

No. 25-1372

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

SURGICAL INSTRUMENT SERVICE COMPANY, INC.,
Plaintiff-Appellant,

v.

INTUITIVE SURGICAL, INC.,
Defendant-Appellee.

United States District Court
for the Northern District of California
No. 21-cv-3496-AMO
Hon. Araceli Martínez-Olguín

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INTRODUCTION

Intuitive's brief reinforces the district court's error in applying *Kodak's* lock-in factors in this case. *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451 (1992). Intuitive repeats, again and again, that the doctrinal concern with single-brand aftermarkets is that, by using such an aftermarket as the tying market, the plaintiff can avoid the requirement of proving market power by baking it into market definition. *E.g.*, Intuitive Br. 4, 26, 27, 35. But where, as here, the tying market is neither brand-specific nor even an aftermarket, that concern evaporates. To win under the governing rule, SIS must prove Intuitive's power in the equipment foremarket where interbrand competition would occur (if Intuitive faced any), and no part of that showing depends on lock-in. Indeed, Intuitive's overwhelming control in that foremarket makes the *Kodak* factors not just unnecessary but incoherent. Here, it makes no sense to ask about the cost of switching from Intuitive's robot to another MIST robot because hospitals have no meaningful alternative to which to switch.

Intuitive identifies no concern with single-brand aftermarkets that is relevant in circumstances in which the plaintiff will prove market power in a brand-agnostic foremarket. And Intuitive does not explain how one would probe the effective connection between foremarket competition and aftermarket discipline using the *Kodak* lock-in factors if there is no foremarket competition to begin with.

Unsurprisingly, then, leading antitrust experts all agree with SIS’s position. So, too, does the Federal Trade Commission—both now and under the prior Administration. *See* FTC Br. 14-24; *FTC v. Deere & Co.*, No. 25-cv-50017, 2025 WL 1638474, at *3 (N.D. Ill. June 9, 2025).

Unable to defend its position with traditional antitrust principles, Intuitive distorts those principles in increasingly extreme ways. Perhaps most egregiously, Intuitive insists that both “market power” and even “monopoly power” are “poor prox[ies]” for measuring when consumers lack choice. Intuitive Br. 40, 45. That is definitionally wrong: Market power is synonymous with a lack of effective consumer choice; it is the ability to “force a purchaser to do something that he would not do *in a competitive market.*” *Jefferson Par. Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 13-14 (1984) (emphasis added).

Intuitive ultimately falls back on asking this Court to affirm on two alternate grounds—one the district court rejected, and one it never heard. Those arguments ignore both the standard and the record, which provided a wealth of evidence from which the jury could easily have ruled against Intuitive if correctly instructed. This Court should reverse and remand for a new trial.

RESTATEMENT OF THE CASE

Much of Intuitive’s brief reads like a closing argument to the jury, picking facts it likes and ignoring others. But in reviewing the district court’s ruling

granting judgment as a matter of law (JMOL), this Court “view[s] the evidence” and “draw[s] all reasonable inferences” in SIS’s favor. *Krechman v. County of Riverside*, 723 F.3d 1104, 1109 (9th Cir. 2013) (quotation marks omitted).

Moreover, Intuitive’s self-serving storytelling is not only legally irrelevant but highly misleading. For example:

- Most of the “dozens” of third-party “devices” Intuitive boasts of having “approved,” *see* Intuitive Br. 9; *accord id.* at 13, 17, 55, were not EndoWrists (or even “devices”), but rather things like detergent, lubricating oil, and instrument trays. 3-SER-548-556.
- Intuitive has “approved” only two third-party EndoWrists, *see* 5-SER-1133-1134, and only after the third party sued and ultimately settled with Intuitive for antitrust violations, *see* FER-20-21; FER-24-25; 3-ER-561-563. Those litigation-driven approvals were the basis of the SIS CEO’s “assumption” that SIS would “similarly be authorized” because it also brought suit. 5-SER-1041; *see* Intuitive Br. 14, 18, 55, 58 (citing 5-SER-1041 without this context).
- SIS’s surgeon-expert’s use of the word ““terrifying”” was about the risks associated with “worn down” instruments, not refurbished EndoWrists. *Contra* Intuitive Br. 11 (quoting 2-ER-232). That expert also testified that he worries “more about the first use” of

surgical instruments than “about subsequent uses.” 2-ER-231.

Any worn-down EndoWrists are screened from SIS’s and

Rebotix’s refurbishment process. FER-29-30.

- Intuitive implies that FDA clearance is required for the service SIS provided. *E.g.*, Intuitive Br. 11-14. But, as the district court recognized in its opinion on the parties’ summary-judgment motions, “FDA has not determined” that such clearance is necessary. 2-SER-359.
- Intuitive notes that, “before SIS began working with Rebotix,” one Rebotix-repaired EndoWrist “malfunctioned during surgery.” Intuitive Br. 12 (citing 4-SER-921). But within Intuitive’s arbitrary usage limits, its EndoWrists regularly fail for reasons unrelated to use count—and “there’s not a significant increase with” number of uses. 3-ER-444-445. There was no proof at trial that repaired EndoWrists failed more frequently, or any differently, than unrepaired EndoWrists.

