BEFORE THE UNITED STATES JUDICIAL PANEL
ON MULTIDISTRICT LITIGATION

In re: Intuitive Surgical, Inc. ***da Vinci*** Robotic Surgical System
Products Liability Litigation MDL Docket No. 2381

DEFENDANT INTUITIVE SURGICAL, INC.'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION PURSUANT TO 28 U.S.C. § 1407 TO TRANSFER RELATED ACTIONS FOR COORDINATED PRETRIAL PROCEEDINGS

Defendant Intuitive Surgical, Inc. ("Intuitive") respectfully submits this response in opposition to Plaintiffs Patricia and Drennan Mayfield's ("Plaintiffs'") motion pursuant to 28 U.S.C. § 1407 to transfer for coordinated pretrial proceedings three individual product liability actions to the United States District Court for the Southern District of Mississippi, where Plaintiffs' action is currently pending, or, alternatively, to transfer all four actions to the Northern District of California. The plaintiffs in each of the four identified actions allege personal injuries purportedly arising from alleged defects in Intuitive's ***da Vinci***® Surgical System, which is a medical device that has been utilized by physicians for over a decade in medical facilities throughout the United States in a variety of surgical procedures.

PRELIMINARY STATEMENT

Plaintiffs, as the proponents of establishing a multi-district litigation ("MDL") proceeding involving only four individual product liability actions, have an especially heavy burden to show that coordination by this Panel is warranted. Plaintiffs have not met that heavy burden at this time, and therefore their motion should be denied without prejudice to either side renewing the motion in the future if the litigation landscape changes significantly. Until such time (if ever), the creation of an MDL proceeding is simply unwarranted. To be clear, Intuitive strongly supports coordination among the pending cases, but here, such coordination can be achieved without the creation of an MDL.

Plaintiffs argue that an MDL is presently necessary because the four individual product liability actions relating to Intuitive's ***da Vinci*** Surgical System purportedly involve common questions of law and fact, and centralizing them in an MDL will avoid duplicative discovery and

possibly inconsistent pretrial rulings. However, Plaintiffs do not explain how an MDL would create efficiencies or conveniences that could not be substantially achieved without an MDL, or why there is a significant risk of substantial, inconsistent rulings when Plaintiffs have only identified a limited number of pending actions. Indeed, this Panel has admonished that where, like here, only a small number of cases are sought to be coordinated through an MDL proceeding, efficiencies and conveniences can appropriately be achieved through informal coordination between the courts and counsel without the necessity of transferring the actions and establishing the apparatus of a single, centralized MDL proceeding. That view is especially pertinent here, where Intuitive is currently the only defendant in the four actions, plaintiffs' attorneys' firms overlap in two of the four actions, and three of the four actions are presently pending in district courts that are geographically close to each other in the Southeastern United States. Indeed, this Panel has rejected requests for coordination under similar circumstances, and it should do so again here.

In the alternative, if the Panel decides that an MDL proceeding is presently warranted despite the limited number of actions at issue, Intuitive respectfully requests that the MDL be assigned to the Northern District of California – the alternative district proposed by Plaintiffs. Intuitive, the sole defendant in each of these four actions, is headquartered within that District, and therefore it represents the only common geographical nexus to these actions. The Northern District of California is also a highly accessible metropolitan location, with the requisite resources and expertise, including a robust record with other MDLs, to oversee this litigation.

STATEMENT OF FACTS

The ***da Vinci*** Surgical System is a robotic surgical device manufactured by Intuitive for over a decade. It is utilized by surgeons in medical facilities throughout the country to facilitate minimally invasive surgeries, including gynecological, urological, and general surgical procedures. Surgeons operate the system by manipulating controllers at a surgeon console that in turn manipulate robotic arms that move surgical instruments used to cauterize, coagulate, and cut human tissue in surgery.[1] In short, the ***da Vinci*** Surgical System offers surgeons an alternative to traditional open and laparoscopic surgery.

