;

b. Defendant represented that the da Vinci Robotic Hysterectomy with monopolar current was as safe and/or safer than other alternative surgical approaches that did not include the use of the da Vinci Robot, and fraudulently concealed information, which demonstrated that the da Vinci Robotic Hysterectomy was not safer than alternatives available on the market; and,

c. Defendant represented that the da Vinci Robotic Hysterectomy was as more efficacious than other alternative surgical approaches and techniques and fraudulently concealed information, regarding the true efficacy of the robotic hysterectomy with monopolar current.

101. In reliance upon Defendant's implied warranty, Plaintiff's surgeon used the da Vinci Robotic Hysterectomy platform as prescribed and in the foreseeable

manner normally intended, recommended, promoted, instructed, and marketed by Defendant.

102. Defendant breached its implied warranty to Decedent in that the da Vinci Robotic Hysterectomy platform with monopolar current was not of merchantable quality, safe and fit for its intended use, or adequately tested.

103. As a direct and proximate consequence of Defendant's breach of implied warranty and/or intentional acts, omissions, misrepresentations and/or otherwise culpable acts described herein, the Plaintiffs sustained injuries and damages alleged herein including pain and suffering.

104. As a further direct and proximate result of the acts of Defendant, Plaintiffs suffered emotional distress and loss of consortium.

Wherefore, Plaintiffs demand judgment against Defendant and seeks compensatory damages, and exemplary and punitive damages together with interest, the costs of suit and attorneys' fees and such other and further relief as this Court deems just and proper.

SIXTH CAUSE OF ACTION - UNJUST ENRICHMENT

105. Plaintiffs incorporate by reference each and every paragraph of this complaint as though set forth in full in this cause of action.

106. At all times relevant to this action, Defendant designed, advertised, marketed, promoted, manufactured, distributed, supplied, and/or sold the da Vinci Robot for hysterectomy use.

107. Plaintiff ANNA LERHAUPT'S surgeon's hospital purchased the da

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Vinci Robot from the Defendant for the purpose of using it for Robotic Hysterectomy. Same hospital purchased disposable and reusable instrument for the performing of ANNA LERHAUPT'S surgery.

108. Defendant has accepted payment from said aforementioned hospital for both the da Vinci robot used in ANNA LERHAUPT'S surgery, but also for the routine maintenance and per surgery cost of additional items including disposable items.

109. ANNA LERHAUPT did not receive the safe and effective surgical product which she intended to purchase; nor did the hospital where ANNA LERHAUPT had her surgery.

110. It is inequitable and unjust for Defendant to retain this money because the Plaintiff did not in fact receive the safe and efficacious surgical procedure Defendant represented da Vinci Robotic Hysterectomy to be.

WHEREFORE, Plaintiffs demand judgment against Defendant and seeks equitable relief, the costs of suit and attorneys' fees, and such other and further relief as this Court deems just and proper.

SEVENTH CAUSE OF ACTION-LOSS OF CONSORTIUM

111. Plaintiffs incorporate by reference each and every paragraph of this complaint as though set forth in full in this cause of action.

112. As a direct consequence of the injuries to the vaginal cuff and subsequent abscess and chronic inflammation and scarring sustained by ANNA LERHAUPT while undergoing a da Vinci Robotic Hysterectomy, and the pelvic pain,

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formation of a large vaginal cuff abscess, bowel wall inflammation, pain with intercourse, permanent scarring, and the emotional consequences; Plaintiff BENJAMIN LERHAUPT has been deprived the normal companionship, company, affection, regard, assistance, comfort, sexual relations, and emotional stability from his wife ANNA LERHAUPT.

113. These physical and emotional consequences of the injuries have negatively impacted the quality and caused undo hardship to the marriage relationship. **Wherefore**, Plaintiffs demand judgment against Defendant and seeks compensatory damages, and exemplary and punitive damages together with interest, the costs of suit and attorneys' fees and such other and further relief as this Court deems just and proper.

DEMAND FOR JURY TRIAL

Plaintiffs demand a trial by jury on all counts and issues so triable.

GLOBAL PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully demand judgment against Defendant on each count as follows:

1. On the First Cause of Action for Product Liability including personal injury and pain and suffering and emotional distress, the sum of $10 million;

2. On the Second Cause of Action for Negligence, the sum of $10

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million;

3. On the Third Cause of Action for Fraud, the sum of $10 million;

4. On the Fourth & Fifth Cause of Action for Breach Of Express Warranty and Breach of Implied Warranty, the sum of $10 million;

5. On the Sixth Cause of Action for Unjust Enrichment, the sum of $200 million

6. On the Seventh Count of Loss of Consortium, the sum of $10 million.

7. On the claim for punitive damages in each cause of action, a total of $20 million; and

8. Reasonable attorney's fees when recoverable

9. Such other additional and further relief to which Plaintiff may be justly entitled, in law or equity.

All together with the interest, costs and disbursements of this action.