Notwithstanding Intuitive’s version of events, the record is replete with evidence that Intuitive built its business model to extract rents from its MIST robot monopoly by programming its EndoWrists to arbitrarily self-destruct after ten uses and preventing anyone else from making or refurbishing replacements. *See*

Opening Br. 15-23. Whether to credit that evidence over Intuitive’s contrary story about safety justifications and “dozens” of third-party approvals is a jury question.

ARGUMENT

I. SIS Is Not Pursuing A “Single-Brand Aftermarket Theory” That Requires Proving Lock-In.

Intuitive’s argument depends on ignoring the critical difference between two types of foremarket/aftermarket tying claims. In the first, standard type of claim, the plaintiff asserts that the defendant has leveraged economic power in the foremarket to distort competition in an aftermarket—sometimes an aftermarket that is limited to products compatible with a single foremarket brand, but sometimes not. In the second type of claim—which Intuitive calls a “single-brand aftermarket theory,” Intuitive Br. 37—the plaintiff argues that the defendant has leveraged economic power in a single-brand aftermarket to distort competition in another market (usually, another aftermarket). SIS is bringing the first type of claim; *Kodak* involved the second, as did *Epic Games, Inc. v. Apple, Inc.*, 67 F.4th 946 (9th Cir. 2023).

The concern associated with the second type of claim does not arise when the tying market is the foremarket in which brands would theoretically compete and the only single-brand aftermarket is the tied market. Single-brand aftermarkets can be “disfavored,” Intuitive Br. 3, because they allow plaintiffs to cast a brand’s ordinary control over its own products as the kind of tying-market power that a

tying claim requires. *See id.* at 4, 26, 27, 35. But that’s not what SIS did here: SIS undertook to prove Intuitive’s extraordinary market power in the tying market for equipment. That is exactly what the relevant element of a tying claim requires, *see Cascade Health Sols. v. PeaceHealth*, 515 F.3d 883, 913 (9th Cir. 2008), and it is the exact showing that the *Kodak* and *Epic* plaintiffs could not make and tried to avoid.

Unable to connect any of the concerns associated with single-brand aftermarkets to this case, Intuitive’s only move is to take a few lines out of context from this Court’s decisions in *Epic* and *Coronavirus Reporter v. Apple, Inc.*, 85 F.4th 948 (9th Cir. 2023). But those cases entailed straightforward applications of *Kodak*’s lock-in factors and in no way called for applying them in a context where, as here, *Kodak*’s central concern is absent.

A. SIS Is Pursuing A Standard Tying Claim In Which It Must Prove Economic Power In The Foremarket.

As the opening brief explained (at 31-39), SIS is pursuing a standard tying claim of the kind the Supreme Court and this Court have both long endorsed. To prevail, it must prove: (1) a tie between distinct products; (2) enough market power in the tying market to make the tie effective; and (3) an anticompetitive effect on a “not insubstantial volume of commerce” in the tied market. *Cascade Health*, 515 F.3d at 913. If the tying market from the second element above is not defined by reference to any particular brand, and the anticompetitive effect outweighs any

procompetitive justifications, that is all the law requires for a winning claim. *See, e.g., International Business Machines Corp. v. United States*, 298 U.S. 131 (1936); *Moore v. James H. Matthews & Co.*, 550 F.2d 1207 (9th Cir. 1977); *see also Kodak*, 504 U.S. at 479 n.29 (holding that requirements for foremarket/aftermarket tying claims are identical to requirements for other tying claims).

Intuitive dismisses this century of settled precedent in two perfunctory paragraphs, suggesting that none of these cases “analyze[d] single-brand aftermarkets.” Intuitive Br. 36. That is just wrong. The Supreme Court in *IBM* described the relevant aftermarket as the “production and sale of tabulating cards suitable for appellant’s [*i.e., IBM’s*] machines.” 298 U.S. at 136 (emphasis added). *Kodak* thus cited *IBM* for the proposition that “one brand of a product can constitute a separate market,” 504 U.S. at 482 (citing *IBM*, 298 U.S. 131), because the aftermarket components of that brand are “not interchangeable” with the aftermarket components of any other product, *id.* That is this case: Just as *IBM* used its economic power in the non-brand-specific foremarket for tabulating machines to coerce customers to buy its *IBM*-compatible tabulating cards, Intuitive used its economic power in a non-brand-specific foremarket of *MIST* robots to coerce customers to buy its Intuitive-compatible *EndoWrists*. If Intuitive is right, *IBM* is wrong.

As Intuitive notes (at 36-37), some cases in which the plaintiff sought to tie foremarket power to aftermarket restrictions do not specify whether the tied aftermarket was brand-specific. But those cases support SIS, not Intuitive. They show that when a plaintiff proves market power in a brand-agnostic foremarket, it doesn't even matter whether the tied aftermarket is limited to a single brand. Take, for instance, *International Salt Co. v. United States*, 332 U.S. 392 (1947), where the defendant leveraged its economic power over industrial salt machines to force purchasers of those machines to use its “salt and salt tablets,” *id.* at 394. Because the plaintiff did not need to show market power in the tied market—only that the tying arrangement impacted more than an “insignificant or insubstantial” volume of trade in the tied product, *id.* at 396—it did not matter whether the tied aftermarket was properly characterized as “salt” generally or “salt compatible with International Salt’s machines.” Either way, the defendant was liable because competitors were “shut out of the market by a provision that limits it, not in terms of quality, but in terms of a particular vendor.” *Id.* at 398. Again, that is a perfect description of this case.

