IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

David Garlich and Lorie Garlich	)	
Plaintiffs,	)	
v.	)	Civil Action No._____
Intuitive Surgical, Inc.	)	
Defendant.	)	

PLAINTIFFS' ORIGINAL COMPLAINT AND JURY DEMAND

Plaintiffs, David Garlich and Lorie Garlich (collectively, "Plaintiffs"), by and through their undersigned counsel file their Original Complaint and Jury Demand against Defendant, Intuitive Surgical, Inc. In support, Plaintiffs respectfully allege, upon information and belief, the following:

THE PARTIES

1. Plaintiff David Garlich (hereinafter "Mr. Garlich") is an individual residing in the State of Texas.

2. Plaintiff Lorie Garlich (hereinafter "Mrs. Garlich") is an individual residing in the State of Texas.

3. Upon information and belief, Defendant Intuitive Surgical, Inc. ("Defendant") is a foreign business corporation, duly organized and existing under and by virtue of the laws of the State of Delaware with its principal place of business being located in the state of California. Defendant may be served with process on its registered agent, CT Corporation System 350 N. St. Paul, Suite 2900, Dallas, Texas 75201.

JURISDICTION AND VENUE

4. Jurisdiction is based on diversity of citizenship. 28 U.S.C. § 1332.

5. Plaintiffs, David and Lorie Garlich, are residents of and domiciled in the State of Texas. Upon information and belief, Defendant ISI is a Delaware corporation with its principal place of business located in the state of California.

6. The amount in controversy is substantially in excess of seventy-five thousand dollars ($75,000), exclusive of interest and costs.

7. In addition, the actions and/or omissions giving rise to this cause of action occurred in this District in that the surgery was performed in the Northern District of Texas. Thus, venue is proper in this District pursuant to 28 U.S.C. § 1391.

GENERAL ALLEGATIONS

8. After being diagnosed with prostate cancer, Plaintiff David Garlich underwent a robotic prostatectomy at UT Southwestern on November 20, 2012, which was performed by Dr. Claus Roehrborn utilizing the da Vinci surgical system.

9. Dr. Roehborn used the da Vinci surgical system as instructed and in the foreseeable manner recommended, promoted, and marketed by Defendant.

10. The da Vinci surgical robotic system gravely injured Mr. Garlich during the prostatectomy. It damaged his bowel resulting in severe infection and other complications requiring subsequent hospitalizations and multiple surgical procedures and/or "washouts." Indeed, Mr. Garlich ultimately suffered septic shock, abdominal compartment syndrome, renal failure, acidosis, and numbness in the hips and knees, among other things.

11. Mr. Garlich remains seriously injured and continues to suffer from chronic pain, kidney disease, memory and cognitive impairments, and other severe issues. Due to the injuries sustained during the da Vinci robotic prostatectomy, Mr. Garlich endured subsequent additional medical tests, procedures, surgical procedures, time in the hospital, and physician consultations. He has suffered severe physical pain, loss of function, emotional distress, and permanent injury and will be requiring further substantial medical treatment.

12. Mr. Garlich's wife, Lorie Garlich, lost consortium as a result of the injuries inflicted by the da Vinci surgical robot on her husband. During his multiple, lengthy hospital stays, she was by his bedside almost continually, and she suffered emotionally, mentally, and physically as a result.

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

14. At all times material hereto, Defendant designed, manufactured, tested, assembled, sold, promoted, labeled, and placed in the stream of commerce the da Vinci surgical system that is the subject of this action.

15. On its website, Defendant represents that surgical robots provide "minimally invasive" surgery and asserts that it is the global technology leader in surgical robotic products.

16. The said robotic device is used in hospitals for a variety of surgeries, including prostatectomy, hysterectomy, and other procedures.

17. Defendant uses prominent websites directed at consumers to created demand for the use of its robotic device by patients who consult surgeons.

18. Defendant has promoted the da Vinci surgical system as: (1) safe and (2) safer than other comparative methods of surgery, including laparascopy, prostatectomy surgery, and open surgery.

