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17 **UNITED STATES DISTRICT COURT**
 18 **NORTHERN DISTRICT OF CALIFORNIA**
 19 **SAN JOSE DIVISION**

20 IN RE INTUITIVE SURGICAL
 21 SECURITIES LITIGATION

Case No. 5:13-cv-01920-EJD (HRL)

22 **CLASS REPRESENTATIVES' NOTICE**
OF MOTION AND MOTION FOR
FINAL APPROVAL OF CLASS
ACTION SETTLEMENT AND PLAN OF
ALLOCATION AND MEMORANDUM
OF POINTS AND AUTHORITIES IN
SUPPORT THEREOF

25 Date: December 20, 2018
 26 Time: 10:00 a.m.
 Dept.: Courtroom 4, 5th Floor
 Judge: Hon. Edward J. Davila

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1 **NOTICE OF MOTION**

2 TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

3 PLEASE TAKE NOTICE that on December 20, 2018, at 10:00 a.m., or as soon thereafter
4 as they may be heard, Class Representatives the Employees' Retirement System of the State of
5 Hawaii ("Hawaii ERS") and Greater Pennsylvania Carpenters' Pension Fund ("Greater
6 Pennsylvania"), on behalf of themselves and all members of the certified Class, will move this
7 Court for orders, pursuant to Rule 23 of the Federal Rules of Civil Procedure: (i) granting final
8 approval of the proposed Settlement of the Action; and (ii) approving the proposed Plan of
9 Allocation for the net proceeds of the Settlement.

10 This motion is supported by the following memorandum of points and authorities and the
11 accompanying Declaration of Jonathan Gardner in Support of Class Representatives' Motion for
12 Final Approval of Class Action Settlement and Plan of Allocation and Class Counsel's Motion
13 for an Award of Attorneys' Fees and Payment of Expenses, dated November 15, 2018 ("Gardner
14 Declaration" or "Gardner Decl."), and the exhibits attached thereto.¹

15 Proposed orders will be submitted with the Class Representatives' reply submission on
16 December 13, 2018, after the November 29, 2018 deadline for requesting exclusion or objecting
17 has passed.

18 **STATEMENT OF ISSUES TO BE DECIDED**

19 1. Whether the Court should grant final approval to the proposed class action
20 Settlement; and

21 2. Whether the Court should approve the proposed Plan of Allocation for
22 distributing the proceeds of the Settlement to eligible Class Members.
23
24

25 ¹ The Gardner Declaration contains a detailed description of the allegations and claims, the
26 procedural history of the Action, the risks faced by the Class in pursuing litigation, the efforts
27 that led to a settlement, among other matters. All exhibits referenced herein are annexed to the
28 Gardner Declaration. For clarity, citations to exhibits that themselves have attached exhibits will
be referenced as "Ex. ___ - ___." The first numerical reference is to the designation of the entire
exhibit attached to the Gardner Declaration and the second alphabetical reference is to the exhibit
designation within the exhibit itself.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Hawaii ERS and Greater Pennsylvania (“Plaintiffs” or “Class Representatives”) through
3 their counsel Labaton Sucharow LLP (“Labaton Sucharow” or “Class Counsel”), respectfully
4 submit this memorandum of points and authorities in support of their motion, pursuant to Federal
5 Rule of Civil Procedure 23(e), requesting (i) final approval of the proposed settlement of the
6 above-captioned class action (the “Settlement”); and (ii) approval of the proposed Plan of
7 Allocation.²

8 **PRELIMINARY STATEMENT**

9 As detailed in the Stipulation, Intuitive Surgical, Inc. (“Intuitive” or the “Company”), and
10 Gary S. Guthart, Marshall L. Mohr, and Lonnie M. Smith (collectively, the “Individual
11 Defendants,” and, together with Intuitive, the “Defendants”) have agreed to deposit \$42,500,000
12 in cash, to secure a settlement of the claims in the Action and all Released Claims. The terms of
13 the Settlement are set forth in the Stipulation, which was previously filed with the Court. ECF
14 No. 298-1. This recovery is a very favorable result for the Class and avoids the substantial risks
15 and expenses of continued litigation, including the risk of recovering less than the Settlement
16 Amount, or nothing at all.

17 As described below and in the accompanying Gardner Declaration, the decision to settle
18 was well-informed by more than five years of contentious and hard-fought litigation involving a
19 comprehensive investigation; two rounds of motion to dismiss briefing, including Defendants’
20 motion for reconsideration; extensive fact and expert discovery (involving the analysis of
21 approximately 550,000 pages of documents produced by Defendants and third parties, such as
22 the FDA, 18 fact depositions, six expert depositions, and 11 expert reports); certification of the
23 Class and overcoming Defendants’ petition for permission to appeal pursuant to Rule 23(f);
24 intensive summary judgment motion practice; and trial preparation. Trial was scheduled to begin
25 on October 30, 2018.

26
27

² All capitalized terms not otherwise defined herein have the meanings set forth in the
28 Stipulation and Agreement of Settlement, dated as of September 11, 2018 (the “Stipulation,”
ECF No. 298-1).

1 The \$42.5 million recovery represents approximately 7.34% of the \$580 million in
2 maximum damages estimated by the Class Representatives' damages expert, Chad Coffman,
3 assuming pre-Class Period gains are netted and the Class prevailed on all claims through trial
4 and appeals, which includes prevailing in full on Defendants' summary judgment motion
5 pending at the time of settlement and, particularly, their argument that Class Representatives
6 could not establish loss causation for any of the three remaining alleged corrective disclosures.
7 *See* Gardner Decl. ¶¶5, 81. If Defendants' arguments prevailed, the Class would have recovered
8 substantially less than the Settlement Amount, or nothing at all. Class Counsel, who has
9 extensive experience and expertise in prosecuting securities class actions, believes that the
10 Settlement represents a very favorable resolution of this complex litigation in light of the specific
11 risks of continued litigation, particularly the challenges of establishing loss causation and
12 materiality. The Class Representatives, who were actively involved in the Action, vigorously
13 represented the Class and have approved the Settlement. *See* Declaration of Elmira K.L. Tsang
14 on Behalf of Hawaii ERS, dated November 2, 2018 (Ex. 1), and the Declaration of James R.
15 Klein on Behalf of Greater Pennsylvania, dated November 2, 2018 (Ex. 2).