B. SIS Is Not Pursuing The “Single-Brand Aftermarket Theory” Of Tying At Issue In *Kodak* and *Epic*.

The plaintiffs’ tying claims in *Kodak* and *Epic* were fundamentally different from the claims in this case. Unlike SIS, those plaintiffs couldn’t prove economic power in a brand-agnostic foremarket. Accordingly, they tried instead to identify a

single-brand aftermarket as the *tying* market and alleged that the defendant leveraged its market power in that single-brand aftermarket to constrain competition in some other aftermarket. In *Kodak*, for instance, the plaintiffs alleged that Kodak was using its power in the market for Kodak copier *parts* (the tying aftermarket) to reduce competition in the market for Kodak copier *servicing* (the tied market). 504 U.S. at 459. The essence of such a case is that, although “there are [fore]market alternatives that buyers may readily use for their purposes,” *Green Country Food Mktg., Inc. v. Bottling Grp., LLC*, 371 F.3d 1275, 1282 (10th Cir. 2004), the plaintiff attempts to define a relevant aftermarket consisting solely of the defendant’s brand and then use the defendant’s inevitable 100% share of that aftermarket to establish the defendant’s market power.

To assess that maneuver, *Kodak* assumed the equipment foremarket for copy machines was competitive and identified the lock-in factors as necessary for plaintiffs to demonstrate that this foremarket competition did not “discipline competition in the aftermarkets”—including the parts market the plaintiffs invoked as their tying market. *Epic*, 67 F.4th at 976 (quoting *Kodak*, 504 U.S. at 486) (brackets omitted). But where, as here, there is no competition in that equipment foremarket—and that market is instead being invoked as the tying market itself—those factors not only serve no purpose but are logically impossible to apply.

Intuitive's brief only reinforces the conclusion that *Kodak's* lock-in factors serve no role in this case.

1. While it repeats ad nauseum the mantra that single-brand aftermarkets are “disfavored,” *e.g.*, Intuitive Br. 1, 3, 27, 34, 35, 36, Intuitive only ever identifies one reason for that disfavor. It emphasizes that the problem with single-brand aftermarkets is that “the antitrust laws are not concerned with ‘*market power*’ that arises solely from contractual rights that consumers knowingly and voluntarily gave to the defendant.” *Id.* at 3 (quoting *Newcal Indus., Inc. v. Ikon Office Sol.*, 513 F.3d 1038, 1048 (9th Cir. 2008)) (emphasis added). Likewise, it frets that relying on single-brand aftermarkets will “risk making every manufacturer a ‘monopolist’ of its own brand and short-circuit the ordinary constraints on establishing an antitrust violation.” *Id.* at 26. This singular focus effectively concedes that the core concern that animated the *Kodak/Epic* lock-in factors is irrelevant if a plaintiff will undertake the “ordinary constraint[.]” of proving regular old market power in a brand-agnostic foremarket. But that is, of course, exactly what SIS is undertaking to prove here.

The problem for Intuitive is that tying claims turn on proving market power only in the tying market. That means that the concern about plaintiffs finessing away any real market-power showing simply cannot arise if they define the tying market as a brand-agnostic equipment foremarket and then prove the defendants’

market power there. At that point, whether the tied aftermarket is defined in brand-specific terms is largely irrelevant.

This case is a perfect example. SIS alleges that the tying market in which it must prove market power is the market for MIST robots—which is neither an aftermarket nor brand-specific. And Intuitive’s market power in that MIST robot market does not arise from any “contractual rights.” Intuitive Br. 3. The *tied* market is limited to EndoWrists that work with Intuitive’s MIST robot, but that is only true because of Intuitive’s domination of the MIST robot foremarket and its use of that power to exclude all possible replacement-part competitors. Put another way, in these circumstances—and unlike in *Kodak* and related cases—Intuitive’s contract terms restricting consumer choice in the aftermarket arise from Intuitive’s market power, not the other way around. *Contra id.*

To see this even more clearly, imagine a world in which multiple brands of MIST robots used interoperable instrument attachments. In that case, the tied market would encompass all such instruments—it would not be limited to a single brand. Intuitive would thus have no argument for requiring SIS to prove the *Kodak* factors. Yet, assuming SIS could still prove that Intuitive had enough market power in the MIST-robot foremarket to coerce its consumers into accepting a tie that they would reject in a truly competitive market, SIS’s antitrust claim would remain the same. That’s because SIS does not need to prove market power in the

tied market, which here is limited to only one brand precisely because of Intuitive’s challenged tie.