In their motion, Plaintiffs identify only four federal product liability actions presently pending involving the ***da Vinci*** Surgical System. (*See* Schedule A, Pls.' Mot. to Transfer [Doc. 1].) Plaintiffs' action (*Mayfield*) is currently pending in the United States District Court for the Southern District of Mississippi. The three other individual actions are pending, respectively, in the Southern District of New York (*McCalla*), the Eastern District of Louisiana (*Silvestrini*), and the Northern District of Alabama (*Jones*). Intuitive is not aware of any other currently-pending federal product liability actions involving the ***da Vinci*** Surgical System. Although not the subject of Plaintiffs' motion, Intuitive is aware of a similarly limited number of state court product liability actions (four) involving the ***da Vinci*** Surgical System.

The four actions that Plaintiffs do seek to have coordinated and consolidated are each at very preliminary stages, having been filed between September 2011 and the present.[2] Each of the four actions asserts personal injuries (including wrongful death in one action) allegedly arising from purported defects in the ***da Vinci*** Surgical System. (*See Jones* Compl. ¶¶ 8, 14; *Mayfield* Compl. ¶ 14; *McCalla* Compl. ¶ 7; *Silvestrini* Compl. ¶ XI.) Each action also alleges

[1] For the Panel's reference, attached as Exhibit A is a photograph of the ***da Vinci*** Surgical System.

[2] *See Silvestrini v. Institutive Surgic*al, Inc., No. 2:11-cv-02704-LMA-DEK (E.D. La. Oct. 28, 2011); *McCalla v. Intuitive Surgical, Inc.*, No. 1:12-cv-02597-RWS (S.D.N.Y. Apr. 4, 2012); *Jones v. Intuitive Surgical, Inc.*, No. 7:12-cv-01082-LSC (N.D. Ala. Apr. 10, 2012); *Mayfield v. Intuitive Surgical, Inc*., No. 4:12-cv-00072-CWR-FKB (S.D. Miss. May 7, 2012).

that Intuitive failed to properly maintain the particular ***da Vinci*** Surgical System used in the medical facilities at issue and train the particular medical personnel involved in the individual surgeries. (*See, e.g., Jones* Compl. ¶¶ 35, 75-80; *Mayfield* Compl. ¶¶ 35, 75-80; *McCalla* Compl. ¶¶ 28, 55; *Silvestrini* Compl. ¶¶ VII, XII(A)(1)-(3).)

Three of the four actions allegedly involved hysterectomies performed at separate medical facilities in Mississippi (*Mayfield* and *Jones*) and Queens, New York (*McCalla*), and the other action allegedly involved a thyoidectomy performed at a New Orleans medical facility (*Silvestrini*). (*See Jones* Compl. ¶¶ 35, 75-80; *Mayfield* Compl. ¶ 8; *McCalla* Compl. ¶ 38; *Silvestrini* Compl. ¶ IV.) The injuries alleged in each action are as follows: one action appears to allege abdominal and pelvic injuries (*see Mayfield* Compl. ¶¶ 9, 10, 13), another appears to allege pelvic, ureter and bladder injuries (*see Jones* Compl. ¶¶ 8, 9, 13), another appears to allege injuries to the arteries that purportedly caused the patient's death (*see McCalla* ¶¶ 7, 40, 41), and the other alleges the plaintiff will need plastic surgery for a scar she received when her procedure was converted to an open surgery after the ***da Vinci*** Surgical System allegedly malfunctioned (s*ee Silvestrini* ¶¶ X, XI).

ARGUMENT

I. Transfer and Pretrial Coordination of These Related Actions Will Not Promote the Goals of 28 U.S.C. § 1407

Transfer under Section 1407 is warranted where the movants, here Plaintiffs, demonstrate that: (i) "civil actions involving one or more common questions of fact are pending in different districts"; (ii) transfer and coordination "will promote the just and efficient conduct of such actions"; and (iii) transfer and coordination will serve "the convenience of parties and witnesses." 28 U.S.C. § 1407(a). Though the four actions here appear to present some common factual and legal issues, given the small number of cases at issue, Plaintiffs cannot demonstrate at this time that such issues are sufficiently numerous or common such that an MDL would "promote the .... efficient conduct of [these] actions" and serve "the convenience of the parties

and witnesses." *Id.* Accordingly, and as demonstrated below, transfer and coordination of these actions in a single court under 28 U.S.C. § 1407 is not appropriate at this time.