16 Accordingly, the Class Representatives respectfully request that the Court grant final
17 approval of the Settlement. In addition, the Plan of Allocation, which was developed with the
18 assistance of the Class Representatives' damages expert, is a fair and reasonable method for
19 distributing the Net Settlement Fund and should also be approved by the Court.

20 **PRELIMINARY APPROVAL AND THE NOTICE PROGRAM**

21 On October 4, 2018, the Court entered an order preliminarily approving the Settlement
22 and approving the proposed forms and methods of providing notice to the Class (the
23 "Preliminary Approval Order", ECF No. 304). Pursuant to and in compliance with the
24 Preliminary Approval Order, through records maintained by Intuitive's transfer agent,
25 information gathered from the previous mailing of the notice of the pendency of the Action (the
26 "Class Notice"), and information provided by brokerage firms and other nominees, beginning on
27 October 15, 2018, the Court-appointed Claims Administrator the Garden City Group, LLC
28 ("GCG"), which was recently acquired by Epiq Class Action and Claims Solutions, Inc. and is

1 now continuing operations as part of Epiq, caused, among other things, the Settlement Notice
2 and Proof of Claim and Release form (together, the “Claim Packet”) to be mailed by first-class
3 mail to potential Class Members. *See* Declaration Regarding (A) Mailing of the Settlement
4 Notice and Proof of Claim Form; (B) Publication of Summary Notice; and (C) Requests for
5 Exclusion in Connection with Settlement Notice, dated November 13, 2018 (“Mailing
6 Affidavit”), Ex. 3 ¶¶3-8. A total of 233,036 Claim Packets have been mailed as of November
7 13, 2018. *Id.* ¶8. On October 22, 2018, the Summary Notice was published in *Investor’s*
8 *Business Daily* and was disseminated over the internet using *PR Newswire*. *Id.* ¶9 and Exhibits
9 C and D attached thereto. The Settlement Notice and Proof of Claim were also posted, for
10 review and easy downloading, on the case-dedicated website established by GCG for purposes of
11 this Action, as well as Labaton Sucharow’s website. *Id.* ¶10.

12 The Settlement Notice described, *inter alia*, the claims asserted in the Action, the
13 contentions of the Parties, the course of the litigation, the terms of the Settlement, the maximum
14 amounts that would be sought in attorneys’ fees and expenses, the Plan of Allocation, the right to
15 object to the Settlement, the right to seek to be excluded from the Class, and the right to opt-back
16 into the Class (for those who previously requested exclusion in connection with the Class
17 Notice). *See generally* Ex. 3-B. The Settlement Notice also gave the deadlines for objecting,
18 seeking exclusion, or opting back into the Class, and advised potential Class Members of the
19 scheduled Settlement Hearing before this Court. *Id.*

20 Defendants also mailed notice of the Settlement pursuant to the Class Action Fairness
21 Act, 28 U.S.C. §1715. Gardner Decl. ¶108.

22 The Ninth Circuit has held that notice must be “reasonably calculated, under all the
23 circumstances, to apprise interested parties of the pendency of the action and afford them an
24 opportunity to present their objections.” *Mendoza v. Tucson Sch. Dist. No. 1*, 623 F.2d 1338,
25 1351 (9th Cir. 1980) (citation omitted). The Ninth Circuit has also ruled that the objection
26 deadline should fall after motions in support of approval and attorneys’ fees and expenses have
27 been filed. *See, e.g., In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988 (9th Cir. 2010)
28 (requiring that fee motion be made available to the class before the deadline for objecting to the

1 fee). The Class Representatives respectfully submit that the notice program utilized here readily
2 meets these standards.

3 To date, the Class’s reaction to the proposed Settlement has been positive. While the
4 deadline (November 29, 2018) for requesting exclusion or objecting to the Settlement has not yet
5 passed, to date there has only been one new request for exclusion (submitted by an individual
6 investor that bought four shares), no objections to the proposed Settlement, and no objections to
7 the Plan of Allocation.³

8 ARGUMENT

9 **I. THE PROPOSED SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE** 10 **UNDER THE APPLICABLE STANDARDS AND SHOULD BE APPROVED**

11 **A. The Standards for Final Approval of Class Action Settlements**

12 Strong judicial policy favors settlement of class actions. *Class Plaintiffs v. City of*
13 *Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992). It is well established in the Ninth Circuit that
14 “voluntary conciliation and settlement are the preferred means of dispute resolution.” *Officers*
15 *for Justice v. Civil Serv. Comm’r*, 688 F.2d 615, 625 (9th Cir. 1982). Indeed, “there is an
16 overriding public interest in settling and quieting litigations,” and this is “particularly true in
17 class action suits.” *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976). Class-
18 action suits readily lend themselves to compromise because of the difficulties of proof, the
19 uncertainties of the outcome, and the typical length of the litigation. Settlements of complex
20 cases such as this one greatly contribute to the efficient utilization of scarce judicial resources
21 and achieve the speedy resolution of claims. *See, e.g., Garner v. State Farm Mut. Auto Ins. Co.*,
22 No. CV 08 1365 CW (EMC), 2010 WL 1687832, at *10 (N.D. Cal. Apr. 22, 2010) (“Settlement
23 avoids the complexity, delay, risk and expense of continuing with the litigation and will produce
24 a prompt, certain and substantial recovery for the Plaintiff class.”) (citation and internal
25 quotation marks omitted).

26 _____
27 ³ A full report on the requests for exclusion submitted in response to the Settlement Notice
28 and responses to any objections will be provided with the Class Representatives’ reply papers on
December 13, 2018. The reply papers will also include information about the claims submitted
to date.