Ultimately, the implication of Intuitive’s argument is that it is subject to *less* antitrust scrutiny because its power in the foremarket is so overwhelming—and its ties so effective—that the only available surgical-robot attachments are the Intuitive-brand EndoWrists it allows its robots to use. That cannot be right.

2. Relatedly, Intuitive’s argument ignores the reasoning of *Kodak* and *Epic*. As the opening brief explained in detail, *Kodak* was unambiguously premised on the assumption that Kodak lacked market power in the equipment foremarket and that consumers therefore had meaningful choice among foremarket brands. Opening Br. 40-46. *Epic*, too, recognized that the lock-in factors presume a “lack of market power in the foremarket” and the possibility of “customers substituting to other [foremarket] products.” 67 F.4th at 976-77. Accordingly, the question was whether there was some market-specific reason that this foremarket competition might not be able to “discipline competition in the aftermarkets.” *Id.* at 976 (quoting *Kodak*, 504 U.S. at 486) (brackets omitted).

That question is irrelevant—even incoherent—if there is no foremarket competition in the first place. If the defendant has the requisite market power in the foremarket, there is not even the possibility that foremarket competition could discipline aftermarket competition because having market power *means* that the

defendant has the power to force consumers into contractual conditions they would otherwise reject—like, say, an anticompetitive aftermarket tie. *See Jefferson Par.*, 466 U.S. at 13-14.

Intuitive never tries to reconcile its position with the actual reasoning in *Kodak* and *Epic*. That is because the two are irreconcilable. There is no reason to instruct the jury that the plaintiff must prove that existing foremarket competition failed to discipline the aftermarket when there is no such competition.

3. Perhaps most tellingly, Intuitive never confronts the opening brief's argument that the *Kodak* factors cannot even be applied coherently in a case, like this one, where there is no foremarket competition. The measuring stick for those factors is whether gathering lifecycle pricing information or switching among competitors is too difficult or expensive for buyers to effectively choose among alternatives. *See* Intuitive Br. 29; Opening Br. 56-57. Accordingly, if there is no choice among alternatives (because they don't exist), there is no measuring stick against which to judge those informational or switching costs. Intuitive never explains how a company like SIS would try to prove the cost of switching to a non-existent alternative. Nor does it say what consumers would do with lifecycle pricing information if they have only one product's lifecycle price to choose. Suppose the cost of getting accurate lifecycle pricing for a MIST robot is 30% of the robot's price, and installation and removal is often expensive. What should the

court tell a jury to do with those facts? How will it decide if those costs are too high to permit effective foremarket switching among alternatives that don't exist?

On this point, Intuitive's lack of answers is fatal to its argument. It cannot insist on giving the jury instructions that it cannot even explain how to apply.

C. Intuitive Gets No Help From *Epic* And *Coronavirus Reporter*.

Struggling to support its position, Intuitive digs deep into the district court dockets in *Epic* and *Coronavirus Reporter* to suggest that Apple actually had market power in the relevant foremarkets there. Intuitive Br. 31-34. That argument fails.

1. *Epic* was simply *Kodak* redux. Apple required anyone distributing apps through its App Store to use Apple's in-app payment system. Epic wanted to use a different in-app payment system in its gaming apps, and so it sued Apple, arguing that this tie violated the antitrust laws. Epic, however, could not prove that Apple had market power in the foremarket for smartphones or smartphone operating systems because Apple controlled only 15% of that market—a fact this Court's opinion emphasized at the very outset. *Epic*, 67 F.4th at 966-67. So Epic argued instead that Apple improperly used its market power in the single-brand (tying) aftermarket of "app distribution (the App Store)" to restrain competition in the (tied) market for "in-app payment processing." *Id.* at 994, 997.

That is a quintessential *Kodak* claim: Consumers could choose between the Apple and Android ecosystems when they chose a mobile device, *id.* at 987, and yet Epic premised its claim on finding market power in a single-brand aftermarket of iOS app distribution that was necessarily limited to Apple. This Court thus applied the *Kodak* lock-in factors and reiterated that their purpose is to identify when “competition in the foremarket cannot discipline competition in the aftermarkets.” *Id.* at 976 (brackets and quotation marks omitted). That does not remotely support applying the lock-in factors when there is no competition in the foremarket that has the potential to discipline aftermarket competition.

Intuitive’s primary response is that Epic “claimed” and “argued” that Apple had market power in the foremarket for “mobile operating systems”—quoting a magistrate judge’s discovery order that, in turn, quoted Epic’s motion to compel. Intuitive Br. 31-32 (quoting *Epic Games, Inc. v. Apple Inc.*, No. 20-cv-05640, 2020 WL 7779017, at *3 (N.D. Cal. Dec. 31, 2020)). The problem for Intuitive is that the district court disagreed: “Apple does not have market power in the smartphone market. Rather Apple only has 15 percent of global market share in 2020.” *Epic Games, Inc. v. Apple Inc.*, 559 F. Supp. 3d 898, 955 (N.D. Cal. 2021). This Court echoed that finding. *Epic*, 67 F.4th at 966-67. Having rejected Epic’s argument, both the district court and this Court then applied the *Kodak* factors to decide if

Epic could proceed with a single-brand aftermarket despite Apple’s lack of market power in the equipment foremarket where consumers would choose among brands.

