

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Bowers v. Kelly

No. 4:23-cv-05396-KAW (N.D. Cal. Aug. 21, 2025) · No. 4:23-cv-05396-KAW · Decided August 21, 2025

SUMMARY

The United States District Court for the Northern District of California grants preliminary approval of a settlement resolving related shareholder derivative actions concerning Ginkgo Bioworks Holdings, Inc. The settlement provides for a \$4.125 million payment to Ginkgo, corporate governance reforms, termination of an operating-company incubation contract, and proposed attorneys’ fees and service awards subject to further court review.

CASE DETAILS

|                       |                                                                                                                                                                                                                                                                                                                                                 |
|-----------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| COURT                 | United States District Court for the Northern District of California                                                                                                                                                                                                                                                                            |
| WRITING FOR THE COURT | Kandis A. Westmore                                                                                                                                                                                                                                                                                                                              |
| JURISDICTION          | United States District Court for the Northern District of California                                                                                                                                                                                                                                                                            |
| DECIDED               | August 21, 2025                                                                                                                                                                                                                                                                                                                                 |
| DOCKET                | 4:23-cv-05396-KAW                                                                                                                                                                                                                                                                                                                               |
| DISPOSITION           | other                                                                                                                                                                                                                                                                                                                                           |
| PROCEDURAL POSTURE    | Plaintiffs in two shareholder derivative actions moved for preliminary approval of a proposed settlement. The court evaluated the settlement and notice plan under Federal Rules of Civil Procedure 23 and 23.1.                                                                                                                                |
| STANDARD OF REVIEW    | Preliminary approval of a derivative settlement is committed to the trial court's sound discretion. At this stage, the court determines whether it will likely be able to approve the settlement under Rule 23(e)(2) and whether the proposal appears fair, reasonable, adequate, free of collusion, and within the range of possible approval. |
| PRECEDENTIAL VALUE    | unknown                                                                                                                                                                                                                                                                                                                                         |
| PARTIES               | Eric Bowers, et al., Weining Hu v. Jason Kelly, et al., Eli Baker, et al.                                                                                                                                                                                                                                                                       |

TOPICS

- shareholder derivative suits
- corporate governance
- corporate law
- civil procedure
- attorney fees

## PRACTICE AREAS

shareholder derivative litigation

corporate governance

settlement approval

securities litigation

civil procedure

## QUESTIONS PRESENTED

1. Whether the proposed settlement of the shareholder derivative actions should receive preliminary approval under Federal Rule of Civil Procedure 23.1(c) and the standards incorporated from Rule 23(e).
2. Whether the proposed notice plan adequately informed Ginkgo shareholders of the settlement and their rights to object.
3. Whether the proposed attorneys' fees, costs, and service awards raised concerns requiring denial of preliminary approval.

## HOLDINGS

1. Preliminary approval was warranted because the settlement appeared to result from serious, informed, arm's-length, noncollusive negotiations, had no obvious deficiencies, and fell within the range of possible approval.
2. The notice plan was adequate subject to specified amendments, including revised objection instructions, removal of the requirement that objections be separately mailed to counsel, and filing of an SEC Form 8-K within 21 days.
3. The proposed \$2.75 million in attorneys' fees and expenses and the proposed \$2,000 service awards did not weigh against preliminary approval, although final approval would require additional justification and information.

## KEY QUOTATIONS

*"The proposed settlement need not be ideal, but it must be fair and free of collusion, consistent with counsel's fiduciary obligations to the class."* (II)

*"For the reasons set forth above, the Court finds that preliminary approval is warranted, and, therefore, GRANTS preliminary approval of the parties' proposed Settlement Agreement and Notice Plan."* (IV)

## FACTUAL BACKGROUND

Ginkgo Bioworks Holdings, Inc. was formed when SPAC Soaring Eagle Acquisition Corp. merged with Legacy Ginkgo. Plaintiffs alleged that directors, officers, and controlling shareholders had conflicts arising from founder shares and approved a merger that allegedly relied on materially misleading revenue, valuation, and related-party disclosures. The proposed settlement required defendants to pay \$4.125 million to Ginkgo, terminate a contract relating to incubated operating companies, and implement corporate-governance, audit, disclosure, training, and financial-oversight reforms.

## PROCEDURAL HISTORY

Weining Hu filed a derivative action on April 28, 2023, and Eric Bowers filed a separate derivative action on October 20, 2023, concerning alleged misconduct surrounding Ginkgo Bioworks Holdings, Inc.'s merger with Legacy Ginkgo. The actions were stayed at various points, and Hu's motion to consolidate them was denied. Defendants moved to dismiss, but the parties suspended litigation deadlines while negotiating a settlement. On May 27, 2025, plaintiffs moved for preliminary approval of a settlement resolving the derivative claims in both actions.