1 Rule 23(e) of the Federal Rules of Civil Procedure requires judicial approval of the
 2 compromise of claims brought on a class basis. The standard for determining whether to grant
 3 final approval to a class action settlement is whether the proposed settlement is “fundamentally
 4 fair, adequate, and reasonable.” *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 458 (9th Cir.
 5 2000) (citing *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998)); *In re TracFone*
 6 *Unlimited Serv. Plan Litig.*, 112 F. Supp. 3d 993, 997 (N.D. Cal. 2015). In making this
 7 determination, courts in the Ninth Circuit consider and balance a number of factors, including:

8 (1) the strength of the plaintiffs’ case; (2) the risk, expense, complexity, and likely
 9 duration of further litigation; (3) the risk of maintaining class action status throughout the
 10 trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the
 11 stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a
 12 governmental participant; and (8) the reaction of the class members of the proposed
 13 settlement.⁴

14 *See Churchill Vill. L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575-76 (9th Cir. 2004) (citing *Hanlon*,
 15 150 F.3d at 1026); *Officers for Justice*, 688 F.2d at 625 (same). Courts have also considered “the
 16 role taken by the lead plaintiff in [the settlement] process, a factor somewhat unique to the
 17 PSLRA.” *In re Portal Software, Inc. Sec. Litig.*, No. C-03-5138 VRW, 2007 WL 4171201, at *3
 18 (N.D. Cal. Nov. 26, 2007) (internal citation omitted). Not all of these factors will apply to every
 19 class action settlement and, under certain circumstances, one factor alone may prove
 20 determinative in finding sufficient grounds for court approval. *See Torrisi v. Tucson Elec.*
 21 *Power Co.*, 8 F.3d 1370, 1376 (9th Cir. 1993).

22 The determination of whether a settlement is fair, adequate, and reasonable is committed
 23 to the Court’s sound discretion. *See Mego*, 213 F.3d at 458 (“Review of the district court’s
 24 decision to approve a class action settlement is extremely limited.”) (citing *Linney v. Cellular*

25 ⁴ Effective on December 1, 2018, Rule 23(e) will be amended to, among other things,
 26 specifically add that in considering approval of a settlement, courts should assess whether (i) the
 27 class representatives and class counsel have adequately represented the class; (ii) the settlement
 28 was negotiated at arm’s-length; (iii) the relief is adequate given “the costs, risks, and delay of
 trial and appeal,” the effectiveness of distributing the relief to the class, the terms of any
 proposed award of attorney’s fees, including the timing, and any agreements required to be
 identified under Rule 23(e)(3); and (iv) the settlement treats class members equitably relative to
 each other. *See* amendments to Rule 23(e)(2)(A)-(D). Many of these considerations are already
 among the factors that courts within the Ninth Circuit weigh and each are readily satisfied here,
 as discussed below and in the related submissions.

1 *Alaska P'ship*, 151 F.3d 1234, 1238 (9th Cir. 1998)). In applying the pertinent factors, the Court
2 need not reach conclusions about the merits of the case, in part because the Court will be called
3 upon to decide the merits if the action proceeds. *See Officers for Justice*, 688 F.2d at 625
4 (“[T]he settlement or fairness hearing is not to be turned into a trial or rehearsal for trial on the
5 merits. . . . [I]t is the very uncertainty of outcome in litigation and avoidance of wasteful and
6 expensive litigation that induce consensual settlements.”). The Court’s discretion in assessing
7 the fairness of the settlement is also circumscribed by “the strong judicial policy that favors
8 settlements, particularly where complex class action litigation is concerned.” *Linney*, 151 F.3d at
9 1238 (quoting *Officers for Justice*, 688 F.2d at 626); *Class Plaintiffs*, 955 F.2d at 1276 (same).

10 **B. Application of the Approval Criteria Supports**
11 **Final Approval of the Settlement**

12 **1. The Class Has Been Robustly Represented by the Class**
13 **Representatives and Class Counsel and the Settlement**
14 **Is the Result of Thorough and Arm’s-Length Efforts**

15 As is evident from the record before the Court, the Parties have vigorously and, at times,
16 contentiously litigated this Action for five years. *See generally* Gardner Decl. §§III-V.
17 Throughout the litigation, the Class had the benefit of representation by two sophisticated
18 institutional investors, Hawaii ERS and Greater Pennsylvania, each of which dedicated
19 substantial efforts to overseeing the prosecution of the claims. *See* Declaration of Elmira K.L.
20 Tsang on Behalf of Hawaii ERS, (Ex. 1), and the Declaration of James R. Klein on Behalf of
21 Greater Pennsylvania, (Ex. 2). As discussed below, it also had the able representation of
22 knowledgeable counsel with extensive experience in shareholder class action litigation and
23 securities fraud cases. Labaton Sucharow is among the most experienced and skilled firms in the
24 securities litigation field, and has a long and successful track record in such cases. Gardner Decl.
¶140.

25 Before and during the negotiations between counsel, the strengths and weaknesses of the
26 Class Representatives’ and Defendants’ respective claims and defenses were fully understood
27 and explored by the Parties. Leading up to the Settlement, Counsel engaged in frank and
28 knowledgeable discussions. With an informed understanding, the Class Representatives agreed

1 to the Settlement. *Id.* ¶¶99-101. There has been no collusion and there can be no doubt that the
2 Settlement was reached through anything other than arm’s-length efforts. Accordingly, as
3 evidenced by the discussion below, the Settlement readily satisfies the approval criteria proposed
4 by the Rule 23 amendments set forth in Rule 23(e)(2)(A) and (B).

5 **2. The Strength of the Class Representatives’ Case and**
6 **the Risks Associated with Continued Litigation**

7 To determine whether the proposed Settlement is fair, reasonable, and adequate, the
8 Court must balance the risks of continued litigation against the benefits afforded to class
9 members and the certainty of a recovery. *See Mego*, 213 F.3d at 458. Although the Class
10 Representatives believe that the case against Defendants is strong, that confidence must be
11 tempered by the fact that the Settlement is certain and that every case involves significant risk of
12 no recovery, particularly in a complex case such as the one at bar. Here, there was no
13 restatement, Company admission, or parallel governmental or criminal proceeding, which would
14 have aided the Class Representatives in proving key elements of the case, like materiality, loss
15 causation, and scienter. There is no question that to prevail here, the Class Representatives
16 would have confronted a number of legal and factual challenges, while trying to prove difficult
17 securities claims within the context of complex scientific and regulatory evidence and testimony.
18 For instance, the Class Representatives would have had to argue, and the Court would need to
19 rule on, the pending summary judgment motion, which sought judgment as a matter of law on
20 the elements of materiality and loss causation. There was no guarantee that the claims would
21 survive this challenge, and, even if they did, how the Court’s rulings would affect the future
22 prosecution of the claims.