19. Defendant sold its 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 an apprehension in their minds that if they did not obtain this technology, they would lose business to competitors.

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

21. Defendant's promotional materials misrepresented the safety, effectiveness, and utility of its da Vinci surgical system, and Defendant failed to provide complete, timely, and accurate information to the government, hospitals, physicians, and consumers with respect to dangerous defects associated with its system.

22. The da Vinci surgical system is defective, among other reasons, because it relies upon the use of monopolar current to cut, burn, and cauterize tissue in lieu of available safer methods.

23. The da Vinci surgical system is also defective in that it lacks adequate insulation for its arms, permitting electrical current to pass into tissue that is outside of the operative field. The insulation on the shafts of the 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, which causes damage.

24. On May 8, 2013, Defendant issued an "urgent medical device notification" warning that certain components of the da Vinci surgical system could be susceptible to microcracks.

Defendant admitted that these microcracks could leak current, resulting in inadvertent burns and damages.

25. Use of Defendant's robotic device in surgery presents considerable risks of complications and injuries, including damage to the bowels, blood vessels, arteries, ureters, bladder, vaginal cuff, and other nerve injuries. More specifically, the da Vinci surgical system can cause partial thermal injury burns to bowel, post-surgical abscesses, tears, dehiscences, bleeding, hematomas, sepsis, fistulas, and other injuries.

26. On occasion, these complications and injuries cause and/or contribute to infectious processes from thermal injury, which lead to excessive pain, suffering and permanent emotional and physical disability.

27. In addition, and in general, due to the lengthened time of surgeries performed with a robot, patients are unnecessarily exposed to anesthesia for a dangerously lengthened period of time.

28. Defendant has been aware and was aware long before November 2012, or should have been so aware, of the aforesaid risks and complications associated with the use of the da Vinci surgical system and has failed to take appropriate precaution, including failure to make proper notifications to hospitals, patients, doctors, and the United States Food and Drug Administration.

29. Defendant does not provide adequate warnings to physicians and patients about the risks and complications associated with the use of the da Vinci surgical system.

30. Defendant has neither performed nor sponsored adequate testing on its device before and after marketing it to determine whether in random tests, its device is either safer or more effective or otherwise superior to other surgical and laparoscopic methods to which it compares itself.

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

32. Defendant has neither undertaken, nor sponsored, any testing as to long-term outcomes, in comparison to other surgical and laparoscopic methods.

33. Defendant has not disclosed in a timely manner, 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.

34. Defendant had been suppressing reports and complaints of complications and performance errors due to the use of its said device prior to Mr. Garlich's surgery.

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

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

37. Defendant has over-promoted the robot to hospitals, physicians and the public, including potential customers, combined with minimizing the risks and complications associated with its use.

38. The da Vinci surgical system was defective in that it relied upon the use of monopolar energy to cut, burn, and cauterize tissue, whereas safer methods were available.

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

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

41. At all times material to this complaint, Defendant failed to warn users and consumers of the robotic device about inadequate insulation on the arms and the potential for electrical current to pass into tissue outside of the operative field.

42. Due to design defects, Defendant's devices have malfunctioned during surgeries, causing injury, requiring additional surgeries and procedures to deal with the complications from robotic use.

43. Defendant has failed to warn users and consumers of its device of the design flaws described in the preceding paragraphs, although it has reached out directly to consumers to promote the purported advantages to patients.

44. Defendant had specific knowledge and awareness of the dangers of monopolar current, and it knew or should have known that there were safety modalities commercially available that could have greatly diminished or eliminated some of these risks, yet the Defendant chose not to include or install such safety measures on the da Vinci surgical system.

45. Defendant has obtained and continues to maintain, approval of the uses of its device from the Food and Drug Administration, but it does so 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

46. Plaintiffs incorporate by reference each and every paragraph and allegation of this complaint as though set forth in full herein.

47. Defendant placed into the stream of commerce the da Vinci robotic device which was defective in design, as previously pleaded.

48. Defendant owed Plaintiffs a duty to exercise reasonable care when designing, testing, marketing, manufacturing, advertising, promoting, distributing and/or selling the product.

