

1 Gail L. Chung (CA State Bar No. 212334)

OUTTEN & GOLDEN LLP

2 One Embarcadero Center, 38th Floor

3 San Francisco, CA 94111

Telephone: (415) 638-8800

4 Jack A. Raisner¹

5 René S. Roupinian²

Robert N. Fisher (CA State Bar No. 302919)

OUTTEN & GOLDEN LLP

6 3 Park Avenue, 29th Floor

7 New York, NY 10016

8 Telephone: (212) 245-1000

9 *Attorneys for Plaintiff Peter Wojciechowski*

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO/OAKLAND DIVISION

13 PETER WOJCIECHOWSKI on his own
14 behalf and on behalf of all other persons
similarly situated,

15 Plaintiff,

16 v.

17 KOHLBERG VENTURES, LLC,

18 Defendant.

CASE NO: _____

**CIVIL COMPLAINT
CLASS ACTION**

For Violation of the Worker Adjustment and
Retraining Notification Act, 29 U.S.C. §§
2101 – 2109

20 Plaintiff, PETER WOJCIECHOWSKI, on behalf of himself and all other persons similarly
21 situated, hereby alleges as follows:

NATURE OF THE ACTION

23 1. This is a class action complaint by Plaintiff Peter Wojciechowski and other similarly
24 situated former employees of Defendant Kohlberg Ventures, LLC (“Defendant” or “Kohlberg
25 Ventures”) for the recovery of damages in the amount of 60 days’ pay and ERISA benefits by reason
26 of Defendant’s violation of Plaintiff and similarly situated employees’ rights under the Worker

27 ^{1 and 2} Not admitted to the Bar of the U.S. District Court for the Northern District of California.
28 Applications for admission *pro hac vice* will be filed.

1 Adjustment and Retraining Notification Act, 29 U.S.C. §§ 2101 – 2109 (the “WARN Act”).

2 Plaintiff and the similarly situated employees were employees of ClearEdge Power,³ a subsidiary of
3 the Defendant, and were terminated as part of, or as a result of, a mass layoff ordered by Defendant
4 on or about April 25, 2014.

5 2. Defendant was a single employer with ClearEdge Power and was the employer of
6 ClearEdge Power’s employees for purposes of the WARN Act at all relevant times.

7 3. Defendant had funded ClearEdge for ten years but decided to pull its funding and
8 place ClearEdge into immediate bankruptcy accompanied by the layoff of most of ClearEdge’s
9 employees.

10 4. Defendant violated the WARN Act by failing to give Plaintiff and other similarly
11 situated employees of Defendant at least 60 days’ advance notice of termination, as required by the
12 WARN Act. Indeed, Defendant gave no written notice to Plaintiff and the similarly situated
13 employees before terminating them. As a consequence, upon their termination, Plaintiff and other
14 similarly situated employees of Defendant were entitled under the WARN Act to recover from
15 Defendant 60 days’ wages and ERISA benefits.

16 5. Plaintiff, on behalf of similarly situated employees, brought an adversary proceeding
17 in the ClearEdge bankruptcy proceeding against the Debtors, and was appointed Class
18 Representative of the Certified Class. In a settlement of that adversary proceeding, the reorganized
19 Debtor paid a portion of the Class’ WARN Act wages and benefits.⁴

20 6. Plaintiff, on behalf of himself and those class members, now seeks an award for the
21 balance of the Class’ WARN Act wages and benefits.

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25 ³ “ClearEdge” or “ClearEdge Power” refers to ClearEdge Power, Inc. and ClearEdge Power, LLC
and their affiliates and subsidiaries which were colloquially referred to as ClearEdge Power.

26 ⁴ ClearEdge Power, Inc. and ClearEdge Power, LLC were reorganized into CEP Reorganization, Inc.
27 in their Chapter 11 bankruptcy case, 14-4419-CN, in the United States Bankruptcy Court for the
Northern District of California. The adversary proceeding is styled, *Wojciechowski v. ClearEdge*
28 *Power, Inc., et al.*, Adv. No. 14-4152-CN.

1 **JURISDICTION AND VENUE**

2 7. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1331 and 29
3 U.S.C. § 2104(a)(5).

4 8. Venue in this Court is proper pursuant to 28 U.S.C. § 1391 and 29 U.S.C.
5 § 2104(a)(5).

6 **INTRADISTRICT ASSIGNMENT**

7 9. On information and belief, a substantial part of the events or omissions which give
8 rise to the claims occurred in San Mateo County. Kohlberg Ventures' headquarters are in San Mateo
9 County. Accordingly, pursuant to N.D. Cal. Local Rule 3-2(c)-(d), the case should be assigned to
10 the San Francisco or Oakland Division.