Perhaps recognizing the difficulty in carrying their burden based on only four individual actions, Plaintiffs assert that "there may be other pending federal actions" and that they "expect additional cases to soon be filed." (Pls. Mot. to Transfer at 3 [Doc. 1].) Indeed, Plaintiffs offer mere conclusory assertions that centralizing these four actions in an MDL proceeding is necessary to ensure the "just and efficient conduct" of these actions. (*See id* at 3-4.) Contrary to Plaintiffs' blanket assertions, this Panel has repeatedly held that the administrative benefits and conveniences of an MDL are unnecessary where, as here, the litigation only involves a small number of individual, non-aggregate cases.[3] *See, e.g., In re Blair Corp. Chenille Robe Prods. Liab. Litig.*, 703 F. Supp. 2d 1379, 1380 (J.P.M.L. 2010) (denying centralization of four "relatively straightforward personal injury or wrongful death actions" because "the proponents of centralization have failed to convince us that any common questions of fact among these four actions are sufficiently complex and/or numerous to justify transfer at this time"); *In re Depo-Provera Prods. Liab. Litig.*, 499 F. Supp. 2d 1348, 1349 (J.P.M.L. 2007) (denying certification of an oral contraceptive medical monitoring class action and two personal injury actions); *accord In re Michaels Stores, Inc., Pin Pad Litig.*, MDL No. 2312, 2012 WL 432605, at *1 (J.P.M.L. Feb. 7, 2012) (to be published in F.2d) (though the Panel recognized that seven individual consumer actions "share factual questions," the "movant [did] not [meet] its burden of demonstrating the need for centralization of such a minimal number of actions"); *In re Air Crash*

[3] Indeed, when the Panel has decided to establish product liability MDLs that are comprised of a relatively small numbers of actions, they typically involve multiple putative class actions rather than individual personal injury claims. *See, e.g., In re Canon U.S.A., Inc., Digital Cameras Prods. Liab. Litig.*, 416 F. Supp. 2d 1369, 1370 (J.P.M.L. 2006) (coordinating two putative class actions and one potential tag-along class action); *In re High Sulfur Content Gasoline Prods. Liab. Litig.*, 344 F. Supp. 2d 755, 756 (J.P.M.L. 2004) (coordinating five putative class actions); *In re St. Jude Med., Inc., Silzone Heart Valves Prods. Liab. Litig.*, MDL 1396, 2001 WL 36292052, at *1-2 (J.P.M.L. Apr. 18, 2001) (coordinating eight putative class actions).

Near Islamabad, Pak., 777 F. Supp. 2d 1352, 1353 (J.P.M.L. 2011) (same); *In re Eli Lilly & Co. (Cephalexin Monohydrate) Patent Litig.*, 446 F. Supp. 242, 244 (J.P.M.L. 1978) (same).[4]

Indeed, this Panel has admonished that where, like here, litigations are comprised of only a limited number of cases, "informal cooperation among the involved attorneys and courts is both practicable and preferable." *In re Northeast Contaminated Beef Prods. Liab. Litig.*, MDL No. 2346, 2012 WL 1389790, at *1 (J.P.M.L. Apr. 17, 2012) (to be published in F.2d); *see also In re Abbott Labs., Inc., Similac Prods. Liab. Litig.*, 763 F. Supp. 2d 1376, 1377 (J.P.M.L. 2011); *In re Chromated Copper Arsenate (CCA) Treated Wood Prods. Liab. Litig.*, 188 F. Supp. 2d 1380 (J.P.M.L. 2002); 15 Charles Alan Wright, et al., *Federal Practice and Procedure* § 3863 at 422 (3d ed. 2007 & Supp. 2012) (noting there are "a significant group of decisions in which transfer and consolidation [were] denied because the number of cases was so small that little duplication of effort was likely to result, making invocation of the Section 1407 procedure unnecessary").

