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SAN MATEO COUNTY

MAR 27 2015

Clerk of the Superior Court  
By Patrice Deang  
DEPUTY CLERK

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

PUBLIC SCHOOL TEACHERS' PENSION  
AND RETIREMENT FUND OF CHICAGO,

Plaintiff,

CASE NO. CIV 526930

v.

ORDER STRIKING DEFENDANTS'  
NOTIFICATION OF NEW/RELATED ACTION

GARY S. GUTHART, et. al.,

Defendants,

-and-

INTUITIVE SURGICAL, INC.,

Nominal Defendant.

Defendants Gary Guthart, et. al., have by Demurrer moved to dismiss this director/officer liability claim on grounds that no pre-suit demand for corporate action was made. The Court is ruling on that Demurrer by separate Memorandum Decision and Order that will be issued later today. This ancillary Order is to address Defendants Gary Guthart, et. al's recently received late-filed additional motion papers.

Hearing on the pending Demurrer was held Friday, February 27, 2015. At the conclusion of that Hearing, the Court took the matter under submission as it had been fully briefed and argued.

ORDER STRIKING DEFS' NOTIFICATION OF NEW/RELATED ACTION

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1 Hardly a week had passed when, and notwithstanding that the matter stood completely submitted, on  
2 Monday March 9, 2015, the demurring Defendants Gary S. Guthart, et. al., filed a Notification Of New Related  
3 Shareholder Derivative Matter (hereinafter "Notice"). This Notice, on its face, stated that it was being filed for  
4 the purpose of bringing to this Court's attention that another shareholder of Intuitive Surgical, Inc., has now filed  
5 his own shareholder derivative case raising substantially similar claims to those in this case, and has done so after  
6 making a pre-suit demand that was rejected by the company. In their Notice, the demurring Defendants Gary S.  
7 Guthart, et. al., here seem to argue that there is now a stockholder admission that the directors of the company are  
8 "...in fact independent and disinterested...".

9 In the Court's opinion, and I so find, this Notice, filed after the pending Demurrer stood fully submitted  
10 and filed without prior leave of Court to do so, was an improper filing of supplemental motion papers. As such,  
11 the Notice is not drawn or filed in conformity with the laws of this State, applicable California Rules of Court,  
12 and/or this Court's Minute Order of February 27, 2015 by which the matter was taken under submission. See  
13 generally *Walters' Estate v. Bank of America* (1<sup>st</sup> Dist. 1949) 89 Cal. App.2d 797, 799 – 800.

14 Furthermore, even if the Court were to consider this Notice on its merits, which I have not, it appears that  
15 the filing is completely devoid of any possible merit. Under applicable Delaware law, the fact that another  
16 Intuitive shareholder made a pre-suit demand on the directors, arguably rising to the level of a tacit admission by  
17 that other particular shareholder that he considered such demand not futile, does not constitute a waiver of  
18 demand-futility on the part of any other Intuitive shareholders or the Plaintiff in this case. See, e.g., *Levine v.*  
19 *Smith* (Del. 1991) 591 A. 2d 194, 197-198, wherein General Motors' shareholder Levine's making a demand  
20 refused did not preclude another General Motors' shareholder Grobow, who made no pre-suit demand, from  
21 pursuit of his shareholder derivative suit if demand futility could be shown.

22 Accordingly, for the reasons stated, this Court exercises its discretion under Calif. Code of Civil Proc.  
23 § 436 (b) and hereby Strikes Out said Notification Of New Related Shareholder Derivative Matter filed March 9,  
24 2015. Plaintiff's Objection to said Notice, and Defendants' Response thereto, shall stand Moot in light of the  
25 striking of the Notice itself.

Dated: March 26, 2015.

IT IS SO ORDERED.

  
JUDGE OF THE SUPERIOR COURT