11 **PARTIES**

12 **Plaintiff**

13 10. Plaintiff Peter Wojciechowski was employed by ClearEdge Power and therefore for
14 WARN Act purposes was an employee of Defendant which was a single employer with ClearEdge.

15 11. Plaintiff worked for Defendant as a Configuration Manager and worked at
16 Defendant's facility located at 195 Governors Highway, South Windsor, Connecticut (the
17 "Governors Highway Facility") until his termination on or about April 25, 2014. Defendant
18 provided him no advance written notice of his termination.

19 **Defendant**

20 12. Upon information and belief, at all relevant times Defendant Kohlberg Ventures, LLC
21 was a California Corporation with its principal place of business located at 3000 Alpine Road,
22 Portola Valley, California ("Kohlberg Ventures' headquarters"), and conducted business in this
23 district.

24 13. Upon information and belief, during all times relevant to this action, Kohlberg
25 Ventures, LLC owned and controlled ClearEdge Power, whether directly or through subsidiary
26 entities or related entities.

1 24. ClearEdge thereafter relocated its corporate headquarters from Oregon to Sunnyvale
2 in Silicon Valley, despite the fact that its engineering department was located in Oregon and its
3 manufacturing facility was in Connecticut.

4 25. Upon information and belief, operational managers of ClearEdge would often meet
5 with James A. Kohlberg (“Mr. Kohlberg”) and John S. Eastburn, Jr. at Kohlberg Ventures’
6 headquarters, minutes away from ClearEdge’s Sunnyvale office.

7 26. Upon information and belief, Kohlberg Ventures’ headquarters at 3000 Alpine Rd in
8 Portola Valley, California, is a building it owned and occupied alone.

9 27. Upon information and belief, Kohlberg Ventures placed the ClearEdge logo alongside
10 its own on the entryway of the Kohlberg Ventures’ headquarters building.

11 28. Upon information and belief, Kohlberg Ventures’ provided ClearEdge office space in
12 its headquarters, and ClearEdge Chief Executive Officer David Wright maintained an office in that
13 building.

14 29. Upon information and belief, in 2013, ClearEdge’s books showed almost \$70 million
15 of revenue, and equity valued (assets exceeding liabilities) at \$78 million.

16 30. As of December 2013, however, ClearEdge actually had grossly insufficient amounts
17 of new money coming into the business. It was paying its expenses by burning through tens of
18 millions of dollars of customer deposits for product on order.

19 31. ClearEdge’s business plan for 2014 relied on customer deposits to fulfill its needs for
20 working capital, but delays in booking orders, among other things, caused it to run out of cash.

21 32. To make payroll in March 2014, Kohlberg Ventures infused \$5 million into
22 ClearEdge.

23 33. ClearEdge’s CEO Wright also contributed a \$325,000 cash infusion.

24 34. In the early spring of 2014, ClearEdge’s business plan and strategy were clearly
25 unsustainable in that its operating expenses created a loss on every sale. To break even, ClearEdge
26 had to radically lower its costs, overhead, and pricing to be competitive in the energy market. To do
27 that, and carry its operating expenses, it needed to raise tens of millions of dollars.

1 35. In late 2013 and early 2014, Samsung proposed a significant purchase of fuel cells
2 from ClearEdge for Korean public works projects expected to generate \$50-100 million in new
3 business for ClearEdge (the “Samsung purchase”).

4 36. By that time, however, ClearEdge had exhausted the equity and debt markets in
5 seeking new lenders and investors. Unable to otherwise sustain itself, Kohlberg Ventures proposed
6 to infuse \$25 million in long term equity financing, and based on that, Macquarie Group proposed to
7 lend \$20 million. Kohlberg Ventures conditioned its infusion, however, on ClearEdge closing the
8 Samsung purchase.

9 37. On March 20, 2014, the Samsung purchase order arrived with a contingency covenant
10 which stipulated that, until the order was officially approved by a Korean public-private entity
11 development agency, the work would not go forward. The order also required that Kohlberg
12 Ventures confirm its continued financial support of ClearEdge.

13 38. James A. Kohlberg, who personally participated in negotiating the Samsung
14 purchase, balked at infusing the \$25 million amount due to the contingency covenant in the Samsung
15 purchase. Mr. Kohlberg demanded that Samsung provide an unconditional purchase order.
16 Samsung refused to remove the contingency.