As recognized by this Panel, even without undertaking the inconvenience of transferring cases to a centralized MDL court, "judges can coordinate proceedings in their respective courts to avoid or minimize duplicative activity and conflicts." *Manual for Complex Litigation (4th)* § 20.14 (2004); *see also In re Fout & Wuerdeman Litig.*, 657 F. Supp. 2d 1371, 1371 (J.P.M.L. 2009) (transfer of four personal injury actions denied because "alternatives to transfer exist that may minimize whatever possibilities there might be of duplicative discovery and/or inconsistent pretrial rulings"); *In re Depo-Provera Prods. Liab. Litig.*, 499 F. Supp. 2d at 1349 (same); *In re*

[4] None of the cases Plaintiffs cite on page four of their brief in purported support of their assertion that an MDL is warranted involved only four cases. *See In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 173 F. Supp. 2d 1377 (J.P.M.L. 2001) (coordinating 14 actions pending in 6 different federal districts); *In re Orthopedic Bone Screw Prods. Liab. Litig.*, MDL No. 1014, 1997 WL 83672, at *1 (J.P.M.L. Feb. 20, 1997) (coordinating 29 actions, with 1,810 related "tag-along" actions transferred later); *In re Silicone Breast Implants Prods. Liab. Litig.*, 793 F. Supp. 1098, 1100 (J.P.M.L. 1992) (coordinating 78 actions pending in 33 different federal districts). Plaintiffs also cite to *In re Humana Inc. Managed Care Litig.*, 2000 WL 1952080, *3 (JPML Aug. 4, 1994), but that citation appears to be incorrect.

DaimlerChrysler Corp. Seat Belt Buckle Prods. Liab. Litig., 217 F. Supp. 2d 1376, 1377 (J.P.M.L. 2002) (same); *In re Chromated Copper Arsenate*, 188 F. Supp. 2d at 1380 (same). Similarly, with only four actions pending, the parties may avoid duplicative discovery (*see* Pls.' Mot. to Transfer at 3 [Doc. 1]) through a variety of readily available mechanisms that do not necessitate the creation of a centralized MDL proceeding, such as cross-noticing depositions and utilizing the same productions of documents and discovery responses in various cases. *See In re Children's Pers. Care Prods. Liab. Lit.*, 655 F. Supp. 2d 1365, 1366 (J.P.M.L. 2009) (discussing a variety of informal coordination mechanisms); *In re Allen Compound Bow Patent Litig.*, 446 F. Supp. 248, 250 (J.P.M.L. 1978) (suggesting parties could coordinate discovery informally by cross-noticing depositions and sharing discovery responses); *In re Eli Lilly & Co.*, 446 F. Supp. at 244 (same).

Moreover, coordination without an MDL is especially feasible and convenient at this time because Intuitive is the sole defendant in all four actions, and plaintiffs in two of the four actions – *Jones* and *Mayfield* – share at least one plaintiffs' firm. *See In re Northeast Contaminated Beef*, 2012 WL 1389790, at *1 ("Plaintiffs in two actions are represented by common counsel…. In these circumstances, informal cooperation among the involved attorneys and courts is both practicable and preferable."); *In re Rite Aid Corp. Wage & Hour Employment Practices Litig.*, 655 F.Supp.2d 1376, 1376 (J.P.M.L. 2009) (transfer denied "where plaintiffs in four of the six actions encompassed by the motion share counsel"); *Multidistrict Litigation Manual* § 5:52 (2012 ed.) ("The Panel has also noted that the fact that the parties in numerous cases were represented by the same counsel militated in favor of finding that 'alternatives to transfer' exist.").[5] Furthermore, coordination without an MDL is especially feasible at this time because the actions are still in their preliminary stages, with one case (*Silvestrini*) filed in September 2011, three of the cases (*Jones*, *McCalla*, and *Mayfield*) filed in April and May 2012,

[5] Although University Healthcare System, LLC was originally named as a defendant in *Silvestrini*, it had been dismissed, leaving Intuitive as the sole defendant in that action, just like the three other pending actions.

and no discovery taken to date in any of the actions. *See In re Chilean Nitrate Products Liab. Litig.*, 787 F. Supp. 2d 1347, 1347-48 (J.P.M.L. 2011) (transfer denied because only two pending actions and defendant offered to coordinate discovery and depositions).