DISPOSITION

other

CASES CITED

- In re Hewlett-Packard Co. S'holder Derivative Litig., No. 12-cv-06003-CRB, 2015 WL 1153864, at \*3 (N.D. Cal. Mar. 13, 2015)
- In re Cadence Design Sys., Inc. Sec. Litig., No. 08-cv-4966 SC, 2011 WL 13156644, at \*2 (N.D. Cal. Aug. 26, 2011)
- In re Pac. Enters. Sec. Litig., 47 F.3d 373, 377 (9th Cir. 1995)
- Lloyd v. Gupta, No. 15-cv-04183-MEJ, 2016 WL 3951652, at \*4 (N.D. Cal. July 22, 2016)
- Class Plaintiffs v. City of Seattle, 955 F.2d 1268, 1276 (9th Cir. 1992)
- In re Tableware Antitrust Litig., 484 F. Supp. 2d 1078, 1079–80 (N.D. Cal. 2007)
- Hanlon v. Chrysler Corp., 150 F.3d 1011, 1026–27 (9th Cir. 1998)
- Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 549 (1949)
- In re Mego Fin. Corp. Sec. Litig., 213 F.3d 454, 459, 462 (9th Cir. 2000)
- Rodriguez v. W. Publ'g Co., 563 F.3d 948, 958–59, 965 (9th Cir. 2009)
- Officers for Just. v. Civ. Serv. Comm'n of City & Cnty. of San Francisco, 688 F.2d 615, 628 (9th Cir. 1982)
- Johnson v. Hui, 752 F. Supp. 909, 913 (N.D. Cal. 1990)
- In re Hewlett-Packard Co. S'holder Derivative Litig., 716 F. App'x 603, 608–09 (9th Cir. 2017)
- Bushansky v. Armacost, No. 12-CV-01597-JST, 2014 WL 2905143, at \*6 (N.D. Cal. June 25, 2014)
- Churchill Vill., L.L.C. v. Gen. Elec., 361 F.3d 566, 575 (9th Cir. 2004)

OPINION

Bowers v. Kelly

PER CURIAM.

1 2 3

4 UNITED STATES DISTRICT COURT

5 NORTHERN DISTRICT OF CALIFORNIA

6 7 WEINING HU, Case No. 4:23-cv-02077-KAW 8 Plaintiff, ORDER GRANTING  
PRELIMINARY

APPROVAL OF SETTLEMENT

9 v. Re: Dkt. No. 69 10 ELI BAKER, et al., 11 Defendants. 12 ERIC BOWERS, et al., Case No. 4:23-cv-05396-KAW 13 Plaintiffs, Re: Dkt. No. 58 14 v. 15 JASON KELLY, et al., 16 Defendants. 17 18 On May 27, 2025, Plaintiffs Weining Hu and Eric Bowers filed a motion for preliminary 19 approval of a settlement agreement between the parties.<sup>1</sup> 20 Having considered the parties' filings and the arguments presented at the August 7, 2025 21 hearing, and for the reasons set forth below, the Court GRANTS Plaintiffs' motion for preliminary 22 approval.

## 23 I. BACKGROUND

24 A. The Derivative Claims 25 Ginkgo Bioworks Holdings, Inc. ("Ginkgo" or "the Company") is an early-stage company 26 27 1 Plaintiffs filed identical motions in both cases, so all references to docket entries in connection 1 that claimed to have developed a platform for cell programming which would enable the 2 biological production of a diverse range of synthetic products. Ginkgo came to exist in its current 3 form when its predecessor, Soaring Eagle Acquisition Corp. ("Soaring Eagle"), a special purpose 4 acquisition corporation ("SPAC"), acquired a private company, Ginkgo Bioworks, Inc. ("Legacy 5 Ginkgo"), with Legacy Ginkgo becoming a subsidiary of the Company (the "Merger"). (Bowers 6 Compl., Dkt. No. 1 ¶¶ 2, 5-6.) 7 In the Derivative Actions, Plaintiffs asserted claims for violations of the Securities 8 Exchange Act of 1934 (the "Exchange Act"), breaches of fiduciary duty, the aiding and abetting 9 thereof, and related stockholder causes of action under Delaware law against the Individual 10 Defendants<sup>2</sup> – directors, officers, or controlling shareholders of Ginkgo and Soaring Eagle – in 11 connection with, inter alia, the Individual Defendants' (i) alleged material misstatements and 12 omissions about the Company's revenue and sources of revenue; and (ii) other alleged misconduct 13 in connection with the Merger that formed Ginkgo. (Hu Compl., Dkt. No. 1 ¶¶ 47-99.) 14 Defendants Eagle Equity Partners III, LLC (the "Sponsor"), Sloan, Baker, Delman, 15 Kazam, Lee, Miller, Paul, and Leiweke (collectively, the "Soaring Eagle Defendants") are former 16 directors, officers, or controlling shareholders of Soaring Eagle. Plaintiffs alleged that the Soaring 17 Eagle Defendants owed Soaring Eagle a fiduciary duty to place the Company's best interests 18 ahead of their own. (Chancery Compl., In re Ginkgo Bioworks Holdings, Inc., Stockholder 19 Derivative Suit, C.A. No. 2024-0361-KSJM (Del. Ch.) ¶¶ 11, 13, 109.) 20 According to Plaintiffs, the Soaring Eagle Defendants conducted one of the largest SPAC 21 initial public offerings on February 26, 2021, when they took Soaring Eagle public, selling over 22 172 million units and raising over \$1.7 billion (the "IPO"). (Bowers Compl. ¶ 5.) Prior to Soaring 23 Eagle's IPO, the Sponsor paid \$25,000 for 43.125 million Soaring Eagle "Founder Shares," 24 roughly \$0.0006 per share. (Hu Compl. ¶ 185.) The Founder Shares would only become freely 25 tradable in the event Soaring Eagle entered into a "business combination" within 24 months of the 26 2 The Individual Defendants are Eli Baker, Arie Belldgrun, Marijn Dekkers, Scott M. Delman, 27 Mark Dmytruk, Christian Henry, Jason Kelly, Reshma Kewalramani, Isaac Lee, Timothy 1 IPO. (Bowers Compl. ¶¶ 65-66.) In the business combination, the Founder Shares would convert 2 to Class A common stock on a one-for-one basis and become freely tradable after a short "lockup" 3 period. (Chancery