17 39. In response, Mr. Kohlberg sought to put in place a \$25 million penalty that Samsung
18 would pay in the event the purchase order was cancelled, which Samsung rejected.

19 40. On or about March 31, 2014, without any board action or meeting, Mr. Kohlberg
20 upon information and belief, announced that the company was closing in an email to certain parties.

21 41. This email announcement was sent without the knowledge of ClearEdge’s CEO
22 Wright, who pleaded with board members to keep the decision private until he had an opportunity to
23 assemble a communication plan to stakeholders.

24 42. Despite face to face meetings between Samsung executives and Messrs. Kohlberg and
25 Eastburn, the impasse was not resolved.

26 43. Upon information and belief, Mr. Kohlberg reassessed his willingness to continue
27 ClearEdge as an investment business. Although Kohlberg Ventures had invested over \$100 million,
28

1 Mr. Kohlberg recognized that given market and price declines, even a drastic restructuring would not
2 be large enough to offset ClearEdge's cost structure in the U.S.

3 44. Upon information and belief, Mr. Kohlberg recognized that ClearEdge needed at least
4 \$75 million to get to profitability which was more than he was willing to finance to sustain the
5 company. Therefore he decided not to provide the funding on which ClearEdge depended to
6 continue its operations.

7 45. On April 16, ClearEdge received retainer agreements from Chapter 11 bankruptcy
8 counsel.

9 46. On April 22, ClearEdge's board resolved to file for Chapter 11 protection.

10 47. On April 25, ClearEdge's employees were terminated without advance notice.

11 48. ClearEdge filed for Chapter 11 protection on May 1, 2014.

12 **a. Common Ownership**

13 49. Kohlberg Ventures and ClearEdge had common ownership as Kohlberg Ventures
14 was, upon information and belief, the direct or indirect owner of ClearEdge or ClearEdge was owned
15 by an entity under the control of Kohlberg Ventures.

16 **b. Shared Officers and Directors**

17 50. During the relevant time period, Kohlberg Ventures was led by two individuals,
18 James A. Kohlberg and John S. Eastburn, Jr.

19 51. Kohlberg Ventures and ClearEdge shared officers and directors, including the
20 following:

- 21 i. Kohlberg Ventures partner and co-founder James A. Kohlberg was the Chairman
22 of ClearEdge's Board of Directors.
- 23 ii. Kohlberg Ventures partner and co-founder Mr. Eastburn was also a director of
24 ClearEdge, was ClearEdge's Secretary, and became the Chief Operating Officer
25 of ClearEdge in the final weeks prior to its closure.
- 26
27
28

1 52. On information and belief, Messrs. Kohlberg and Eastburn had ultimate control over
2 the ClearEdge board and were able to influence the decisions of outside board members whom they
3 had hand-picked based on their prior relationships.

4 53. For example, when ClearEdge director Phil Angelides ran for Governor of California
5 in 2006, Jerome Kohlberg, James Kohlberg's father, contributed \$20,000 to his campaign.

6 **c. De Facto Control**

7 54. Kohlberg Ventures exercised de facto control over ClearEdge Power.

8 55. Kohlberg Ventures made the decision to place ClearEdge into bankruptcy and
9 terminate Plaintiff and the other similarly situated former employees.

10 56. Mr. Kohlberg was deeply involved in the management and operation of ClearEdge.

11 57. Mr. Kohlberg engaged in day to day decisionmaking for ClearEdge, acting as its
12 shadow-CEO or super-CEO, exercising control over ClearEdge that went beyond that of an ordinary
13 Chairman of the Board.

14 58. ClearEdge officers obeyed Mr. Kohlberg's direct commands in operating ClearEdge.

15 59. ClearEdge functioned as Mr. Kohlberg's company, which was operated by the
16 ClearEdge CEO Wright at Kohlberg's direction.

17 60. Mr. Kohlberg was in at least daily telephone contact with Mr. Wright and was in
18 frequent contact with the Chief Financial Officer, and in this way directed their actions in the day-to-
19 day management of ClearEdge.

20 61. In the final weeks prior to the termination of ClearEdge's employees, Kohlberg
21 Ventures partner, Mr. Eastburn, became the chief operating officer of ClearEdge and took over
22 functional control over ClearEdge.

23 62. During this period, Mr. Eastburn directed the day-to-day management of ClearEdge.

24 63. He also directed the creation of models and contingency plans for ClearEdge
25 including plans to reduce the size of the workforce as well as plans for dealing with ClearEdge's
26 creditors and lenders.