In sum, Intuitive respectfully submits that the creation of an MDL with only four currently-pending cases is premature. As this Panel has pointed out in the past, there are other informal mechanisms readily available to the parties that will permit them to work collectively to "minimize whatever possibilities there might be of duplicative discovery and/or inconsistent pretrial rulings," *In re Blair Corp.*, 703 F. Supp. 2d at 1380, and that will well serve the convenience of the parties and witnesses. Nonetheless, to the extent that circumstances change materially in the future, including prior to the Panel's hearing, Intuitive reserves its rights to re-evaluate its current position with respect to the creation of an MDL. *See In re BMW Reverse Transmission Prods. Liab. Litig.*, 543 F. Supp. 2d 1382, 1382 (J.P.M.L. 2008) (denying transfer of two actions but noting that "if additional related actions with overlapping putative classes are filed in the future, centralization might be a possibility at that time"); *In re Air Crash Disaster at Anchorage, Alaska on Nov. 27, 1970*, 342 F. Supp. 755, 756 (J.P.M.L. 1972) (deciding, without prejudice, not to transfer three actions because there were "too few actions … to justify transfer" and thus, it was "premature to decide the question of transfer and to choose the transferee district until more actions have been filed"); *In re Professional Basketball Antitrust Litig.*, 344 F. Supp. 1405, 1406 (J.P.M.L. 1972) (denying transfer of eight cases without prejudice because coordination was premature).

II. Alternatively, Coordination in the Northern District of California Is Appropriate

If the Panel should decide that consolidation and coordination is presently warranted despite the small number of cases on file, Intuitive respectfully submits that the Northern District of California is the most appropriate MDL venue. Plaintiffs argue that the actions should be transferred to Judge Reeves in the Southern District of Mississippi or, alternatively, to a judge in the Northern District of California. Although Intuitive agrees that Judge Reeves in the Southern District of Mississippi is an experienced and highly capable judge, the reasons Plaintiffs cite for

transfer to that district do not favor the Southern District of Mississippi over the Northern District of California.

The Panel considers several key factors in selecting an appropriate MDL forum, including: (i) the location of parties, witnesses, and documents; (ii) the accessibility of the transferee district for parties and witnesses; and (iii) the respective case loads and experience of the proposed transferee district courts. *See In re Air Crash at Belle Harbor, N.Y. on Nov. 12, 2001*, 203 F. Supp. 2d 1379, 1380-81 (J.P.M.L. 2002); *In re Corn Derivatives Antitrust Litig.*, 486 F. Supp. 929, 931-32 (J.P.M.L. 1980). As set forth below, all of these factors support coordination of these actions in the Northern District of California.

First, as Plaintiffs note in their moving brief regarding the location of the parties, witnesses, and documents, the "Northern District of California is a particularly convenient forum for litigation after consolidation of these actions given that it is the home of [Intuitive's] corporate headquarters and operations." (Pls.' Mot. to Transfer at 6 [Doc. 1].) Because Intuitive is the only defendant in the four actions, the Northern District of California presents the only common location for witnesses and documents. *See In re Pfizer Inc. Sec., Derivative & ERISA Litig.*, 374 F. Supp. 2d 1348, 1350 (J.P.M.L. 2005) (centralizing 29 actions in the Southern District of New York where "Pfizer has its headquarters and many individual defendants reside, and therefore relevant witnesses and documents will likely be found there"); *In re Navistar 6.0 L Diesel Engine Prods. Liab. Litig.*, 777 F. Supp. 2d 1347, 1348 (J.P.M.L. 2011) (transferring multiple actions to the Northern District of Illinois because "[d]efendants' headquarters, and therefore relevant documents and witnesses, are located in or relatively near [the] district"); *In re Kugel Mesh Hernia Patch Prods. Liab. Litig.*, 493 F. Supp. 2d 1371, 1373 (J.P.M.L. 2007) (transferring 13 actions and 18 potential tag along actions to the District of Rhode Island in part because "[defendant's] headquarters are located within th[is] district and thus witnesses and relevant documents will likely be found there").