49. 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 the robot, specifically by, among other things:

a. failing to use due care in the preparation, development, manufacture, inspection, and safety evaluation of the da Vinci surgical system;

b. failing to use due care in the design of the da Vinci surgical system with special consideration to the monopolar current and insulation of the robotic arms and instruments and associated microcracks to prevent the aforementioned risk of injuries to individuals during procedures;

c. 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 surgery, especially with respect to the reusing of the instruments with multiple different patients;

d. failing to analyze sufficiently and thoroughly the data resulting from the pre-marketing tests of the monopolar current used in the da Vinci Robotic Prostatectomy;

e. failing to report in a complete, timely, and accurate fashion to the FDA, the medical community, and the general public the data resulting from pre- and post-marketing tests of the da Vinci surgical system indicating risks associated with risks associated with its use;

f. failing to conduct adequate post-market monitoring and surveillance of post-surgical complications associated with the use of the da Vinci surgical system;

g. failing to conduct or sponsor adequate testing on the da Vinci surgical system to determine whether its system is safer or otherwise superior to other surgical or laparoscopic methods;

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

i. designing, manufacturing, marketing, advertising, distributing and promoting the da Vinci surgical system without adequate warning of the significant and dangerous risks associated with its use and without proper instructions to avoid the harm which could foreseeably occur as a result of using monopolar energy on the existing da Vinci surgical system;

j. failing to give healthcare providers adequate information to weigh the risks of serious injury and/or death for a given patient undergoing a procedure using the da Vinci surgical system;

k. failing to exercise due care when advertising and promoting the da Vinci surgical system;

l. negligently continuing to manufacture, market, advertise, and promote the da Vinci surgical system after Defendant knew or should have known of the risks of serious injury and/or death associated with using mononpolar current to perform certain aspects of surgical procedures, including prostatectomies;

m. failing to use due care in the preparation and development of the da Vinci surgical system to prevent the aforementioned risk of injuries to individuals through the use of monopolar current;

n. failing to conduct adequate intra-operative surveillance and post-operative complication studies to determine the safety of the use of monopolar energy during the robotic prostatectomy procedure taught by Defendant, when Defendant knew or should have known that such intra-operative surveillance and post-operative complication analysis would be the primary means to determine the relative risk of using monopolar current;

o. failing to disclose in a complete, accurate, and timely fashion the results of the pre-marketing testing of issues with monopolar energy and post-marketing surveillance of injuries and complications related to the use of the da Vinci surgical system to Plaintiff, consumers, the medical community, and the FDA;

p. failing to accompany marketing materials promoting the robot using monopolar current with proper warnings regarding all possible adverse side effects associated with the use of the same;

q. failing to provide adequate and accurate training and information to the sales representatives who sold the robot;

r. failing to provide adequate and accurate training and information to the healthcare providers with respect to the appropriate use of the da Vinci robot for prostatectomy;

s. failing to conduct, fund, or sponsor research into the development of safer robotic surgical instruments which would pose the least risk of causing severe thermal injury to the bowel, bladder, and/or blood vessels;

t. failing to use due care in the selling of monopolar scissors to prevent the aforementioned risk of injuries to individuals who underwent da Vinci robotic procedures;

u. failing to educate healthcare providers and the public about the safest use of the monopolar scissors in da Vinci surgical procedures;

v. failing to give healthcare providers adequate information to weigh the risks of serious injury and/or death for their patients undergoing da Vinci surgical procedures and technique featuring the use of monopolar current; and

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

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

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

52. At the time the device left the possession of Defendant, it was in an unreasonably dangerous and defective condition for application for robotic prostatectomy using monopolar energy.

53. Despite the fact that Defendant knew or should have known that the da Vinci surgical system using monopolar current had increased the risk of serious injury and/or death, Defendant continued to promote and market the same to consumers, including Mr. Garlich, when safer and more effective methods of treatment were available.

54. The Defendant designed, tested, manufactured, packaged, marketed, assembled, distributed, promoted, and sold the da Vinci surgical system, placing the same into the stream of commerce.