1 64. Messrs. Kohlberg and Eastburn participated in the decision to terminate
2 ClearEdge’s employees and on information and belief Kohlberg Ventures made and executed the
3 decision to shut down ClearEdge.

4 65. Relatedly, on information and belief, in ClearEdge’s final days, Kohlberg Ventures
5 made the decision not to fund payroll to pay ClearEdge’s employees with full knowledge that
6 ClearEdge had insufficient funds to make payroll and was unable to obtain such funds from any
7 source, a deficiency that came as no surprise.

8 66. Mr. Kohlberg himself engaged in the negotiations with Samsung regarding its deal
9 with ClearEdge.

10 67. With that deal at an impasse, rather than fund ClearEdge, Mr. Kohlberg decided to
11 walk away and that ClearEdge would file for bankruptcy.

12 68. Mr. Kohlberg explained to Samsung why he (and Kohlberg Ventures) decided to
13 shut down ClearEdge.

14 69. Citing to several market factors and a need for at least \$75 million to get to
15 profitability, he indicated that “[w]ith the greatest regret of my career, I therefore concluded that
16 Kohlberg Ventures could not invest additional capital in ClearEdge.” He further explained that he
17 “considered it a tragedy” that ClearEdge would close.

18 **d. Dependency of Operations**

19 70. ClearEdge was dependent on Kohlberg Ventures to operate.

20 71. As indicated above, Kohlberg Ventures had invested over \$100 million in ClearEdge.

21 72. At the time Kohlberg Ventures decided to stop funding ClearEdge, ClearEdge had
22 over \$30 million in vendor debt and needed approximately \$50 million to satisfy its operational
23 needs for 2014.

24 73. On information and belief, ClearEdge did not have any prospects for receiving
25 funding from any other source during the relevant time period and was completely dependent on
26 funding from Kohlberg Ventures to ensure its continued operation.

1 82. Common questions of law and fact exist as to members of the WARN Class,
2 including, but not limited to, the following:

- 3 (a) whether the members of the WARN Class were employees of the Defendant
4 who worked at or reported to Defendant's Facilities;
5 (b) whether Defendant unlawfully terminated the employment of the members of
6 the WARN Class without cause on their part and without giving them 60 days
7 advance written notice in violation of the WARN Act;
8 (c) whether Defendant unlawfully failed to pay the WARN Class members 60
9 days wages and benefits as required by the WARN Act;
10 (d) whether Defendant acted as a single employer with ClearEdge Power under
11 the Federal WARN Act.

12 83. The Plaintiff's claims are typical of those of the WARN Class. The Plaintiff, like
13 other WARN Class members, worked at or reported to one of Defendant's Facilities and were
14 terminated without cause on or about April 25, 2014, due to the mass layoffs and/or plant closings
15 ordered by Defendant.

16 84. At all relevant times, Defendant was an "employer," as that term is defined in 29
17 U.S.C. § 2101 (a)(1) and 20 C.F.R. § 639(a) and continued to operate as a business until it decided to
18 order a mass layoffs or plant closings at the Facilities.

19 85. The Plaintiff will fairly and adequately protect the interests of the WARN Class. The
20 Plaintiff has retained counsel competent and experienced in complex class actions, including the
21 WARN Act and employment litigation.

22 86. Class certification of these claims is appropriate under Fed. R. Civ. P. 23(b)(3)
23 because questions of law and fact common to the WARN Class predominate over any questions
24 affecting only individual members of the WARN Class, and because a class action is superior to
25 other available methods for the fair and efficient adjudication of this litigation – particularly in the
26 context of WARN Act litigation, where individual plaintiffs may lack the financial resources to
27 vigorously prosecute a lawsuit in federal court against a corporate defendant, and damages suffered
28 by individual WARN Class members are small compared to the expense and burden of individual
prosecution of this litigation.

1 87. Concentrating all the potential litigation concerning the WARN Act rights of the
2 members of the Class in this Court will obviate the need for unduly duplicative litigation that might
3 result in inconsistent judgments, will conserve the judicial resources and the resources of the parties,
4 and is the most efficient means of resolving the WARN Act rights of all the members of the Class.

5 88. Plaintiff intends to send notice to all members of the WARN Class to the extent
6 required by Rule 23.

7 **CAUSE OF ACTION: VIOLATION OF THE WARN ACT**

8 89. Plaintiff realleges and incorporates by reference all allegations in all proceeding
9 paragraphs.

10 90. At all relevant times, Defendant employed more than 250 employees who in the
11 aggregate worked at least 4,000 hours per week exclusive of hours of overtime within the United
12 States.