Compl. ¶ 5.) At the time of the Merger, the Founder Shares were worth over 4 \$431 million. (Id.; Hu Compl. ¶ 186.) If Soaring Eagle did not complete a transaction within 24 5 months, the Founder Shares would expire as worthless and Soaring Eagle would have to pay back 6 the IPO investors. (Bowers Compl. ¶ 66.) In other words, the Soaring Eagle Defendants could 7 only unlock the value associated with their Founder Shares — for which they paid a de minimis 8 amount — if a business combination occurred. (Chancery Compl. ¶ 6.) Plaintiffs alleged that the 9 Soaring Eagle directors’ interests in the Sponsor, which owned the Founder Shares, created a 10 conflict of interest between them and the Company. Id. 11 Plaintiffs alleged that the Soaring Eagle Defendants agreed to the Merger that valued 12 Legacy Ginkgo at \$15 billion, even though it brought in less than \$80 million in revenue while 13 losing over \$100 million. (Chancery Compl. ¶¶ 7, 177.) The valuation of Legacy Ginkgo was 14 largely based on the projections contained in the Proxy soliciting shareholder approval of the 15 Merger. (Chancery Compl. ¶ 15.) These projections claimed that Legacy Ginkgo would have 16 \$345 million of unlevered free cash flow in 2021, which would then increase 20x to \$7.6 billion 17 by 2025. Id. ¶¶ 15, 111. According to Plaintiffs, Defendants knew this was impossible. Id. 18 Plaintiffs further alleged that the companies that were utilizing Legacy Ginkgo’s platform 19 were actually related parties that were often founded, funded, and staffed by Legacy Ginkgo, its 20 employees, or its key investors, and not “leading multinationals” as Defendants claimed. (Bowers 21 Compl. ¶¶ 73, 97.) These “OpCos” often operated out of Ginkgo’s own headquarters. Id. 22 Defendants, however, held these OpCos out as independent companies despite their obvious 23 overlaps with Legacy Ginkgo. (See, e.g., Hu Compl. ¶¶ 69, 165.) According to Plaintiffs, 72% of 24 Legacy Ginkgo’s 2020 revenue and 100% of its deferred revenue came from these related party 25 OpCos. (Bowers Compl. ¶ 78.) 26 Plaintiffs alleged that, to complete the Merger, Defendants issued a materially false and 27 misleading Proxy, and that the Proxy made misleading claims about Legacy Ginkgo’s value and 1 were propped up by a slew of related-party transactions. (Bowers Compl. ¶¶ 9, 72, 80-97.) As a 2 result of this misleading Proxy, Legacy Ginkgo’s shareholders voted in favor of the Merger. (Hu 3 Compl. ¶ 128.) 4 B. Procedural Background 5 i. The Federal Derivative Actions 6 On April 28, 2023, Plaintiff Hu filed Hu v. Baker, et al., No. 4:23-cv-02077-KAW, in the 7 United States District Court for the Northern District of California derivatively on behalf of 8 nominal defendant Ginkgo and against certain of the Individual Defendants alleging claims for 9 breach of fiduciary duty, aiding and abetting breach of fiduciary duty, violations of Section 14(a) 10 of the Exchange Act, unjust enrichment, and contribution and indemnification (the “Hu Action”). 11 On October 20, 2023, Plaintiff Bowers filed Bowers v. Kelly, et al., No. 4:23-cv-05396- 12 KAW, in the Northern District derivatively on behalf of nominal defendant Ginkgo and against 13 certain of the Individual Defendants alleging claims for violations of Section 14(a) of the 14 Exchange Act, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, unjust 15 enrichment, abuse of control, gross mismanagement, and waste of corporate assets (the “Bowers 16 Action”). Prior to filing his complaint, Bowers made a litigation demand on the Company’s Board 17 to investigate

and redress the wrongdoing alleged in the Derivative Actions (the “Litigation 18 Demand”). 19 On December 15, 2023, the Court entered a Stipulation and Order staying the Bowers 20 Action pending events in the related Securities Action and subject to certain conditions. On 21 January 29, 2024, the Court entered a similar Stipulation and Order in the Hu Action. On 22 February 28, 2024, Hu moved to consolidate the Hu Action and the Bowers Action, which was 23 ultimately denied on September 13, 2024. (Hu, Dkt. No. 54.) 24 On January 17, 2025, Defendants moved to dismiss. (Hu, Dkt. No. 61.) On February 20, 25 2025, the Court entered a Stipulation and Order suspending the deadlines in the Federal Derivative 26 Actions to allow the parties to finalize the settlement of the Derivative Actions. (Hu, Dkt. No. 64.) 27 ii. The Delaware Chancery Action 1 records pursuant to 8 Del. C. § 220 in connection with the misconduct alleged in the Derivative 2 Actions (the “Newman 220 Demand”). (Decl. of Francis A. Bottini, Jr., “Bottini Decl.,” Dkt. No. 3 69-1 ¶ 21.) Thereafter, pursuant to a confidentiality agreement, the Company produced over four 4 thousand pages of documents to Newman that were responsive to his demand (the “220 5 Documents”). Id. On April 4, 2024, utilizing the 220 Documents, Newman filed the Newman 6 Action derivatively on behalf of nominal defendant Ginkgo and against the Individual Defendants 7 alleging claims for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, and 8 unjust enrichment. Id. 9 On July 6, 2023, Shlomo Moskowitz made a demand to inspect the Company’s books and 10 records pursuant to 8 Del. C. § 220 in connection with the misconduct alleged in the Derivative 11 Actions (the “Moskowitz 220 Demand,” and with the Newman 220 Demand, the “220 12 Demands”). (Bottini Decl. ¶ 22.) Thereafter, pursuant to a confidentiality agreement, the 13 Company produced 220 Documents to Moskowitz that were responsive to his demand. Id. On 14 April 17, 2024, utilizing the 220 Documents, Moskowitz filed the Moskowitz Action derivatively 15 on behalf of Ginkgo and against certain of the Individual Defendants alleging claims for breach of 16 fiduciary duty, contribution and indemnification, and aiding and abetting breach of fiduciary duty. 17 Id. 18 On September 10, 2024, the Delaware Chancery Court granted the parties’ stipulation for 19 consolidation of the Newman and Moskowitz Actions, appointing co-lead counsel, and extending 20 the defendants’ deadline to respond to the operative complaint. (Bottini Decl. ¶ 23.) On 21 November 22, 2024, Defendants moved to dismiss the operative complaint in the Delaware 22 Chancery Action and filed an opening brief in support of their motion. Id. On January 17, 2025, 23 plaintiffs in the Delaware Chancery Action filed a verified amended consolidated complaint. Id. 24 C. Mediation and Settlement 25 The Settling Parties engaged in mediation over the course of several months. (See Bottini 26 Decl. ¶ 24.) On January 30, 2024, the Plaintiffs in the Federal Derivative Actions engaged in a 27 virtual mediation with Michelle Yoshida, who also served as the mediator in the related, securities 1 Action”). (Pls.’ Mot. at 1 n. 4, 7.) On September 30, 2024, counsel for Plaintiffs in the Derivative 2 Actions participated in a full-day, in-person mediation