Intuitive also protests that the foremarket in *Epic* was not the “smartphone market” but the market in “mobile operating systems.” Intuitive Br. 33. But for *Epic*’s purposes, that is a distinction without a difference. Because “Apple does not license or sell iOS as a standalone product,” *Epic*, 67 F.4th at 980, consumers choose between operating systems by choosing between phones. In fact, *Epic* relies on that premise again and again. *See id.* at 973, 987, 990. Apple’s 15% phone-market share—and lack of market power—thus necessarily applied to both the market for smartphones and the market for mobile operating systems. *See Epic*, 559 F. Supp. 3d at 955.

That leaves Intuitive with this Court’s statement regarding the requirements for “establish[ing] a single-brand aftermarket,” in which this Court included the *Kodak* factors. Intuitive Br. 29 (quoting *Epic*, 67 F.4th at 977). That statement, however, merely summarized this Court’s description of *Kodak*, which presumed (1) a “lack of market power in the foremarket,” (2) “competition in the foremarket,” and (3) the possibility of “customers substituting to other [foremarket] products.” *Epic*, 67 F.4th at 976-77. Nothing in the sentence Intuitive likes can be read to require that a plaintiff prove the lock-in factors when the plaintiff’s theory requires proving market power in a brand-agnostic

foremarket. Such a reading would conflict with the very purposes for the lock-in factors that *Epic* itself identified.

2. *Coronavirus Reporter* is equally unhelpful to Intuitive. The plaintiffs there alleged “in scattergun fashion that there were at least fifteen ‘relevant markets,’” and this Court found those allegations woefully inadequate. 85 F.4th at 956 & n.3. The Court then went on to briefly address a single-brand-aftermarket theory like the one *Epic* had just rejected—*i.e.*, a tying theory that used Apple’s App Store as the tying market. *Id.* at 956-57.

Intuitive insists that the foremarket in *Coronavirus Reporter* was limited to “smartphones sold in the United States” and that Apple “was alleged” to have “60% to 80%” of that market. Intuitive Br. 32. None of that appears anywhere in this Court’s decision. Undeterred, Intuitive cites (1) a page of *Coronavirus Reporter* that does not exist (“85 F.4th at 896”); (2) a page from *Coronavirus Reporter*’s opening brief (which Intuitive incorrectly attributes to SIS); and (3) two paragraphs from the *Coronavirus Reporter* complaint. *Id.* This Court’s holding turned on none of that, however—and that absence has special force in a case where this Court’s primary holding was that the plaintiff’s “scattergun” approach to market definition failed to identify which of the fifteen asserted markets were even relevant.

II. While The Court Could Resolve This Case More Narrowly, The Rule Is That The *Kodak* Factors Are Irrelevant When The Plaintiff Proves Market Power In A Brand-Agnostic Tying Market.

Intuitive suggests that SIS fails to articulate a “test” for when the *Kodak* factors are unnecessary to state a tying claim in a foremarket/aftermarket case. *E.g.*, Intuitive Br. 42. But the correct rule is simple and well-settled—a defendant must have “enough economic power in the tying product to coerce its customers into purchasing the tied product.” *Cascade Health*, 515 F.3d at 913. Proving “market power” in a tying foremarket that is brand-agnostic thus obviates the *Kodak* factors.

This case is narrower and easier, however, because Intuitive’s near-total monopoly in the upstream equipment market gives it far more leverage over counterparties than mere market power, without any need to reference the *Kodak* factors or consumer lock-in. That conclusion suffices to establish the error below. But to the extent the law would benefit from clarification, the Court should reaffirm that market power in a brand-agnostic tying market is sufficient to state a tying claim. Intuitive’s contrary arguments amount to a fundamental quarrel with the idea of market power itself.

1. As noted above, SIS’s “test” is just a recitation of settled doctrine: If the plaintiff can prove market power in the tying market without invoking any single-brand market, the *Kodak* factors have no role to play. *See Cascade Health*, 515

F.3d at 913. That is also, unsurprisingly, the rule endorsed by the FTC (at FTC Br. 14-24) and the country’s leading antitrust professors (at Antitrust Law Professors Br. 7, 13-15)—including Herbert Hovenkamp, the author of the authoritative treatise that Intuitive repeatedly cites, *see* Intuitive Br. 52, 53, 57.

This rule makes sense because it accords with the definition of market power. The relevant question in a tying case is whether a defendant’s effort to impose an anticompetitive tie will be “discipline[d]” by competition in the upstream market where consumers choose among different brands. *E.g., Kodak*, 504 U.S. at 486. And the uniformly recognized definition of market power is the ability to “force a purchaser to do something that he would not do in a competitive market.” *Jefferson Par.*, 466 U.S. at 13-14. Accordingly, proving that Intuitive has “market power” in the upstream market for MIST robots requires SIS to show that there is insufficient competition among MIST robot firms to discipline Intuitive from imposing anticompetitive terms on its hospital counterparties—like, say, forcing them to agree to Intuitive’s restrictions on instrument attachments.