55. The da Vinci surgical system was designed, developed, inspected, manufactured, assembled, labeled, licensed, marketed, advertised, sterilized, promoted, sold, packaged, supplied

and/or distributed by Defendant in a defective and unreasonably dangerous condition to consumers, including Mr. Garlich.

56. The da Vinci surgical system was expected to and did reach users and/or consumers, including Mr. Garlich, without considerable change in the defective and unreasonably dangerous condition in which it was manufactured and sold.

57. Mr. Garlich's surgeon used the da Vinci robotic Prostatectomy platform including monopolar current as instructed by and in the foreseeable manner that was normally intended, recommended, promoted, and marketed by Defendant.

58. The da Vinci surgical system was unreasonably dangerous as designed because it failed to perform safely when used by ordinary clients, including Mr. Garlich's surgeon, and including when it was used as intended in a reasonably foreseeable manner.

59. The da Vinci surgical system is unreasonably dangerous as designed because the risks of serious injury and/or death, including bowel, bladder, permanent scarring, or vascular injury, among others, posed by the monopolar current and the system's issues with insufficient insulation and microcracks, exceeded any stated benefit the da Vinci robotic surgical approach was designed to or might in fact have bestowed. The risks posed by the da Vinci surgery system are ones that are beyond those contemplated by the medical community and customers, including Mr. Garlich.

60. The da Vinci surgical system was defective in design because it did not have, nor was it packaged with or accompanied by, adequate warnings to alert the medical community, including Mr. Garlich's surgeon, to the risks described herein, including, but not limited to, the risk of serious injury and/or death, including bowel or other injury, posed by its monopolar current risks. The da Vinci surgical system was also not accompanied by adequate labeling, instructions

for use and/or warnings capable of fully apprising the medical communicates and potential consumers, including Mr. Garlich, of the potential grave risks and serious side effects associated with its use.

61. There were safer alternative energy modalities available.

62. Monopolar energy, as used and taught on the da Vinci surgical system, was unsafe for normal and reasonably anticipated use in performing the surgery on Mr. Garlich.

63. Given the potential and actual risk of harm associated with the use of monopolar energy so close to the bowel, bladder, 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 surgical system should not have been marketed in that condition.

64. Defendant knew or should have known of the unreasonably dangerous conditions posed by the da Vinci surgical system. Defendant acted with conscious and deliberate indifference to the foreseeable harm by continuing to design, manufacture, and market the use of the da Vinci surgical system in an effort to maximize profits with disregard to the public's health and safety.

65. Plaintiffs could not, through the exercise of reasonable care, have discovered the risks of serious injuries caused by the da Vinci surgical system. If Mr. Garlich had been aware of these risks, he would have chosen surgical procedures with similar efficacies but without the additional risks. As a result, Mr. Garlich endured the personal injuries described herein.

66. The information Defendant provided to the medical community and to consumers regarding the safety and efficacy of the da Vinci surgical system, particularly the information contained in the advertising and promotional materials, failed to accurately reflect the aforementioned serious and potentially fatal side effects.

67. Had adequate warnings and instructions been provided, a reasonable surgeon in a similar position to Mr. Garlich's surgeon would not have suggested the da Vinci surgical system, and Mr. Garlich's injuries would not have occurred.

68. As a direct and proximate result of Defendant's negligence, willful, wanton, and/or intentional acts, omissions, misrepresentations, and/or otherwise culpable acts described herein, the Plaintiff, Mr. Garlich, sustained injuries and damages alleged herein.

69. That by reason of the foregoing and Defendant's aforesaid conduct, among other things, Plaintiff David Garlich suffered injuries which caused him to undergo multiple additional surgeries, 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, and has incurred medical expenses.

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

71. As a result of said conduct, Defendant has become strictly liable to Plaintiff.

72. Defendant's conduct in continuing to market, sell, and distribute the aforesaid devices after obtaining knowledge they were defective and not performing as represented or intended, showed complete indifference to and/or 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 demand judgment against Defendant and seek 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.