23 **(a) Loss Causation and Damages Challenges**

24 The principle risk in continuing the litigation is the difficulty of proving loss causation
25 and damages, which were hotly contested by Defendants at every turn, particularly class
26 certification and summary judgment, and would continue to be challenged in *Daubert* motions,
27 at trial, in post-trial proceedings and appeals. *See Gardner Decl.* ¶¶73-74, 84-87. To succeed at
28 trial “a plaintiff [must] prove that the defendant’s misrepresentation (or other fraudulent conduct)

1 proximately caused the plaintiff's economic loss." *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336,
2 346 (2005). If a jury were to find that any of the three remaining alleged corrective disclosures
3 were not truly corrective, the potential recovery for the Class would be significantly diminished,
4 as happened in connection with class certification where the Court rejected certain other alleged
5 corrective disclosure dates.

6 Principally, Defendants have argued that the "corrective" disclosures do not correct the
7 allegedly false statements. Gardner Decl. ¶¶84-87. This was a centerpiece of Defendants'
8 summary judgment motion. *Id.* ¶¶73-74. For example, Defendants argued that nothing in the
9 February 28, 2013 Bloomberg article – announcing that the FDA was surveying surgeons at
10 several hospitals regarding da Vinci and any complications they have may have encountered –
11 corrected any alleged omissions regarding a purported defect or supposed internal recalls.
12 Defendants would also argue that the Class Representatives' argument that news of the FDA
13 survey was a partial corrective disclosure has been rejected by the Ninth Circuit in a line of cases
14 finding that an announcement of an investigation, standing alone, is insufficient to establish loss
15 causation. *Id.* ¶¶73, 84.

16 Defendants would also have continued to argue that the March 5, 2013 Bloomberg
17 article, which reported on allegations from two personal injury lawsuits that had been filed
18 against Intuitive as well as other lawsuits filed against the Company, did not reveal anything new
19 to the market, because this information was all publicly available. Accordingly, the
20 accompanying stock drop cannot be evidence of loss causation. *Id.* ¶73, 85.

21 Regarding the July 18, 2013 Warning Letter where the Company announced, on July 18,
22 2013, that it received a Warning Letter from the FDA, Defendants would have argued that the
23 Warning Letter revealed no information that Defendants had allegedly concealed, and
24 accordingly, the Class Representatives cannot establish loss causation based on the stock price
25 movement on July 18-19, 2013. Defendants would have argued that the only "new" information
26 revealed on July 18, 2013, was the existence of a Warning Letter (the contents of which were not
27 made public until July 31, 2013). Defendants would have noted that since the July 18
28 announcement revealed only the receipt of the letter itself, which the Class Representatives do

1 not allege Defendants concealed, the announcement cannot qualify as a corrective disclosure,
2 and the accompanying stock drop cannot be a basis for proving loss causation. *Id.* ¶¶73, 86.

3 The elimination of even one of these alleged corrective disclosures would have
4 considerably reduced damages, leaving the Class Representatives to seek significantly less than
5 \$580 million.

6 Defendants would also dispute the Class Representatives' expert's damages
7 methodology. Defendants would continue to challenge Mr. Coffman's analyses, arguing, among
8 other things, that he failed to conduct an adequate analysis to determine which of the challenged
9 statements were material to the market and did not determine which corrective disclosures
10 corrected any particular prior statements. *Id.* ¶89.

11 The Class Representatives' expert has estimated maximum aggregate damages to be
12 approximately \$580 million, if the Class Representatives were to prevail on all of their claims,
13 including all three alleged corrective disclosures. Accordingly, the proposed Settlement
14 represents a recovery of approximately 7.34% of this estimate. Of course if Defendants
15 prevailed at summary judgment on their argument that there is no loss causation, then the Class
16 would recover nothing at all. *Id.* ¶90.

17 Resolution of these loss causation and damages issues would involve dense and complex
18 testimony of expert witnesses and the Parties would end up in a "battle of the experts" where it
19 would be impossible to predict with any certainty which arguments would find favor with a jury.
20 *See, e.g., Nguyen v. Radiant Pharms. Corp.*, No. SACV 11-00406 DOC (MLGx), 2014 WL
21 1802293, at *2 (C.D. Cal. May 6, 2014) (approving settlement in securities case where
22 "[p]roving and calculating damages required a complex analysis, requiring the jury to parse
23 divergent positions of expert witnesses in a complex area of the law" and "[t]he outcome of that
24 analysis is inherently difficult to predict and risky") (citation omitted); *In re Warner Commc'ns*
25 *Sec. Litig.*, 618 F. Supp. 735, 744, 745 (S.D.N.Y. 1985) (approving settlement where "it is
26 virtually impossible to predict with any certainty which testimony would be credited, and
27 ultimately, which damages would be found to have been caused by actionable, rather than the
28 myriad nonactionable factors such as general market conditions"), *aff'd*, 798 F.2d 35 (2d Cir.

1 1986). The outcome could well have depended on whose testifying expert the jury believed or
2 even whether the jury was able to follow the economic theories used by the experts.

3 **(b) Materiality Defenses**

4 The Class Representatives also faced substantial risks in proving that Defendants’
5 statements and alleged omissions were materially misleading at the time that they were made or
6 occurred.