Intuitive muddles this simple point by repeatedly conflating market power with mere market share and then complaining that consumers can still have “choices” in the face of market power because market power can be found at relatively low shares. Intuitive Br. 38-40. This leads Intuitive into some elementary errors of antitrust law. Chief among them is the suggestion that, “[p]ut

simply, market power is a poor proxy for measuring the lack of consumer choice.” *Id.* at 40. Put simply, that is as wrong as it gets. Market power is not just a “proxy” for measuring a “lack of consumer choice”; it is a literal measurement of consumer choice, and it arises only where consumers do not have enough competing choices to prevent a firm from imposing coercive, anticompetitive terms on its counterparties. *Jefferson Par.*, 466 U.S. at 13-14; *see also, e.g.*, Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* (CCH) § 515 (2025) (Areeda & Hovenkamp) (“the presence or absence of substitutes to which buyers may turn” is “a key to the existence of market power”).

Intuitive’s errors lead to nonsensical arguments. For example, Intuitive argues (at 40) that “even if ... a market [for MIST robots] did exist, the evidence shows substantial substitution with other forms of surgery,” and that “Intuitive vigorously competes against” them. But if Intuitive is right that MIST robots “vigorously compete” with “other forms of surgery,” that would require rejecting the premise that there is a relevant antitrust market for MIST robots. While Intuitive is free to argue to the jury that the relevant antitrust market is broader than MIST robots, it cannot both assume that it loses on that intensely factual question and then somehow insist that MIST robots still compete so vigorously with other

forms of surgery that consumers can choose those alternatives to avoid its aftermarket restrictions.

2. Having argued that market power doesn't *really* mean the power to restrict consumer choice, Intuitive asserts that SIS has somehow "forfeited" any narrower rule that would require "monopoly" power, a "near-total monopoly," or anything else. Intuitive Br. 42-44. But the question all along has been whether a *Kodak* instruction was required in these circumstances. And a ruling in SIS's favor does not necessitate adopting any precise "rule." SIS has consistently argued that the facts and governing law of this case make such an instruction inappropriate, and that is all it must show to prevail here.

In any event, SIS advanced precisely the arguments that Intuitive now says are waived. It told the district court that Intuitive's proposed *Kodak* instruction was unnecessary because Intuitive has "no" competitors. 4-ER-798-805. And it explained its position that a showing of "dominant market power" in the foremarket obviated any need for consideration of the *Kodak* factors. 4-ER-780-783. Adopting that proposition would suffice to reverse here.

This matters because Intuitive hopes to force this Court to consider an invented fact pattern involving minimum allegations of market power (like a market share of 30%, *see* Intuitive Br. 39), rather than the facts presented here. But the actual facts are the ones that matter, and they cannot be reconciled with

Intuitive’s argument for requiring the *Kodak* factors. What makes this case so simple is that Intuitive is the only MIST robot game in town and does not permit any other brand of surgical attachments to interoperate with its robots. That makes it entirely appropriate to articulate the tied market as limited to “EndoWrists”—because those are effectively the only MIST robot surgical attachments that exist. And it likewise means that nothing would be changed by describing a nominally broader relevant market that somehow included more (non-existent) EndoWrist substitutes.

It is illuminating in this regard that Intuitive never proposes any alternative definition for the tied market for EndoWrists that it says is impermissible in the absence of the *Kodak* factors, nor has it ever explained what would change if the market were described as (for example) “the market for MIST surgical robot attachments” rather than “the market for EndoWrists.” And that’s because the answer is that nothing would change: The tied market includes only one brand not because of some clever trick of market definition but because there is only one brand of MIST robots upstream, and that brand won’t let anyone else sell attachments. It is a recipe for doctrinal chaos to encourage this Court to find fault with one market definition on the basis of some brightline rule about “single brand” aftermarket without any plausible or meaningful alternative that would connect in any way to the antitrust substance of this (or any similar) case.

Finally, Intuitive gets no help from its suggestion (at 44) that it might not be a monopolist because, despite its obvious market domination, other firms could easily enter. That argument at least gets at the right question—*i.e.*, the extent of its market power in the tying foremarket. The problem for Intuitive is just that it is factually false and obviously for the jury to decide.

3. Perhaps recognizing that it must ultimately defend its position on the facts of this case, Intuitive eventually suggests (at 35) that even a near-total monopoly like the one it holds can be consistent with consumer choice. The point appears to be that the hospitals that “choose” to buy the MIST robots they need from the Intuitive MIST robot monopoly are still “voluntarily” choosing to accept Intuitive’s contract terms. And this, Intuitive suggests, should make the *Kodak* factors necessary, because they show that the source of Intuitive’s coercive power in the tied market for EndoWrists is just “voluntary” contract and not lock-in or market power over MIST robots themselves. *See id.* (citing *Newcal*, 513 F.3d at 1048-49).