session in New York City before the 3 Mediator, along with counsel for Ginkgo and the Individual Defendants. (Bottini Decl. ¶ 26.) In 4 advance of the mediation, Plaintiffs in the Derivative Actions prepared and submitted a detailed 5 mediation statement and prepared and served a global settlement demand upon Defendants. Id. 6 While no resolution was reached at the conclusion of either mediation session the Parties 7 continued their negotiations and engaged in facilitated discussions regarding the strengths and 8 weaknesses of the claims and defenses at issue. (Bottini Decl. ¶ 27.) The Settling Parties 9 continued to exchange information, documents, and detailed written settlement proposals and 10 counterproposals, debating the merits of the proposals in numerous communications between the 11 Settling Parties' counsel and the Mediator. Id. 12 From January 2024 to February 2025, Plaintiffs' Counsel had numerous discussions with 13 Defendants' counsel and the Mediator regarding settlement issues and to request additional 14 information. (Bottini Decl. ¶ 28.) On February 8, 2025, the Mediator made a double-blind 15 recommendation concerning the cash component of the Settlement, in the amount of \$4,125,000, 16 which the Settling Parties accepted. Id. At the same time, the Settling Parties agreed on the 17 corporate governance reforms to be adopted by the Company in connection with the Settlement 18 (Stipulation, Bottini Decl., Ex. 1 ¶ 2.5), as well as the valuable Contract Termination (Stipulation 19 ¶ 2.2). (Bottini Decl. ¶ 28.) 20 After reaching agreement on the Settlement Amount, Reforms, and Contract Termination, 21 the Settling Parties negotiated and ultimately agreed upon the amount of attorneys' fees and 22 expenses to be paid to Plaintiffs' counsel, subject to Court approval, in consideration for the 23 substantial benefits conferred upon Ginkgo and Current Ginkgo Stockholders by the Settlement. 24 (Bottini Decl. ¶ 29 (citing Stipulation ¶ 3.1).) 25 On February 19, 2025, the parties informed the Court that they had reached a settlement in 26 principle and requested that all case deadlines be suspended to allow them to finalize the 27 settlement. (Dkt. No. 63.) The request was granted. (Dkt. No. 64.) On May 27, 2025, Plaintiffs 1 D. Terms of the Settlement 2 The proposed settlement agreement ("Stipulation") resolves the claims Plaintiffs have 3 asserted on behalf of Ginkgo in this action. Under the terms of the settlement agreement, the 4 Individual Defendants agree to pay \$4.125 million to Ginkgo, addresses the core concerns raised 5 in the Derivative Actions, and offers Ginkgo and its shareholders the benefit of the substantial and 6 targeted Reforms to be implemented and maintained by Ginkgo for at least three years, including 7 the adoption of enhanced oversight and disclosure procedures for related person transactions, 8 implementation of enhanced employee training in related person transactions and disclosures, 9 enhancement of the Audit Committee of the Ginkgo's Board of Directors (the "Board"), 10 enhancement of the Disclosure Committee, and enhancement of Ginkgo's internal audit and 11 financial oversight functions. (Bottini Decl. ¶ 30; Stipulation ¶ 2.5.) In addition, the Company 12 will terminate the contract through which it has historically incubated new operating companies or 13 "OpCos" via a third-party service provider (i.e., the "Contract Termination"). (Bottini Decl. ¶ 30; 14 Stipulation ¶ 2.2.) The Settling Parties estimate that the Contract Termination will have a value to 15 Ginkgo in the form of savings of

fees under the contract and other associated costs savings 16 totaling approximately \$3-4 million over at least the next three years. Ids. 17 The Settling Parties acknowledge and agree that Plaintiffs' litigation and settlement efforts 18 in the Derivative Actions caused the payment of the Settlement Amount and the Contract 19 Termination and were a substantial factor in the Ginkgo Board's agreement to adopt the Reforms. 20 (Bottini Decl. ¶ 31; Stipulation ¶¶ 2.3-2.4.) The Settling Parties further acknowledge and agree 21 that these Reforms confer substantial benefits on the Company and Current Ginkgo Stockholders 22 and that the Settlement on the terms set forth herein is in all respects fair, reasonable, and 23 adequate, and serves the best interests of the Company and current Ginkgo Stockholders, 24 supporting preliminary, and ultimately final, approval of the Settlement. (Stipulation ¶ 2.4.) 25 After agreeing upon the principal terms of the Settlement, the Settling Parties negotiated 26 the payment of attorneys' fees and costs in the amount of \$2,750,000, subject to court approval, in 27 recognition of the substantial benefits provided to Ginkgo as a result of the prosecution and

## 1 II. LEGAL STANDARD

2 Pursuant to Federal Rule of Civil Procedure 23.1, "[a] derivative action may be settled, 3 voluntarily dismissed, or compromised only with the court's approval." Fed. R. Civ. P. 23.1(c).