SECOND CAUSE OF ACTION—GENERAL NEGLIGENCE AND NEGLIGENT TRAINING & PROCTORING & CERTIFICATION

73. Plaintiffs incorporate by reference each and every paragraph and allegation of this complaint as though set forth in full herein.

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

75. Specifically, 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, and blood vessels, which was a proximate cause for Mr. Garlich's multiple surgeries and long term pain and suffering.

76. Defendant took it upon itself to "train" and "certify" Mr. Garlich's surgeon on the use of the da Vinci surgical system using monopolar current. Upon information and belief, Defendant specifically trained Plaintiff's surgeon on the use of monopolar current via operative endoshear scissors during the prostactectomy.

77. Defendant did not properly proctor and/or properly instruct Mr. Garlich'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.

78. Defendant had a financial incentive to promptly train, proctor, and certify Mr. Garlich's surgeon without regard to whether or not Mr. Garlich's surgeon was truly trained in a proper, skilled, and competent manner on the da Vinci surgical system. Defendant did so without providing any standardization of demonstrated competencies, instead choosing to qualify the large majority of surgeons in the fastest way possible in order to improve Defendant's sales.

THIRD CAUSE OF ACTION—FRAUD

79. Plaintiffs incorporate by reference each and every paragraph and allegation of this complaint as though set forth in full herein.

80. Defendant misrepresented the safety and comparative efficacy of its device, upon which Mr. Garlich's surgeons relied, to his detriment.

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

82. Defendant was aware of, or should have been aware of, the known dangers of monopolar current with respect 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.

83. Defendant was aware, or should have been aware, of the known dangers of monopolar current with respect to capacitive coupling, which like insulation failure can cause a thermal injury to occur in adjacent structures like bowel, bladder, or blood vessel.

84. 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 surgical system. Defendant did so based not on wanting to pay for the cost of having to license these safer energy technologies.

85. 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

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 chose not to purchase it for its da Vinci surgical system using monopolar current.

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

87. Further, Defendant suppressed reports of adverse outcomes with the use of its device, which would have been material to consumers and users making the decision to use the said device.

88. 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.

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

FOURTH CAUSE OF ACTION—BREACH OF EXPRESS WARRANTY

90. Plaintiffs incorporate by reference each and every paragraph and allegation of this complaint as though set forth in full herein.

91. Defendant made express warranties of safety to the buyers and consumers of the device utilized during Plaintiff DAVID GARLICH's surgery, upon which the buyers and users, as agents of Plaintiff relied, to his detriment. Defendant expressly represented to Plaintiff (and to the consumers and the medical community) that the da Vinci robotic surgical system 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.

92. Defendant breached express warranties with respect to the da Vinci surgical system in the following ways:

a. Defendant represented through labeling, advertising, marketing materials, detail persons, seminar presentations, surgeon training sessions, publications, notice letters, and regulatory submissions that the da Vinci surgical system 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 surgical system;

b. Defendant represented that the da Vinci surgical system was as safe and/or safer than alternative surgical methods and fraudulently concealed information that demonstrated that the da Vinci surgical system approach was not safer than alternatives available on the market; and

c. Defendant represented that the da Vinci surgical system was more efficacious than other alternative surgical methods and fraudulently concealed information that it was not more efficacious than alternative surgical methods.

93. Da Vinci Robotic Surgery 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.

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

95. Plaintiff, his surgeons, and others in the medical community, relied upon Defendant's express warranties, resulting in the Plaintiff's da Vinci robotic surgery.

96. Plaintiff, after ascertaining through his own injuries that the da Vinci surgical system violated express warranties, hereby supply notice to Defendant INTUITIVE SURGICAL, INC. of same through the filing of this lawsuit.

97. As a direct and proximate result 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.

98. By selling the said device, Defendant made implied warranties of safety, merchantable quality, and fitness for use, which were breached when Plaintiff was injured during surgery.

99. As a further and proximate result of the acts of Defendant, Plaintiffs suffered emotional distress.

WHEREFORE, Plaintiffs demand judgment against Defendant and seek 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

100. Plaintiffs incorporate by reference each and every paragraph and allegation of this complaint as though set forth in full herein.