Second, as to the factor relating to the accessibility of the forum, the Northern District of California, and San Francisco in particular, is a geographically accessible and convenient forum

for all parties and witnesses. Two international airports service San Francisco and provide daily service to most metropolitan areas. The federal courthouse is less than thirty miles from either of these airports. The Panel has previously recognized San Francisco's convenient location and accessibility in finding that the Northern District of California is an appropriate MDL forum. *See In re Compression Labs., Inc., Patent Litig.*, 360 F. Supp. 2d 1367, 1369 (J.P.M.L. 2005) (noting that the Northern District of California "is an easily accessible, metropolitan district that is well equipped with the resources that this complex docket is likely to require").

Third, as to the remaining factor relating to the forum's experience and case load, although the Southern District of Mississippi is highly capable, the Northern District of California also is well-equipped to handle and manage these actions. For example, despite the fact that the Northern District of California was among the top ten federal districts in terms of total civil court filings in 2011,[6] the median time from filing to disposition for all civil cases in that District was only eight months, demonstrating a reliable track record of consistently handling cases in a highly efficient manner.[7] According to available United States District Court statistics, the Northern District of California is also one of the more experienced districts in handling product liability cases.[8] Additionally, the Northern District of California has extensive experience handling complex multidistrict litigations: from 1977 to 2011, the panel transferred over seventy litigations to the district, the fourth largest number of MDLs transferred to any federal district.[9]

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[6] *See* Administrative Office of the United States Courts, *2011 Annual Report of the Director: Judicial Business of the United States Courts* 122-124 (2012) (Table C-1), *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/appendices/C01Sep11.pdf.

[7] *See id.* at 158 (Table C-5), *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/appendices/C05Sep11.pdf.

[8] *See, e.g., id.* at 183-185 (Table C-11), *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/appendices/C11Sep11.pdf.

[9] *See* J.P.M.L., *Multidistrict Litigation Terminated Through September 30, 2011*, at 31-33, http://www.jpml.uscourts.gov/sites/jpml/files/JPML_Terminated_Litigations-2011.pdf.

Thus, although Intuitive believes an MDL proceeding is unwarranted at this time, Intuitive respectfully submits that if an MDL were established, the Northern District of California would be the most appropriate forum because Intuitive, the only party common to all four actions, is located there, and the Northern District of California possesses substantial accessibility, expertise, and infrastructure to effectively handle this litigation as set forth above.

CONCLUSION

For the foregoing reasons, Intuitive respectfully submits that the Panel should deny Plaintiffs' motion for pretrial coordination and consolidation as premature based on the limited number of federal cases on file at this time, without prejudice to either side moving for the establishment of a centralized MDL proceeding in the future if circumstances materially change. Alternatively, if the Panel determines that the creation of an MDL proceeding is presently warranted, Intuitive respectfully requests transfer to the Northern District of California – the alternative choice of the Plaintiffs and the location of Defendant Intuitive – the only party common to all four actions.

Dated: New York, New York
May 31, 2012

Respectfully submitted,

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Exhibit A

The ***da Vinci*®** Surgical System
Picture of Surgeon Console and Patient Cart – ***da Vinci*** Si HD Surgical System

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ON MULTIDISTRICT LITIGATION

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MDL Docket No. 2381

PROOF OF SERVICE

I hereby certify that, on May 31, 2012, Defendant Intuitive Surgical, Inc.'s Response in Opposition to Plaintiffs' Motion Pursuant to 28 U.S.C. § 1407 to Transfer Related Actions for Coordinated Pretrial Proceedings, including the related Exhibit A, was filed with the Clerk of the Panel using the CM/ECF system and was served on all counsel of record via CM/ECF.

Dated: New York, New York
May 31, 2012

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