4 Rule 23, in turn, "governs a district court's analysis of the fairness of a settlement of a shareholder

5 derivative action." *In re Hewlett-Packard Co. S'holder Derivative Litig.*, No. 12-cv-06003-CRB, 6 2015 WL 1153864, at \*3 (N.D. Cal. Mar. 13, 2015); see also *In re Cadence Design Sys., Inc. Sec. 7 Litig.*, No. 08-cv-4966 SC, 2011 WL 13156644, at \*2 (N.D. Cal. Aug. 26, 2011) ("Within the 8 Ninth Circuit, Rule 23's requirements for approval of class action settlements apply to proposed 9 settlements of derivative actions." (citing *In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 377 (9th Cir. 10 1995))). Accordingly, "[c]ourts considering settlements of derivative actions have generally found 11 '[c]ases involving dismissal or compromise under Rule 23(e) of nonderivative cases ... relevant by 12 analogy." *Lloyd v. Gupta*, No. 15-cv-04183-MEJ, 2016 WL 3951652, at \*4 (N.D. Cal. July 22, 13 2016) (second and third alterations in original) (quoting 7C Charles A. Wright & Arthur R. Miller, 14 Federal Practice and Procedure § 1839 (3d ed. 2007)). The Ninth Circuit maintains a "strong 15 judicial policy" that favors the settlement of class actions. *Class Plaintiffs v. City of Seattle*, 955 16 F.2d 1268, 1276 (9th Cir. 1992).

17 Rule 23 requires courts to follow a two-step process in evaluating a class action or 18 derivative action settlement. First, the parties must show "that the court will likely be able to ... (i) 19 approve the proposal under Rule 23(e)(2)." Fed. R. Civ. P. 23(e)(1)(B). In other words, a court 20 must make a preliminary determination that the settlement "is fair, reasonable, and adequate" 21 when considering the factors set out in Rule 23(e)(2). Fed. R. Civ. P. 23(e)(2). The court's task at 22 the preliminary approval stage is to determine whether the settlement falls "within the range of 23 possible approval." *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1080 (N.D. Cal. 2007) 24 (citation omitted). "The initial decision to approve or reject a settlement

proposal is committed to the sound discretion of the trial judge.” *City of Seattle*, 955 F.2d at 1276 (citation omitted). Second, if the court preliminarily approves a derivative action settlement, notice “must be given to shareholders or members in the manner that the court orders.” Fed. R. Civ. P. 23.1(c). 1 reasonable, and adequate.” Fed. R. Civ. P. 23(e)(2). 2 Within this framework, preliminary approval of a settlement is appropriate if “the proposed 3 settlement appears to be the product of serious, informed, non-collusive negotiations, has no 4 obvious deficiencies, does not improperly grant preferential treatment to class representatives or 5 segments of the class, and falls within the range of possible approval.” *In re Tableware*, 484 F. 6 Supp. 2d at 1079 (citation omitted). The proposed settlement need not be ideal, but it must be fair

7 and free of collusion, consistent with counsel's fiduciary obligations to the class. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998) (“Settlement is the offspring of compromise; 9 the question we address is not whether the final product could be prettier, smarter or snazzier, but 10 whether it is fair, adequate and free from collusion.”). To assess a settlement proposal, courts must 11 balance a number of factors: 12 [T]he strength of the plaintiffs’ case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class 13 action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; 14 the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed 15 settlement.

16 *Id.* at 1026 (citations omitted). The proposed settlement must be “taken as a whole, rather than the

17 individual component parts,” in the examination for overall fairness. *Id.* Courts do not have the 18 ability to “delete, modify, or substitute certain provisions”; the settlement “must stand or fall in its 19 entirety.” *Id.* (citation omitted).

### 20 III. DISCUSSION

21 A. Preliminary Approval Factors 22 i. Procedural Concerns 23 In the class action context, the Court must consider whether “the class representatives and 24 class counsel have adequately represented the class” and whether “the proposal was negotiated at 25 arm’s length.” Fed. R. Civ. P. 23(e)(2)(A)-(B). As the Advisory Committee notes suggest, these 26 are “matters that might be described as ‘procedural’ concerns, looking to the conduct of the 27 litigation and of the negotiations leading up to the proposed settlement.” Fed. R. Civ. P. 1 a. Adequate Representation 2 Like class representatives, “a stockholder who brings suit on a cause of action derived 3 from the corporation ... sues, not for himself alone, but as representative of a class comprising all 4 who are similarly situated.” *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 549 (1949). 5 Here, Plaintiffs and their counsel have “prosecute[d] the action vigorously on behalf of the 6 [shareholders].” *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 462 (9th Cir. 2000). Prior to 7 reaching the settlement, Plaintiffs’ counsel conducted a lengthy investigation, which included 8