101. At all relevant and material times, Defendant manufactured, distributed, advertised, promoted and sold the da Vinci surgical system.

102. At all relevant times, Defendant intended that the da Vinci surgical system 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.

103. Defendant breached various implied warranties with respect to the da Vinci surgical system 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 Prostatectomy 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 surgical system with monopolar current.

b. Defendant represented that the da Vinci surgical system 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 Prostatectomy was not safer than alternatives available on the market; and,

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

104. In reliance upon Defendant's implied warranty, Plaintiff's surgeon used the da Vinci Robotic surgical system as prescribed and in the foreseeable manner normally intended, recommended, promoted, instructed, and marketed by Defendant.

105. Defendant breached its implied warranty to Plaintiff in that the da Vinci surgical system with monopolar current was not of merchantable quality, safe and fit for its intended use, or adequately tested.

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

107. 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 seek 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

108. Plaintiffs incorporate by reference each and every paragraph and allegation of this complaint as though set forth in full herein.

109. At all times relevant to this action, Defendant designed, advertised, marketed, promoted, manufactured, distributed, supplied, and/or sold the da Vinci surgical system for prostatectomy use.

110. Plaintiff's surgeon's hospital purchased the da Vinci surgical system from the Defendant for the purpose of using it for Robotic Prostatectomy. The same hospital purchased disposable and reusable instrument for the performing of DAVID GARLICH'S surgery.

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

112. DAVID GARLICH did not receive the safe and effective surgical product which he intended to purchase, nor did the hospital where DAVID GARLICH had his surgery.

113. 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 Prostatectomy to be.

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

SEVENTH CAUSE OF ACTION-LOSS OF CONSORTIUM

114. Plaintiffs incorporate by reference each and every paragraph and allegation of this complaint as though set forth in full herein.

115. As a direct consequence of the injuries sustained by DAVID GARLICH while undergoing a da Vinci Robotic Prostatectomy, and the constant pain, injury to the bowels, development of sepsis and other complications, inability to engage in the normal course of relationships and the emotional consequences, Plaintiff LORIE GARLICH has been deprived the normal companionship, company, affection, regard, assistance, comfort, and emotional stability from her husband DAVID GARLICH.

116. These physical and emotional consequences of the injuries have negatively impacted the quality and caused undue hardship to the marriage relationship.

WHEREFORE, Plaintiffs demand judgment against Defendant and seek 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.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs prays for judgment against the Defendant as follows:

a. Compensatory damages, in excess of the amount required for federal diversity jurisdiction, and in an amount to totally compensate Plaintiffs for all of their injuries and damages, both past, present, and future.

b. Special damages, in excess of the amount required for federal diversity jurisdiction, and in an amount to fully compensate Plaintiffs for all of their injuries and damages, both past and present, including but not limited to, past and future medical expenses, lost income, loss of earning capacity, permanent disability, and pain and suffering;

c. Restitution and disgorgement of profits;

d. Punitive damages;

e. Attorneys' fees, expenses, and costs of this suit;

f. Pre-judgment and post-judgment interest in the maximum amount allowed by law; and

g. Such other relief, monetary or equitable, as this Court deems necessary, just and proper.

DEMAND FOR JURY TRIAL

The Plaintiffs hereby demand a trial by jury on all Counts and as to all issues.

Date: August 23, 2013

Respectfully submitted this 23rd day of August, 2013.

/s/ Andrew L. Payne
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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

David Garlich and Lorie Garlich

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

(c) Attorneys *(Firm Name, Address, and Telephone Number)*
Andrew L Payne, Payne Mitchell Law Group
2911 Turtle Creek Boulevard, Suite 1400, Dallas, TX 75219; 214-252-18

DEFENDANTS

Intuitive Surgical Inc.

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

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

Attorneys *(If Known)*

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 and One Box for Defendant)*
(For Diversity Cases Only)

	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

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

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

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

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

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. Section 1332

Brief description of cause:
Surgical robot caused internal injuries

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 _____

DATE 08/23/2013

SIGNATURE OF ATTORNEY OF RECORD /s/ Andrew L. Payne

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____