7 As Defendants had in their summary judgment motion, they would have continued to
8 assert a “truth on the market defense,” arguing that each piece of allegedly concealed
9 information was actually publicly available to the market. Gardner Decl. ¶88. For example,
10 Defendants would have argued that Class Representatives’ claim that Defendants failed to
11 disclose that the Company sent letters in October 2011 to all da Vinci customers regarding the
12 proper use of the Tip Cover, was immaterial because the letters were in fact widely publicized
13 before the first allegedly misleading statement was made on February 6, 2012. Additionally,
14 Defendants would have argued that a Citron Research analyst report, published on December 19,
15 2012, discussed the “gathering storm of legal liability accruing to the company” due to the
16 Company’s alleged failure to disclose the risks associated with da Vinci. Defendants would also
17 argue that another Citron Report, published on January 17, 2013, discussed pending litigation
18 against Intuitive arising from the risks associated with the robot instruments. *Id*; *see also In re*
19 *Apple Comput. Sec. Litig.*, 886 F. 2d 1109, 1113 (9th Cir. 1989) (truth on the market defense
20 satisfied where “information was transmitted to the public with a degree of intensity and
21 credibility sufficient to effectively counter-balance any misleading impressions created by the
22 insiders’ one-sided representation”) (citation omitted); *Lovallo v. Pacira Pharms., Inc.*, No. 14-
23 06172, 2015 WL 7300492, at *10 (D.N.J. Nov. 18, 2015) (finding truth on the market where
24 plaintiff is able to find the information “based on a single Web search” and where “information
25 was not buried”).

26 While the Class Representatives would advance a number of arguments in response,
27 including that the allegedly concealed information did not receive adequate exposure and was
28

1 essentially impossible for an investor to aggregate and understand, there is no certainty as to how
2 the Court or a jury would come out on this issue. *See, e.g., Id.*

3 If Defendants' motion were successful, the Class Representatives' case would have been
4 severely curtailed, if not over.

5 **(c) Scienter Defenses**

6 Defendants cannot be liable under the Securities Exchange Act of 1934 unless they acted
7 with scienter – *i.e.*, knowledge of falsity, or reckless disregard for whether their statements were
8 true or false. Here, Defendants have strongly contested that the Class Representatives would be
9 able to prove motive or that Defendants knew or recklessly disregarded facts indicating that their
10 public statements were false when made. Gardner Decl. ¶¶92-95.

11 Regarding the alleged insider trading of each of the Individual Defendants, Defendants'
12 would likely seek to put forth expert testimony arguing, among other things, that the sales of the
13 Individual Defendants followed 10b5-1 trading plans that were entered into before any of the
14 alleged corrective disclosures and were consistent with SEC requirements and Company insider
15 trading policies. Defendants would also argue that Defendants Mohr and Guthart approved a
16 stock *repurchase* plan prior to the Class Period, which negates any finding of scienter because it
17 tends to show that they believed the share price would rise in the future. *Id.* ¶93.

18 With respect to knowledge of the allegedly concealed information, Defendants would
19 likely continue to press that the Class Representatives cannot prove that they knew facts contrary
20 to each alleged misrepresentation or omission. For instance, Defendants maintained that the July
21 2013 FDA Warning Letter was not known to them ahead of time and was not kept “secret.” *Id.*

22 The Class Representatives would counter with evidence showing that Defendants, among
23 other things, exchanged communications with the FDA discussing the serious problems with,
24 and injuries resulting from, the Tip Cover, as well as documents and testimony establishing that
25 all of the Individual Defendants regularly attended internal meetings and received reports
26 apprising them of the sharp rise in MDRs and adverse events, as well as the Tip Cover issues
27 affecting patients. *Id.* ¶94. While the Class Representatives' would put forth evidence and
28 expert opinion to support their claims, there is no certainty about which side a jury would credit.

1 Indeed, the Class Representatives would have been forced to tell its story to the jury through
2 current or former employees of the Company, who would likely be adverse to the Class.

3 In sum, as a result of the various defenses described above and in the Gardner
4 Declaration, it is possible that, even if the Court or a jury were to find that Defendants knowingly
5 made materially misleading statements, in the end Class Members could recover nothing.

6 In light of the above, the Settlement satisfies the Ninth Circuit’s first and second factors,
7 as well as the proposed criteria set forth in amended Rule 23(e)(2)(C)(i), regarding the adequacy
8 of the relief provided to the Class taking into account the risks of further litigation.

9 **3. The Complexity, Expense, and Likely Duration of Further Litigation**

10 Final approval is also supported by the complexity, expense, and likely duration of
11 continued litigation. *See Torrissi*, 8 F.3d at 1376 (“the cost, complexity and time of fully
12 litigating the case all suggest that this settlement was fair”); *see also* proposed amendment to
13 Rule 23(e)(2)(C)(i) (codifying the measure of adequacy by, among other things, “the costs, risks,
14 and delay of trial and appeal”). “Generally, unless the settlement is clearly inadequate, its
15 acceptance and approval are preferable to lengthy and expensive litigation with uncertain
16 results.” *In re LinkedIn User Privacy Litig.*, 309 F.R.D. 573, 587 (N.D. Cal. 2015) (citation
17 omitted).

18 Here, at every turn, the litigation raised difficult legal and factual issues that required
19 creativity and sophisticated analysis. The complexity, expense, and duration of preparing and
20 trying the case before a jury, subsequent post-trial motion practice, and a likely appeal of the
21 Court’s rulings on class certification, summary judgment, post-trial motions, and a jury verdict
22 would be significant. Barring a settlement, there is no question that this case would be litigated
23 for years, taking a considerable amount of court time and costing millions of additional dollars,
24 with the possibility that the end result would be no better for the class, and might be worse. *See*
25 *Destefano v. Zynga Inc.*, No. 12-04007-JSC, 2016 WL 537946, at *10 (N.D. Cal. Feb. 11, 2016)
26 (“continuing litigation would not only be costly – representing expenses that would take away
27 from any ultimate classwide recovery – but would also delay resolution and recovery for
28 Settlement Class Members”); *cf. Glickenhau & Co., v. Household Int’l, Inc.*, 787 F.3d 408 (7th

1 Cir. 2015) (reversing and remanding jury verdict of \$2.46 billion after 13 years of litigation on
2 loss causation grounds and error in jury instruction under *Janus Capital Grp., Inc. v. First*
3 *Derivative Traders*, 564 U.S. 135 (2011)).