reviewing SEC filings, public statements, articles, and securities, reviewing Company contracts 9 and existing governance policies, and reviewing thousands of pages of discovery produced in the 10 Securities Action, the Federal Derivative Actions, and the Delaware Chancery Action. (Pls.’ Mot. 11 at 12.) Under these circumstances, the Court is satisfied that they possessed “sufficient 12 information to make an informed decision about settlement.” *In re Mego Fin. Corp. Sec. Litig.*, 13 213 F.3d at 459 (citation omitted). Accordingly, this factor weighs in favor of approval. 14 b. Arm’s Length Negotiation 15 Next, the Court considers how the parties arrived at the settlement, specifically whether the 16 settlement was “the product of an arms-length, non-collusive, negotiated resolution.” *Rodriguez v. 17 W. Publ’g Co.*, 563 F.3d 948, 965 (9th Cir. 2009). Here, the Settlement was the product of 18 multiple sessions of negotiations supervised by mediator Michelle Yoshida, and some of which 19 was done in connection with the Securities Action. (Bottini Decl. ¶¶ 24-28.) The Court finds that 20 the parties reached the settlement via an arms-length, non-collusive, negotiated resolution, and that 21 this factor weighs in favor of preliminary approval. 22 ii. Substantive Concerns 23 a. Strength of Plaintiffs’ Case, Risks of Continuing Litigation, and Settlement 24 Amount 25 Consistent with Rule 23’s instruction to consider “the costs, risks, and delay of trial and 26 appeal,” Fed. R. Civ. P. 23(e)(2)(C)(i), courts in this circuit evaluate “the strength of the plaintiffs’ 27 case; the risk, expense, complexity, and likely duration of further litigation,” *Hanlon*, 150 F.3d at 1 settlement is expected to provide to [the company] is a central concern.” Fed. R. Civ. P. 2 23(e)(2)(C)-(D) advisory committee’s note to 2018 amendment. To evaluate the adequacy of the 3 settlement amount in light of the case’s risks, “courts primarily consider plaintiffs’ expected 4 recovery balanced against the value of the settlement offer.” *In re Tableware*, 484 F. Supp. 2d at 5 1080. But “[i]t is well-settled law that a cash settlement amounting to only a fraction of the 6 potential recovery does not per se render the settlement inadequate or unfair.” *Officers for Just. v. 7 Civ. Serv. Comm’n of City & Cnty. of San Francisco*, 688 F.2d 615, 628 (9th Cir. 1982). 8 Here, the risk, expense, complexity, and likely duration of further litigation weigh in favor 9 of preliminary approval. At the time of settlement, both plaintiffs had pending motions to dismiss 10 on the threshold issue of demand futility. (Pls.’ Mot. at 19.) Even if Plaintiffs survived the 11 pending motions, the Board would then have the ability to appoint a special litigation committee 12 tasked with investigating the claims and determining whether to permit the plaintiffs to prosecute 13 the claims or terminate the litigation. *Id.* (citing *Johnson v. Hui*, 752 F. Supp. 909, 913 (N.D. Cal. 14 1990).) As Plaintiffs explain, even if they later 15 defeat[ed] the recommendation of a Special Litigation Committee, the challenges remain daunting, including, inter alia, (i) building a 16 circumstantial case for liability based upon thousands of complex business and financial documents; (ii) proving actual damages in a 17 battle of the experts; (iii) overcoming motions for summary adjudication; (iv) securing a favorable judgment at trial through 18 circumstantial evidence comprised of complex corporate documents and the testimony of predominantly hostile percipient witnesses and 19 contested expert testimony; (v) maintaining that judgment through post-trial motions and appeals; and (vi)

enforcing any judgment as 20 might be obtained. 21 (Pls.' Mot. at 19-20.) As a result, courts in this district have generally recognized that it is often 22 difficult for plaintiffs to prevail in derivative actions and on securities fraud claims. See, e.g., 23 *Hefler v. Wells Fargo & Co.*, No. 16-CV-05479-JST, 2018 WL 6619983, at \*13 (N.D. Cal. Dec. 24 18, 2018), *aff'd sub nom. Hefler v. Pekoc*, 802 F. App'x 285 (9th Cir. 2020) ("Courts have 25 recognized that, in general, securities actions are highly complex and that securities class litigation 26 is notably difficult and notoriously uncertain." (quoting *In re Facebook, Inc., IPO Sec. & 27 Derivative Litig.*, 2018 WL 6168013, at \*15)); *In re Oclaro, Inc. Derivative Litig.*, No. C-11-3176 1 is generally difficult to prevail in a derivative suit." ). 2 With those risks in mind, the Court considers the financial settlement of \$4.125 million, 3 and additional value of the Contract Termination, which is expected to save Ginkgo \$3-4 million 4 over the next three to four years. (Pls.' Mot. at 15.) The accumulating costs of litigation could 5 significantly mitigate the value of a judgment on the merits. Cf. *In re Apple Computer, Inc. 6 Derivative Litig.*, No. C 06-4128 JF (HRL), 2008 WL 4820784, at \*2 (N.D. Cal. Nov. 5, 2008) 7 ("The principal factor to be considered in determining the fairness of a settlement concluding a 8 shareholders' derivative action is the extent of the benefit to be derived from the proposed 9 settlement by the corporation, the real party in interest.") (quoting *Shlensky v. Dorsey*, 574 F.2d 10 131, 147 (3d Cir. 1978)). The Court notes that the settlement also included significant Reforms 11 designed to prevent recurrence of the alleged misconduct and further damage to Ginkgo, including 12 new auditing and disclosure requirements, and which, for that reason, provide substantial benefit 13 to shareholders. (See Stipulation ¶¶ 2.4-2.5; Pls.' Mot. at 15-16.) 14 Accordingly, given the risks described above, the Court finds that the Settlement amount 15 of \$4.125 million, plus the estimated costs savings and the implementation of the agreed upon 16 reforms, is reasonable and weighs in favor of preliminary approval. 17 b. Terms of Attorneys' Fees 18 "For more than two decades, the Ninth Circuit has set the 'benchmark for an attorneys' fee 19 award in a successful class action [at] twenty-five percent of the entire common fund.' " *Rodman 20 v. Safeway Inc.*, No. 11-CV-03003-JST, 2018 WL 4030558, at \*3 (N.D. Cal. Aug. 23, 2018) 21 (quoting *Williams v. MGM-Pathe Commc'ns Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997)). 22 The Settling Parties agreed to pay Plaintiffs' Counsel attorneys' fees and expenses in the 23 amount of \$2,750,000, subject to court approval. (Stipulation ¶ 31.) While this amount exceeds 24 the 25% benchmark, the Court understands that the settlement agreement requires the 25 implementation of significant Reforms and the Contract Termination, which involves an estimated 26 costs savings of \$3-4 million. (See Pls.' Mot. at 8-9.) Taken together, the financial award and the 27 costs savings total approximately \$7-8M, even before accounting for the impact of the Reforms. 1 to explain why deviation from the 25% bench is appropriate at that time. The Court also expects 2 counsel to provide additional information at the final approval stage, including the breakdown of 3 hours spent by each attorney and substantive information regarding their legal experience to 4 support their billing rates under a lodestar analysis. Such information is necessary to fulfill the 5 Court's "independent obligation to ensure that the