13 91. At all relevant times, Defendant was an “employer,” as that term is defined in 29
14 U.S.C. § 2101(a)(1) and 20 C.F.R. § 639(a), and continued to operate as a business until it
15 determined to order a mass layoff at the Facilities.

16 92. On or about April 25, 2014, Defendant ordered a “mass layoff,” as that term is
17 defined by 29 U.S.C. § 2101(a)(1).

18 93. The mass layoff at the Facilities resulted in “employment losses,” as that term is
19 defined by 29 U.S.C. §2101(a)(2) for at least fifty (50) of Defendant’s employees as well as 33% of
20 Defendant’s workforce at the Facilities, excluding “part-time employees,” as that term is defined by
21 29 U.S.C. §2101(a)(8).

22 94. Plaintiff and each of the other members of the Class were discharged by Defendant
23 without cause on his or her part as part of or as the reasonably foreseeable result of the mass layoff
24 ordered by Defendant at the Facilities.

25 95. Plaintiff and each of the other members of the Class are “affected employees” of the
26 Defendant within the meaning of 29 U.S.C. §2101(a)(5).

1 F. Plaintiff's reasonable attorneys' fees and the costs and disbursements that the Plaintiff
2 incurred in prosecuting this action, as authorized by the WARN Act, 29 U.S.C. §
3 2104(a)(6); and

4 G. Such other and further relief as this Court may deem just and proper.

5 DATED: November 23, 2016

Respectfully submitted,

6 By: /s/ Gail L. Chung
7 Gail L. Chung (CA State Bar No. 212334)
8 **OUTTEN & GOLDEN LLP**
9 One Embarcadero Center, 38th Floor
10 San Francisco, CA 94111
11 Telephone: (415) 638-8800
12 Fax: (646) 509-2070
13 Email: gl@outtengolden.com

14 Jack A. Raisner
15 René S. Roupinian
16 Robert N. Fisher (CA State Bar No. 302919)
17 **OUTTEN & GOLDEN LLP**
18 685 Third Avenue, 25th Floor
19 New York, NY 10017
20 Telephone: (212) 245-1000
21 Email: jar@outtengolden.com
22 Email: rsr@outtengolden.com
23 Email: rfisher@outtengolden.com

24 *Attorneys for Plaintiff Peter Wojciechowski, on his own*
25 *behalf and on behalf of all other persons similarly*
26 *situated*

CIVIL COVER SHEET

The JS-CAND 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved in its original form by the Judicial Conference of the United States in September 1974, is required for the Clerk of Court to initiate the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

PETER WOJCIECHOWSKI on his own behalf and on behalf of all other persons similarly situated

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

(c) Attorneys (Firm Name, Address, and Telephone Number)

Gail L. Chung, OUTTEN & GOLDEN LLP, One Embarcadero Center, 38th Floor San Francisco, CA 94111
Jack A. Raisner, René S. Roupinian, Robert N. Fisher, OUTTEN & GOLDEN LLP 685 Third Avenue, 25th Floor, New York, NY 10017

DEFENDANTS

KOHLBERG VENTURES, LLC

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

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED. Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff
2 U.S. Government Defendant
3 Federal Question (U.S. Government Not a Party)
4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

Table with columns for Plaintiff (PTF) and Defendant (DEF) citizenship and incorporation status. Includes categories like Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, and Foreign Nation.

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Large table with columns for CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, and OTHER STATUTES. Each category contains a list of specific legal codes with checkboxes.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding
2 Removed from State Court
3 Remanded from Appellate Court
4 Reinstated or Reopened
5 Transferred from Another District (specify)
6 Multidistrict Litigation-Transfer
8 Multidistrict Litigation-Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): 29 U.S.C. § 2101, et seq.
Brief description of cause: Violation of the WARN Act for failure to give 60 days' notice prior to mass layoff and/or plant closing

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, Fed. R. Civ. P. DEMAND \$ CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S), IF ANY (See instructions):

JUDGE DOCKET NUMBER

IX. DIVISIONAL ASSIGNMENT (Civil Local Rule 3-2)

(Place an "X" in One Box Only) SAN FRANCISCO/OAKLAND SAN JOSE EUREKA-MCKINLEYVILLE

DATE: 11/23/2016

SIGNATURE OF ATTORNEY OF RECORD:

Handwritten signature of Gail L. Chung

ClassAction.org

This complaint is part of ClassAction.org's searchable class action lawsuit database and can be found in this post: [WARN Act, ERISA Class Action Filed Against Kohlberg Ventures](#)