Dated: San Francisco, California

JULY 26, 2012

Respectfully submitted,

HERSH & HERSH
A Professional Corporation

By_____
NANCY HERSH
Attorneys for Plaintiffs

HERSHANDHERSH
A Professional Corporation

JS 44 (CAND Rev. 12/11)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. *(SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)*

I. (a) PLAINTIFFS

ANNA LERHAUPT AND BENJAMIN LERHAUPT

(b) County of Residence of First Listed Plaintiff Hamilton County
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys *(Firm Name, Address, and Telephone Number)*
Nancy Hersh, Esq.; Mark Burton, Esq.
Hersh & Hersh, 601 Van Ness Ave., Suite 2080
San Francisco, CA 94102; Tel: (415) 441-5544

DEFENDANTS

INTUITIVE SURGICAL, INC.,

County of Residence of First Listed Defendant Santa Clara
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys *(If Known)*

HRL

ADR

II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*

- ☐ 1 U.S. Government Plaintiff
- ☐ 3 Federal Question *(U.S. Government Not a Party)*
- ☐ 2 U.S. Government Defendant
- ☒ 4 Diversity *(Indicate Citizenship of Parties in Item III)*

III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff) (For Diversity Cases Only) and One Box for Defendant)*

	PTF	DEF		PTF	DEF
Citizen of This State	☒ 1	☐ 1	Incorporated *or* Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated *and* Principal Place of Business In Another State	☐ 5	☒ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT *(Place an "X" in One Box Only)*

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excl. Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☐ 190 Other Contract
- ☐ 195 Contract Product Liability
- ☐ 196 Franchise

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury
- ☐ 362 Personal Injury - Med. Malpractice

PERSONAL INJURY
- ☒ 365 Personal Injury - Product Liability
- ☐ 367 Health Care/ Pharmaceutical Personal Injury Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

FORFEITURE/PENALTY
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 690 Other

LABOR
- ☐ 710 Fair Labor Standards Act
- ☐ 720 Labor/Mgmt. Relations
- ☐ 740 Railway Labor Act
- ☐ 751 Family and Medical Leave Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Empl. Ret. Inc. Security Act

IMMIGRATION
- ☐ 462 Naturalization Application
- ☐ 463 Habeas Corpus - Alien Detainee (Prisoner Petition)
- ☐ 465 Other Immigration Actions

BANKRUPTCY
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 840 Trademark

SOCIAL SECURITY
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS
- ☐ 870 Taxes (U.S. Plaintiff or Defendant)
- ☐ 871 IRS—Third Party 26 USC 7609

OTHER STATUTES
- ☐ 375 False Claims Act
- ☐ 400 State Reapportionment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced and Corrupt Organizations
- ☐ 480 Consumer Credit
- ☐ 490 Cable/Sat TV
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 890 Other Statutory Actions
- ☐ 891 Agricultural Acts
- ☐ 893 Environmental Matters
- ☐ 895 Freedom of Information Act
- ☐ 896 Arbitration
- ☐ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- ☐ 950 Constitutionality of State Statutes

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

CIVIL RIGHTS
- ☐ 440 Other Civil Rights
- ☐ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing/ Accommodations
- ☐ 445 Amer. w/Disabilities - Employment
- ☐ 446 Amer. w/Disabilities - Other
- ☐ 448 Education

PRISONER PETITIONS
- ☐ 510 Motions to Vacate Sentence

Habeas Corpus:
- ☐ 530 General
- ☐ 535 Death Penalty
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Condition
- ☐ 560 Civil Detainee - Conditions of Confinement

V. ORIGIN *(Place an "X" in One Box Only)*

☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district *(specify)* ☐ 6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing *(Do not cite jurisdictional statutes unless diversity)*:
28 U.S.C. Sections 1332(a)(1) and 1332(c)(2)

Brief description of cause:
Personal injury, Product Liability, Negligence, Fraud, Breach of Express and Implied Warranty, Unjust Enrichment

VII. REQUESTED IN COMPLAINT: ☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 **DEMAND $**

CHECK YES only if demanded in complaint:
JURY DEMAND: ☒ Yes ☐ No

VIII. RELATED CASE(S) IF ANY *(See instructions)*: JUDGE _____ DOCKET NUMBER _____

IX. DIVISIONAL ASSIGNMENT (Civil L.R. 3-2)

(Place an "X" in One Box Only) ☐ SAN FRANCISCO/OAKLAND ☒ SAN JOSE ☐ EUREKA

DATE 11/20/2012

SIGNATURE OF ATTORNEY OF RECORD

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

I. (a) Plaintiffs-Defendants. Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.

(b) County of Residence. For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)

(c) Attorneys. Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".

II. Jurisdiction. The basis of jurisdiction is set forth under Rule 8(a), F.R.C.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.

United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.

United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.

Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.

Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; federal question actions take precedence over diversity cases.)

III. Residence (citizenship) of Principal Parties. This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.

IV. Nature of Suit. Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerks in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.

V. Origin. Place an "X" in one of the seven boxes.

Original Proceedings. (1) Cases which originate in the United States district courts.

Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.

Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.

Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.

Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.

Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.

Appeal to District Judge from Magistrate Judgment. (7) Check this box for an appeal from a magistrate judge's decision.

VI. Cause of Action. Report the civil statute directly related to the cause of action and give a brief description of the cause. Do not cite jurisdictional statutes unless diversity. Example: U.S. Civil Statute: 47 USC 553
Brief Description: Unauthorized reception of cable service

VII. Requested in Complaint. Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.

Demand. In this space enter the dollar amount (in thousands of dollars) being demanded or indicate other demand such as a preliminary injunction.

Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.

VIII. Related Cases. This section of the JS 44 is used to reference related pending cases if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

IX. Divisional Assignment. In accordance with Civil L.R. 3-2(c) - (f), select the appropriate venue based upon the county in which a substantial part of the events or omissions which give rise to the claim occurred or in which a substantial part of the property that is the subject of the action is situated.

Date and Attorney Signature. Date and sign the civil cover sheet.