4 Likewise, as described in greater detail in the Gardner Declaration, the Action involved
5 difficult, hotly disputed, and expert-intensive issues related to market efficiency, loss causation,
6 damages, insider trading, and FDA regulations. Presenting this complex evidence persuasively
7 to a jury presented its own significant challenges, in addition to the risks created by the “battle of
8 the experts” that would have ensued.

9 Importantly, there was no road-map for Class Counsel to follow in this Action as neither
10 the SEC nor the Department of Justice brought any proceedings against Defendants.

11 The Settlement, therefore, provides sizeable and tangible relief to the Class now, without
12 subjecting Class Members to the risks, duration, and expense of continuing litigation. This
13 factor weighs strongly in favor of final approval of the Settlement.

14 **4. The Risk of Maintaining Class-Action Status Through Trial**

15 This Court’s certification of the Class withstood Defendants’ petition to the Ninth Circuit
16 pursuant to Fed. R. Civ. P. 23(f). However, while the Class Representatives are confident that
17 the certification of the Class would have remained intact, under Rule 23(c)(1)(C), a Court’s prior
18 grant of certification “may be altered or amended before final judgment.” Accordingly, there
19 was an ongoing risk that the Class could be decertified or modified if the litigation were to
20 continue. *See In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1041 (N.D. Cal. 2008)
21 (noting that even if a class is certified, “there is no guarantee the certification would survive
22 through trial, as Defendants might have sought decertification or modification of the class”).
23 Thus, the risk of failing to maintain class certification through trial favors approval of the
24 Settlement.

25 **5. The Amount Offered in the Settlement**

26 In evaluating the fairness of a settlement, a fundamental question is how the value of the
27 settlement compares to the amount the class potentially could recover at trial, discounted for risk,
28 delay, and expense. Thus, “[i]t is well-settled law that a cash settlement amounting to only a

1 fraction of the potential recovery does not per se render the settlement inadequate or unfair.”
2 *Mego*, 213 F.3d at 459 (citation omitted). Indeed, “[t]here is a range of reasonableness with
3 respect to a settlement – a range which recognizes the uncertainties of law and fact in any
4 particular case and the concomitant risks and costs necessarily inherent in taking any litigation to
5 completion[.]” *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 119 (2d Cir. 2005).

6 The proposed \$42.5 million Settlement is well within the range of reasonableness in light
7 of the potential recovery at trial and the risks of continued litigation. As noted above, the Class
8 Representatives’ damages expert has estimated that if liability were to be established with
9 respect to all of the claims, including all three alleged corrective disclosures, the maximum
10 aggregate damages recoverable at trial would be approximately \$580 million. As a percentage of
11 this maximum estimate of damages, the \$42.5 million Settlement represents a recovery of
12 approximately 7.34%. Gardner Decl. ¶5. Of course this estimated recovery assumes that the
13 Class Representatives were able to establish damages based on all remaining corrective
14 disclosures, which was vigorously contested by Defendants in connection with summary
15 judgment and would be contested at trial and beyond.

16 Since the passage of the Private Securities Litigation Reform Act of 1995 (“PSLRA”),
17 courts have approved settlements that recovered a similar, or smaller, percentage of maximum
18 damages. *See, e.g., McPhail v. First Command Fin. Planning, Inc.*, No. 05cv179-IEG- JMA,
19 2009 WL 839841, at *5 (S.D. Cal. Mar. 30, 2009) (finding a \$12 million settlement recovering
20 7% of estimated damages was fair and adequate); *Omnivision*, 559 F. Supp. 2d at 1042
21 (\$13.75 million settlement yielding 6% of potential damages after deducting fees and costs was
22 “higher than the median percentage of investor losses recovered in recent shareholder class
23 action settlements”) (citation omitted); *Int’l Bd. of Elec. Workers Local 697 Pension Fund v.*
24 *Int’l Game Tech., Inc.*, No. 3:09-cv-00419-MMD-WGC, 2012 WL 5199742, at *3 (D. Nev. Oct.
25 19, 2012) (approving \$12.5 million settlement recovering about 3.5% of the maximum damages
26 that plaintiffs believe could be recovered at trial and noting that the amount is within the median
27 recovery in securities class actions settled in the last few years).

28

1 The Settlement also presents a superior recovery when compared to the median and
2 average settlement values in securities class action settlements in 2017, which was reported by
3 Cornerstone Research to be \$5 million and \$18.2 million, respectively. *See*, Laarni T. Bulan,
4 Ellen M. Ryan, and Laura E. Simmons, *Securities Class Action Settlements – 2017 Review and*
5 *Analysis*, at 3 (Cornerstone Research 2018), Ex. 4.

6 Accordingly, it is respectfully submitted that the Settlement is a favorable result that falls
7 well within the range of reasonableness.

8 **6. The Extent of Discovery Completed and the Stage of the Proceedings**

9 The stage of the proceedings and the amount of discovery completed are also factors
10 courts consider in determining the fairness, reasonableness, and adequacy of a settlement. *See*
11 *Mego*, 213 F.3d at 459. This factor strongly weighs in favor of approval of the Settlement.

12 At the time the Parties agreed to settle, the Class Representatives and Class Counsel had
13 exhaustively litigated the Action and had a thorough and realistic understanding of the strengths
14 and weaknesses of the claims and defenses asserted. The Action has been hotly contested from
15 its inception, more than five years ago. As a result, the Class Representatives' and Class
16 Counsel's knowledge of the strengths and weaknesses of the claims alleged and the stage of the
17 proceedings are more than adequate to support the Settlement. This knowledge is based on,
18 among other things, Class Counsel's wide-ranging investigation before filing the consolidated
19 complaints; the briefing and order on Defendants' two motions to dismiss, and Defendants'
20 motion for reconsideration; Class Counsel's extensive class, fact, and expert discovery; as well
21 as the briefing on class certification and Defendants' Rule 23(f) petition, and the motion for
22 summary judgment. *See* Gardner Decl. §III-V.

23 In particular, Class Counsel conducted an extensive review of publicly available
24 information before filing the complaints, including documents filed publicly by the Company
25 with the U.S. Securities and Exchange Commission; press releases, news articles, analyst reports,
26 and other public statements concerning Intuitive's business and the da Vinci Surgical System;
27 and other publicly available information and data concerning Intuitive, its securities, and the
28 markets therefor. *Id.* ¶¶15, 26.