Meanwhile, the entire premise of antitrust law is that a contract is not “voluntary” just because it was signed without something akin to a threat of physical violence. Competition law regards “market power” and “consumer choice” as antonyms, and thus the fact that Intuitive’s restraints are embodied in contracts that hospitals “choose” to sign does not make those contracts voluntary in

the way *Newcal* envisaged. *Contra id.* In fact, firms with market power frequently use “voluntary” contracts to impose their illegal restraints on competition. And that is why *Epic* itself expressly anticipated and rejected the argument Intuitive now makes, warning that if all contracts were treated as voluntary or “independent” in this sense, “virtually all tying arrangements would be beyond the reach of Section 1,” and antitrust claims would be unavailable “where they are most needed: when dealing with restraints imposed *by firms that have market power.*” 67 F.4th at 982 (emphasis added). As it turns out, antitrust law is fairly devoted to the proposition that “market power is a [good] proxy for the lack of consumer choice.” *See* p. 20, *supra*.

That is even more true when it comes to a monopoly like Intuitive’s. From the perspective of antitrust law, Intuitive’s suggestion (at 45) that “[a] finding of monopoly power ... is a poor proxy for identifying the types of cases where a defendant can lock customers into a second market” is even more bizarre than its account of market power. A monopolist—and especially a near-total monopolist like Intuitive—is exactly the kind of party that antitrust law regards as capable of forcing its counterparties to do things they would refuse to do in a competitive market. *Jefferson Par.*, 466 U.S. at 13-14.

It somehow gets worse from there. As a near-total monopolist itself, Intuitive must eventually argue that even “a near-total monopolist” can face

competition because at “a high enough price, even poor substitutes start to look good to the consumer.” Intuitive Br. 46. In so doing, Intuitive admits that “the record shows” that it is such a powerful monopolist that it “has already priced itself into competition,” and yet urges that this somehow suggests that it doesn’t have the power to restrict consumer choice. *Id.*

This confuses a well-known antitrust *fallacy*—known as the *Cellophane* fallacy—for actual antitrust law. Intuitive is of course correct that, “[w]hen a monopolist increases its price to its profit-maximizing level, it leads to interchangeability because some customers will substitute away” at any higher price. Areeda & Hovenkamp § 540. For example, if the price of insulin gets too high, a diabetic may eventually forgo it in favor of feeding their family or paying rent. But no antitrust lawyer would thus conclude that an insulin monopolist lacked the economic power to force its counterparties to accept anticompetitive demands. *See, e.g.,* Richard A. Posner, *Antitrust Law: An Economic Perspective* 150 (2d ed. 2001) (flagging the “elementary point” that “[r]easonable interchangeability at the current price, far from demonstrating the absence of monopoly power, might well be evidence of that power”); *accord* Areeda & Hovenkamp § 540. Antitrust lawyers are carefully taught the *Cellophane* fallacy in law school so that they will not go out into the world and confuse an inability to

raise prices from an already supracompetitive point with the absence of coercive monopoly power. Yet Intuitive asks this Court to do just that.

4. In contrast to the violence Intuitive’s argument would do to basic antitrust principles, SIS’s position entails none of the risks that Intuitive and its amici suggest.

First, there is no risk that plaintiffs can conjure market power where it is absent because Supreme Court precedent supporting SIS’s position affirmatively requires showing (at least) market power over the upstream market where interbrand competition would take place. Intuitive’s repeated warnings about a flood of aftermarket tying cases are thus red herrings. The *Kodak* factors protect against inappropriate findings of market power arising from a single-brand aftermarket in cases where the defendant “*lack[s]* ... market power in the primary equipment market.” *Kodak*, 504 U.S. at 455 (emphasis added). In cases where the plaintiff must show that the defendant “[*has*] market power in the primary equipment market,” the defendant is protected by that market-power requirement itself. *Id.*

Second, there is no risk that SIS’s position will undermine patient safety or somehow confuse legitimate safety demands with monopolizing behavior. The rule of reason itself permits Intuitive to argue to the jury that its restraints are justified by safety concerns and not more restrictive of competition than necessary.

The problem for Intuitive is not that these arguments are legally foreclosed, but that they are bad on their facts. A competitive actor in an efficient market would not program its attachments to transform themselves into medical waste without testing whether they could safely be used many more times. But a monopolist looking for an effective “counting device to effect price discrimination” and better extract monopoly rents would do exactly that. *Id.* at 487, 499 (Scalia, J., dissenting). The question of how to understand Intuitive’s practices is for the jury.

III. The Law And The Record Preclude Affirmance on Alternate Grounds.

Affirmance of a grant of judgment as a matter of law is proper only if—when the evidence is viewed in the light most favorable to SIS and all reasonable inferences are drawn in its favor, *Krechman*, 723 F.3d at 1109—“there can be but one reasonable conclusion as to the verdict,” *Velazquez v. City of Long Beach*, 793 F.3d 1010, 1018 (9th Cir. 2015) (quotation marks omitted). Asserted grounds for judgment as a matter of law not raised in “pre-verdict Rule 50(a) motion[s]” are “waived for purposes of appeal.” *OTR Wheel Eng’g, Inc. v. West Worldwide Servs., Inc.*, 897 F.3d 1008, 1016 (9th Cir. 2018). Intuitive makes two such arguments, but one was forfeited, and both lack merit.