[attorney's fees] award, like the settlement 6 itself, is reasonable, even if the parties have already agreed to an amount." In re Bluetooth, 654 7 F.3d at 941. 8 Accordingly, the Court finds that, at the preliminary approval stage, the amount of 9 attorneys' fees does not weigh against approval. 10 c. Preferential Treatment 11 Plaintiffs intend to seek a total of \$8,000 in service awards, or \$2,000 each, which includes 12 Mssrs. Newman and Moskowitz in the Delaware Chancery Action. (Stipulation ¶ 3.3.) The 13 awards, if approved, will be paid from Plaintiffs' Counsel's attorneys' fees. Id. 14 The Ninth Circuit has recognized that service awards to named plaintiffs in a class action 15 are permissible and do not necessarily render a settlement unfair or unreasonable. See, e.g., 16 Rodriguez v. W. Publ'g Corp., 563 F.3d 948, 958-59 (9th Cir. 2009). Derivative plaintiffs may 17 likewise merit compensation "for work done on behalf of the [shareholders]." Id.; see also In re 18 Galena Biopharma, 2016 WL 3457165, at \*12 (approving incentive award to derivative action 19 lead plaintiffs). In this district, the presumptively reasonable amount for service awards is \$5,000. 20 Harris v. Vector Mktg. Corp., No. C-08-5198 EMC, 2012 WL 381202, at \*7 (N.D. Cal. Feb. 6, 21 2012) (collecting cases). 22 Thus, while the Court finds that the \$2,000 service award to be presumptively reasonable, 23 the matter will be decided in connection with final approval. 24 d. Experience and Views of Counsel 25 Plaintiffs' counsel has significant experience obtaining favorable results as lead counsel in 26 27 3 Lead Plaintiffs will need to address why Mssrs. Newman and Moskowitz should receive service 1 shareholder derivative litigation. (See Decl. of Francis A. Bottini, Jr. ISO of Mot. to Consolidate, 2 Hu, Dkt. No. 33-1 ¶¶ 8-13.) "[A]lthough a court might give weight to the fact that counsel for the 3 class or the defendant favors the settlement, the court should keep in mind that the lawyers who 4 negotiated the settlement will rarely offer anything less than a strong, favorable endorsement." 5 Principles of the Law of Aggregate Litigation § 3.05 cmt. a (Am. Law. Inst. 2010). Thus, while the 6 fact that counsel advocates in favor of this settlement weighs in favor of its approval, the Court 7 gives it little weight. See In re Wells Fargo & Co. Sharehold Derivative Litig., No. 16-CV-05541-8 JST, 2019 WL 13020734, at \*8 n. 9 (N.D. Cal. May 14, 2019). 9 iii. Reaction of Shareholders to the Proposed Settlement 10 Like other courts in this district, the Court will wait until the final approval hearing to 11 determine shareholders' reaction to the settlement. See In re Wells Fargo & Co. Sharehold 12 Derivative Litig., No. 16-CV-05541-JST, 2019 WL 13020734, at \*8 (N.D. Cal. May 14, 2019). 13 iv. No Obvious Deficiencies 14 The Court has reviewed the settlement and did not find any obvious deficiencies. To the 15 extent any shareholder calls attention to any such deficiency, the Court will consider it at the final 16 approval hearing. 17 B. Notice Plan 18 The Court must separately evaluate the proposed notice procedure. Rule 23.1(c) requires 19 that notice of the Settlement "must be given to shareholders or members in the manner that the 20 court orders." Fed. R. Civ. P. 23.1(c). In determining the appropriate notice method, "the Court 21 considers whether such notice would be sufficient to reach the majority of interested 22 stockholders." Bushansky v. Armacost, No. 12-CV-01597-JST, 2014 WL 2905143, at \*6 (N.D. 23 Cal. June 25, 2014) (citing Wright & Miller, Federal Practice & Procedure § 1839). 24 The parties