1 In connection with fact discovery, Class Counsel engaged in an extremely labor intensive
2 meet and confer process with Defendants on the scope of discovery, and ultimately obtained and
3 analyzed approximately 550,000 pages of documents from Defendants and non-parties, such as
4 medical professors who promoted the da Vinci System and manufacturers of the da Vinci Tip
5 Cover, and took or defended 18 fact depositions (including each of the Individual Defendants
6 and four Class Representative depositions). *Id.* §IV.A-E. Class Counsel also reviewed the
7 patent application for the redesigned Tip Cover filed with the U.S. Patent and Trademark
8 Office’s, which Defendants raised in connection with their class certification “truth-on-the-
9 market” defense. *Id.* ¶34.

10 In connection with expert discovery, Class Counsel worked extensively with experts on
11 issues related to loss causation and damages, insider trading, and FDA regulatory practices and
12 procedures for medical devices, and these experts issued 11 opening or rebuttal reports
13 (including three reports submitted in connection with class certification). Class Counsel also
14 challenged Defendants’ three experts during their depositions and through rebuttal reports. In
15 total, Class Counsel took or defended six expert depositions. *Id.* §IV.F.

16 In sum, the Class Representatives had a full understanding of the likelihood of success
17 and the potential recovery at trial at the time the Settlement was entered into. *See Portal*
18 *Software*, 2007 WL 4171201, at *4 (“The settlement reflects three and a half years of completed
19 work including pre-filing investigation, locating and interviewing over twenty-one witnesses, . . .
20 and plaintiff’s analysis of defendants’ motion for summary judgment. . . . As a result, the true
21 value of the class’s claims [were] well-known.”); *Eisen v. Porsche Cars N. Am., Inc.*, No. 2:11-
22 cv-09405-CAS-FFMx, 2014 WL 439006, at *4 (C.D. Cal. Jan. 30, 2014) (approving settlement
23 when record established that “all counsel had ample information and opportunity to assess the
24 strengths and weaknesses of their claims and defenses”). This factor strongly supports final
25 approval of the Settlement.

26 7. The Experience and Views of Counsel

27 Experienced counsel, negotiating at arm’s-length, have weighed the factors discussed
28 above and endorse the Settlement. As the Ninth Circuit observed in *Rodriguez v. West*

1 *Publishing Corporation*, “[t]his circuit has long deferred to the private consensual decision of the
2 parties” and their counsel in settling an action. 563 F.3d 948, 965 (9th Cir. 2009). The views of
3 the attorneys actively conducting the litigation and who are most closely acquainted with the
4 facts of the underlying litigation, are entitled to “great weight.” *Nat’l Rural Telecomm. Coop. v.*
5 *DirectTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004) ; *see also Zynga*, 2016 WL 537946, at *13
6 (“A district court is entitled to give consideration to the opinion of competent counsel that the
7 settlement is fair, reasonable, and adequate.”) (internal quotation omitted).

8 Class Counsel firmly believes that the Settlement is fair, adequate, and reasonable, and
9 particularly so in view of the risks, burdens, and expense of continued litigation. Further, it is
10 respectfully submitted that Class Counsel is experienced and able in this area of practice (*see*
11 Gardner Decl. ¶140 and Ex. 5-D) and “[t]here is nothing to counter the presumption that Lead
12 Counsel’s recommendation is reasonable.” *Omnivision*, 559 F. Supp. 2d at 1043. Accordingly,
13 this factor strongly favors approval of the Settlement.

14 **8. The Presence of a Governmental Participant**

15 With respect to the seventh factor, there was no governmental proceeding that assisted
16 with the investigation or prosecution of the Action – no “roadmap” to be followed, or criminal
17 convictions that have aided the Class Representatives in proving elements of the case, like loss
18 causation, materiality, and scienter. Accordingly, this factor supports approval of the Settlement.

19 **9. Reaction of the Class to Date**

20 As discussed above, pursuant to this Court’s Preliminary Approval Order, the Court-
21 approved Settlement Notice and Claim Form were mailed to potential Class Members who were
22 (i) identified in connection with the Class Notice or (ii) identified through continued outreach to
23 banks, brokers, and other nominees. *See* Ex. 3 ¶¶4-6. The Summary Notice was published in
24 *Investor’s Business Daily* on October 22, 2018 and transmitted over the internet using
25 *PRNewswire* on October 22, 2018. *Id.* ¶9. Additionally, the Stipulation, Settlement Notice,
26 Claim Form, and Preliminary Approval Order, among other documents, were posted to the
27 website dedicated to the Action (*id.* ¶10), as well as Labaton Sucharow’s website.

28

1 When measuring the adequacy of notice in a class action under either the Due Process
2 Clause or the Federal Rules, the Court should look to its reasonableness. *See, e.g., Silber v.*
3 *Mabon*, 18 F.3d 1449, 1454 (9th Cir. 1994) (“We therefore conclude that the appropriate
4 question remains . . . ‘what notice is reasonably certain to inform the absent members of the
5 plaintiff class,’ and the appropriate standard is the ‘best notice practicable’ under *Eisen* and
6 *Mullane*”) (internal citation omitted). Here, the method of dissemination of the Notices to
7 potential Class Members followed the industry gold-standard in securities cases and satisfies
8 these standards. *See, e.g., In re Immune Response Sec. Litig.*, 497 F. Supp. 2d 1166, 1170 (S.D.
9 Cal. 2007) (approving notice where it was mailed directly to class members and summary notice
10 was published).

11 The Settlement Notice advised the Class of the terms of the Settlement, the Plan of
12 Allocation, and the maximum amount of Class Counsel’s request for an award of attorneys’ fees
13 and expenses, as well as the procedure and deadline for filing objections, opting out of the Class,
14 and opting back in. *See generally* Ex. 3-B. The Settlement Notice also stated that the motions in
15 support of approval of the Settlement and the request for attorneys’ fees and expenses would be
16 filed with the Court no later than November 15, 2018, and be available to the public through the
17 website, Class Counsel’s website, request to the Claims Administrator, the Clerk’s Office, or
18 PACER. Ex. 3-B at Question 20.