1. Intuitive forfeited its argument that, even if the *Kodak* factors do not apply, it is entitled to judgment as a matter of law because SIS failed to present evidence of Intuitive’s pre-2019 market power. Intuitive Br. 49-50. Intuitive did

not assert any lack of evidence of its pre-2019 market power in its Rule 50(a) motion, FER-3-18; at the hearing on that motion, 3-ER-524-531; in its renewed motion, 4-ER-701-706; or in the summary-judgment motion Intuitive purported to incorporate by reference, *see* 3-ER-531; FER-37-67.

The argument in any event lacks merit, as the record contains more than “substantial evidence to support a finding” that Intuitive had pre-2019 market power. *Electro Source, Inc. v. UPS, Inc.*, 95 F.3d 837, 838 (9th Cir. 1996). “Market power is generally inferred from the defendant’s possession of a high market share and the existence of significant barriers to entry.” *Epic*, 67 F.4th at 983 (quotation marks omitted). Intuitive’s expert agreed that, “[f]rom 1999 through 2018, approximately, Intuitive was the only firm selling MIST surgical robots in the United States,” FER-34—meaning that it had 100% market share. *See also* 3-ER-580-582 (Intuitive’s CEO conceding that, at times before 2019, no other MIST robots were available). The jury also heard about significant barriers to entry that were not confined to any time period. *E.g.*, 3-ER-539-551; 5-SER-1094-1103; 5-SER-1109-1110; 5-SER-1135-1137. A reasonable jury could have concluded that Intuitive had pre-2019 market power.

2. Intuitive’s theory that SIS failed to prove that Intuitive’s process for approving third parties to repair EndoWrists was illusory fares no better. *See* Intuitive Br. 50-61. Intuitive incorrectly assumes that it was SIS’s burden to prove

that Intuitive’s purported approval process was *not* illusory. Multiple courts have disagreed, noting that a defendant seeking to “defeat[] the existence of an illegal tie-in” must provide “evidence that a method for approval in fact existed.” *United States v. Mercedes-Benz N.A.*, 517 F. Supp. 1369, 1383 (N.D. Cal. 1981); *see also*, e.g., *Mozart Co. v. Mercedes-Benz of N. Am., Inc.*, 593 F. Supp. 1506, 1517 (N.D. Cal. 1984) (similar). Intuitive cites two contrary cases, but neither contains any holding or analysis regarding burden. *See Pullos v. All. Laundry Sys., LLC*, 2009 WL 10708625 (D. Nev. July 29, 2009), *aff’d*, 424 F. App’x 663 (9th Cir. 2011); *Photovest Corp. v. Fotomat Corp.*, 606 F.2d 704 (7th Cir. 1979). And Intuitive never even argues that JMOL would have been warranted if it had the burden of proof.

Regardless of who had the burden, the evidence strongly supports a finding that Intuitive had no process for approving third-party EndoWrists and that any prospect of nevertheless obtaining approval was illusory. Intuitive’s assertion that it approved “dozens” of “accessories” in the da Vinci’s first 20 years does not withstand scrutiny. Intuitive Br. 55 (quoting 5-SER-1130). Those “accessories” included numerous types of detergent—but no EndoWrists. 3-SER-547-556. Moreover, Intuitive had not approved *any* third party to work on EndoWrists until “years” after 2020, 5-SER-1133—and even then the approvals came only through settlements of antitrust litigation, 3-ER-561-563. In general, no one even asked

because, “[b]ased on Intuitive’s actions,” seeking approval “would have been an exercise in futility,” 3-ER-315-316 (testimony of SIS CEO); *accord* 5-SER-959; *see, e.g., Tic-X-Press, Inc. v. Omni Promotions Co. of Ga.*, 815 F.2d 1407, 1417 (11th Cir. 1987) (illegal tie where third-party approval not requested because parties “understood” that it would be denied).

The jury heard that Intuitive had no established process for approving EndoWrist repair. 4-ER-609-610; *see, e.g., Tic-X-Press*, 815 F.2d at 1417 (illegal tie where defendant “had never established written standards and procedures for approving” third parties). Indeed, the only “process” Intuitive had in place for third-party EndoWrists was a set of carefully honed measures to detect and end their use. 3-ER-572-574; 6-ER-1224-1246; FER-68. Tellingly, Intuitive cites no evidence concerning what its EndoWrist approval process was—because it did not exist.

Intuitive repeatedly trumpets the statement by SIS’s CEO that he could “make the assumption” that SIS would be authorized to repair EndoWrists just like two other third parties were. Intuitive Br. 58 (quoting 5-SER-1041); *see also id.* at 14, 18, 55. But Intuitive ignores the fact that those two third parties were only “approved” through settlements of antitrust litigation just like the litigation SIS brought here. 3-ER-561-563. Taken in context, the CEO’s “assumption” was that

SIS would obtain authorization *if SIS sued Intuitive for antitrust violations*—not by pursuing some non-existent process for third-party approval.¹

CONCLUSION

The Court should reverse and remand for a new trial.

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¹ The district court can decide on remand whether, if Intuitive continues quoting the CEO out of context, the jury should hear about these other suits. *See* 2-SER-216 (excluding as more prejudicial than probative).

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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