propose to provide notice through requiring Ginkgo to (1) post the Long Form 25 Notice on Ginkgo's Investor Relations webpage with the Stipulation of Settlement (and exhibits 26 thereto) and maintain these documents until after the Final Approval Hearing, (2) publish via 27 GlobeNewswire or similar wire service with a link to its Investor Relations webpage and the 1 the Notice and Stipulation (with corresponding exhibits) as exhibits to a Current Report on either 2 Form 8-K or 10-Q. (Stipulation ¶ 4.1)4 Courts have found that similar procedures satisfy Rule 3 23.1 and due process. See *In re ImmunityBio, Inc. Shareholder Derivative Litigation*, No. 3:24- 4 CV-02014-GPC-VET, 2025 WL 2147066, at \*3 (S.D. Cal. July 29, 2025) (allowing notice 5 through online publication); see also *In re Hewlett-Packard Co. S'holder Derivative Litig.*, 716 F. 6 App'x 603, 608 (9th Cir. 2017) (affirming district court's approval of "notice procedures, which 7 included placing notice of the settlement on two consecutive days in *The New York Times*, 8 *Investor's Business Daily*, *The Wall Street Journal*, and *The San Francisco Chronicle*, filing an 8- 9 K with the SEC, and publishing the notice on its website"); Bushansky, 2014 WL 2905143, at \*6 10 (collecting cases). The Court reaches the same conclusion here. 11 Upon review of the Long Form and Summary Notices, the Court finds that they do not 12 adequately explain how to file an objection with the Court. As a result, page 19 of the proposed 13 Long Form Notice and pages 3-4 of the Summary Notice must be amended as follows (changes 14 are underlined): 15 A. You Must Make Detailed Objections in Writing and File with the Court 16 Any objections must be presented in writing and must contain 17 the following information: 18 1. Notice of whether you intend to appear at the Settlement Hearing; 19 2. Your name, legal address, and telephone number; 20 3. Proof of being a Current Ginkgo Stockholder as of the Record Date and representation that you will continue to own Ginkgo common 21 stock as of the date of the Settlement Hearing; 22 4. The date(s) you acquired your Ginkgo shares and the number of Ginkgo shares held; 23 5. A detailed statement of your specific position with respect to the 24 matters to be heard at the Settlement Hearing, including a statement of each objection being made; and 25 6. The grounds for each objection or the reasons for your desire to 26 appear and to be heard. 27 1 All written objections and supporting papers must (a) clearly identify the case name and number ( *Hu v. Baker*, Case No. 23-cv- 2 02077-KAW), (b) be submitted to the Court either by filing them electronically or in person at any location of the United States District 3 Court for the Northern District of California or by mailing them to the Class Action Clerk, United States District Court for the Northern 4 District of California, 1301 Clay Street, Oakland, CA 94612, and (c) be filed or postmarked on or before \_\_\_\_\_, 2025." 5 The Court will not consider any objection that does not substantially comply with these requirements. Any counsel retained 6 by a purported objector for the purpose of asserting an objection must make a notice of appearance on the Court by \_\_\_\_\_, 2025, which is 7 fourteen (14) days prior to the Settlement Hearing. If you appear through your own attorney, you are responsible for hiring and paying 8 that attorney. 9 Second, the Court strikes the requirement that objections to

the settlement be separately 10 sent to counsel as listed. (Long Form at 19, § D; Summary Notice at 4.) The Court finds that the 11 requirement to mail courtesy copies to be unnecessarily onerous, considering that counsel will 12 receive an electronic notice of any objection filed with the Court. If counsel receives any written 13 objections from shareholders, they are directed to electronically file them on the public docket. 14 Finally, regarding SEC disclosure, the Court will require Ginkgo to file a Form 8-K within 15 21 days of this order. The SEC filing is part of the notice plan, which should be completed well in 16 advance of the filing of the motion for final approval, so that shareholders have a meaningful 17 opportunity to object. Requiring Form 8-K also allays any concern the Court may have that 18 publication by wire service notice will not reach all shareholders. 19 Otherwise, the Court finds that the content of the proposed notice “describes the terms of 20 the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come 21 forward and be heard.” In re Hewlett-Packard, 716 F. App'x at 609 (quoting Churchill Vill., L.L.C. 22 v.Gen. Elec., 361 F.3d 566, 575 (9th Cir. 2004)).

#### 23 IV. CONCLUSION

24 For the reasons set forth above, the Court finds that preliminary approval is warranted, and, 25 therefore, GRANTS preliminary approval of the parties’ proposed Settlement Agreement and 26 Notice Plan. 27 For settlement purposes only, the Court APPOINTS Dr. Hu and Mr. Bowers as Lead ! 9 Ginkgo to post Long Form Notice and 14 days from the date of this order Stipulation of Settlement (with exhibits) to 3 Ginkgo’s website Ginkgo to disseminate Summary Notice via 14 days from the date of this order 4 wire service 5 Ginkgo shall file SEC Form 8-K with the SEC | 21 days from the date of this order to disclose the Settlement 6 Defendants’ Counsel shall file declaration November 3, 2025 confirming compliance with the Notice Plan 7 Plaintiffs to file Motion for Final Settlement November 3, 2025 Approval and Lead Counsel to file Motion for 8 Attorneys’ fees, costs, and service awards 9 Deadline for Shareholders to file Objections to | December 4, 2025 Settlement and/or Fee and Expense 10 Application Reply papers to any requests for exclusion or | December 11, 2025 11 objections Final Approval Hearing December 18, 2025, at 1:30 p.m. 13 || ITISSO ORDERED. v 14 Dated: August 21, 2025 . © Kew A. lh) More A 16 United States Magistrate Judge = 17 Z 18 19 20 21 22 23 24 25 26 27 28