19 To date, 233,036 Claim Packets have been mailed to potential Class Members and
20 nominees. Ex. 3 ¶8. While the objection/exclusion deadline – November 29, 2018 – has not yet
21 passed, to date, no objections and only one new exclusion request, by an individual investor
22 representing four shares, has been received.⁵ *Id.* ¶14.

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24
25 ⁵ In connection with the previously issued Class Notice, the Claims Administrator received
26 six valid and timely exclusion requests. *See* ECF No. 285, Mailing Decl. ¶2. No institutional
27 investor or pension fund requested exclusion and the requests relate to only 190 shares of
28 Intuitive stock. Investors who requested exclusion in connection with the Class Notice were not
required to request exclusion in response to the Settlement Notice. A full report on the
additional exclusion requests will be submitted with the Class Representatives’ December 13,
2018 reply papers.

1 **II. THE PLAN OF ALLOCATION OF THE NET SETTLEMENT FUND FOR**
2 **DISTRIBUTING RELIEF TO THE CLASS IS FAIR, ADEQUATE, AND**
3 **REASONABLE AND SHOULD BE APPROVED**

4 The standard for approval of a plan of allocation in a class action under Rule 23 of the
5 Federal Rules of Civil Procedure is the same as the standard applicable to the settlement as a
6 whole – the plan must be fair, reasonable, and adequate. *Class Plaintiffs*, 955 F.2d at 1284;
7 *Omnivision*, 559 F. Supp. 2d at 1045. An allocation formula need only have a reasonable basis,
8 particularly if recommended by experienced class counsel. *In re Heritage Bond Litig.*, No. 02-
9 ML-1475, 2005 WL 1594403, at *11 (C.D. Cal. June 10, 2005).

10 Here, the Class Representatives’ damages expert, Chad Coffman, prepared the Plan of
11 Allocation after careful consideration of the Class Representatives’ theories of liability and
12 damages under the Exchange Act. Gardner Decl. ¶112. The Plan of Allocation was fully
13 described in the Settlement Notice and, to date, there has been no objection to the proposed plan.
14 *See Ex. 3-B at 9-12.*

15 “[A] plan of allocation . . . fairly treats class members by awarding a pro rata share to
16 every Authorized Claimant, even as it sensibly makes interclass distinctions based upon, inter
17 alia, the relative strengths and weaknesses of class members’ individual claims and the timing of
18 purchases of the securities at issue.” *Redwen v. Sino Clean Energy, Inc.*, No. 11-3936, 2013 U.S.
19 Dist. LEXIS 100275, at *29 (C.D. Cal. July 9, 2013) (citation and internal quotation marks
20 omitted). Here, the Plan of Allocation provides for distribution of the Net Settlement Fund
21 among Authorized Claimants on a *pro rata* basis based on “Recognized Loss” formulas tied to
22 liability and damages. These formulas consider the amount of alleged artificial inflation in the
23 prices of Intuitive publicly traded common stock, as quantified by Mr. Coffman. *See* Gardner
24 Decl. ¶113. Mr. Coffman analyzed the movement in the prices of Intuitive stock and took into
25 account the portion of the price drops allegedly attributable to the alleged fraud. *Id.* Claimants
26 will be eligible for a payment based on when they purchased, held, or sold their Intuitive stock,
27 which is consistent with the Exchange Act. *Id.* ¶114. The claims of all claimants, including the
28 Class Representatives, will be determined on a *pro rata* basis based on the Plan of Allocation.

1 The Claims Administrator will calculate claimants' Recognized Losses using the
2 transactional information provided by claimants in their Claim Forms. Because the vast majority
3 of securities are held in "street name" by the brokers that buy them on behalf of clients, the
4 Claims Administrator, Class Counsel, and Defendants do not independently have class members'
5 transactional data. Claims can be submitted in paper format, electronically through the case
6 website, or for large investors with thousands of transactions through email to GCG's electronic
7 filing team. *Id.*

8 Once the Claims Administrator has processed all submitted claims and provided
9 claimants with an opportunity to cure deficiencies or challenge rejection determinations,
10 payment distributions will be made to eligible Authorized Claimants using checks and, in some
11 instances, wire transfers. After an initial distribution of the Net Settlement Fund, if there is any
12 balance remaining in the Net Settlement Fund (whether by reason of tax refunds, uncashed
13 checks or otherwise) after at least six (6) months from the date of initial distribution, Class
14 Counsel will, if feasible and economical, re-distribute the balance among Authorized Claimants
15 who have cashed their checks. Re-distributions will be repeated until the balance in the Net
16 Settlement Fund is no longer economically feasible to distribute to Authorized Claimants. Any
17 balance that still remains in the Net Settlement Fund after re-distribution(s), which is not feasible
18 or economical to reallocate, after payment of any outstanding Notice and Administration
19 Expenses or Taxes, will be donated in equal amounts to Bay Area Legal Aid and Consumer
20 Federation of America, as directed by the Court at the preliminary approval hearing. *See* Ex. 3-B
21 at 11; Gardner Decl. ¶115.

22 Accordingly, for all of the reasons set forth herein and in the Gardner Declaration, it is
23 respectfully submitted that the Plan of Allocation is fair, reasonable and adequate and should be
24 approved, and that the Settlement satisfies the proposed approval criteria set forth in Rule
25 23(e)(2)(C)(ii).

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CONCLUSION

For all the foregoing reasons, the Class Representatives respectfully request that the Court: (i) grant final approval of the Settlement; and (ii) approve the Plan of Allocation as fair, reasonable, and adequate.

Dated: November 15, 2018

Respectfully submitted,

s/ Jonathan Gardner

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CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2018, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I have mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Service List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on November 15, 2018

/s/ Jonathan Gardner
JONATHAN GARDNER

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15 **Manual Notice List**

16 The following is the list of attorneys who are not on the list to receive e-mail notices for this case
17 (who therefore require manual noticing). You may wish to use your mouse to select and copy
18 this list into your word processing program in order to create notices or labels for these
19 recipients.

- 20 • **(No manual recipients)**
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