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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

PETER WOJCIECHOWSKI,

Plaintiff,

v.

KOHLBERG VENTURES, LLC,

Defendant.

Case No. [16-cv-06775-TSH](#)

**ORDER RE: MOTION FOR
SUMMARY JUDGMENT**

Re: Dkt. No. 91

I. INTRODUCTION

Pending before the Court is Defendant Kohlberg Ventures, LLC’s (“Kohlberg Ventures”) Motion for Summary Judgment pursuant to Federal Rule of Civil Procedure 56. ECF No. 91. Plaintiff Peter Wojciechowski, on behalf of himself and a certified class (referred to here collectively as “Wojciechowski”), filed an Opposition, ECF No. 97, and Defendant filed a Reply. ECF No. 99.

In his Complaint, ECF No. 1, Wojciechowski seeks to recover damages for alleged violations of the Worker Adjustment and Retraining Notification Act (the “WARN Act” or the “Act”), 29 U.S.C. §§ 2101–2109. He alleges that Kohlberg Ventures, his employer ClearEdge Power, LLC (“CEP LLC”) and its owner, ClearEdge Power, Inc. (“CEP Inc.”) (collectively referred to herein as “ClearEdge”) constitute a “single employer” under the WARN Act and are liable for violation of the Act’s notice requirement. Kohlberg Ventures, by this motion, seeks summary judgment against Wojciechowski on the grounds that “single employer” status is not a basis for imposing joint liability under the WARN Act, and that, in any event, Kohlberg Ventures was not Wojciechowski’s employer. Having considered the parties’ positions, relevant legal authority, and the record in this case, the Court **GRANTS** Kohlberg Ventures’ motion.

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II. BACKGROUND

A. The Parties

CEP LLC was formerly known as ClearEdge Power Corporation and, before then, was known as UTC Power Corporation. Declaration of John S. Eastburn, Jr. in support of Defendant Kohlberg Ventures, LLC’s Motion for Summary Judgment (“Eastburn Decl.”) ¶ 5. CEP Inc., a single member Delaware limited liability company, is the sole member of CEP LLC, meaning CEP Inc. owned 100% of CEP LLC. *Id.* The executive officers of CEP Inc. managed CEP LLC. *Id.* CEP LLC was headquartered at 195 Governor’s Highway in South Windsor, Connecticut. *Id.*

CEP Inc. was an Oregon corporation with its headquarters at 920 Thompson Place, Suite 100, Sunnyvale, California in 2013. Declaration of Shelley Hilderbrand in support of Defendant Kohlberg Ventures, LLC’s Motion for Summary Judgment (“Hilderbrand Decl.”) ¶ 2. Prior to that time, ClearEdge’s headquarters was located in Hillsboro, Oregon. *Id.*

In February 2013, CEP Inc. acquired UTC Power Corporation, a subsidiary of United Technologies Corporation. *Id.* Following the acquisition, ClearEdge manufactured 400 kilowatt (“kW”) high temperature phosphoric acid fuel cells (“PAFCs”) for commercial and residential applications at its two facilities in South Windsor, Connecticut (“South Windsor Facilities”). *Id.* ¶ 3. ClearEdge was the employer of record of the South Windsor Facilities employees and issued employee paychecks and W2 forms. *Id.* Neither CEP LLC nor CEP Inc. are defendants in this case. *See* Complaint, ECF No. 1.

Kohlberg Ventures is a limited liability company that operates as a venture capital firm that invests its own capital in, among other things, early stage cleantech companies. Eastburn Decl. ¶ 3. James Kohlberg is a Co-Founder and sole Member (owner) of Kohlberg Ventures. *Id.* ¶ 6. John S. Eastburn Jr. is a Co-Founder and Manager of Kohlberg Ventures. *Id.* ¶ 1. Kohlberg Ventures’ corporate address is and at all times was 3000 Alpine Road, Portola Valley, CA. *Id.* ¶ 3. Kohlberg Ventures never has manufactured any products, nor has it ever had officers or directors. *Id.* Neither CEP Inc. nor CEP LLC was a subsidiary of Kohlberg Ventures. *Id.* ¶ 8.

In February 2013, Kohlberg Ventures made its only investment in CEP Inc. by purchasing Series F stock, after which Kohlberg Ventures owned approximately 3% of the total outstanding

1 shares of CEP Inc. *Id.* ¶ 4; Declaration of Rene S. Roupinian in support of Plaintiff’s Opposition
2 to Defendant’s Motion to Dismiss (“Roupinian Decl.”) Ex. 2. At the time of the employment
3 terminations at issue in this case, various entities controlled by James Kohlberg owned a total of
4 approximately two-thirds of CEP Inc. stock. Eastburn Decl. ¶ 4; Roupinian Decl., Ex. 2. These
5 entities, each of which James Kohlberg was either the sole owner or controlling shareholder, were:
6 The James A. Kohlberg Revocable Trust, Bay Area Holdings Inc., KCEP Acquisition Company
7 LLC, KCEP 2 Acquisition Company LLC (collectively known as “Kohlberg Entities”), in addition
8 to the shares owned by Defendant Kohlberg Ventures LLC. Eastburn Decl. ¶ 4; Roupinian Decl.,
9 Ex. 2.

10 Kohlberg Ventures has never had an ownership interest in or right to control any of these
11 Kohlberg Entities. Eastburn Decl., ¶ 4. Nonetheless, in a March 30, 2014 letter to Samsung
12 Everland, a potential ClearEdge customer, Kohlberg stated that “As you may know, Kohlberg
13 Ventures, LLC and its affiliates (‘KV’) is the majority shareholders of ClearEdge, in which we
14 began investing in 2004. Over this period, KV has invested over \$130,000,000 million in the
15 company.” Roupinian Decl. Ex. 1. On March 10, 2014, Kohlberg Ventures loaned \$5 million
16 dollars to CEP Inc. to address CEP Inc.’s near-term financing needs. Eastburn Decl. ¶ 12. Thus,
17 Kohlberg Ventures’ financial involvement with ClearEdge was limited to its Series F investment
18 in and subsequent \$5 million loan to CEP Inc. *Id.* ¶ 8. Neither CEP Inc. nor CEP LLC was a
19 subsidiary of Kohlberg Ventures. *Id.*

20 Wojciechowski was an employee of ClearEdge in its South Windsor Facilities. On or
21 about April 25, 2014, ClearEdge terminated Wojciechowski without notice. Six days later, on
22 May 1, 2014, ClearEdge filed for bankruptcy.

23 **B. Procedural History**

24 Wojciechowski filed an adversary class action against ClearEdge in bankruptcy court,
25 alleging that CEP LLC and CEP Inc. were a “single employer” under the WARN Act and that it
26 violated the Act when it fired him and other employees without the sixty day advance notice
27 required by the Act. Wojciechowski entered into a settlement agreement with both ClearEdge
28 entities in which he and the class released all claims they had against them and their respective

1 estates, “excluding any third parties which may or may not be affiliated with Defendants
2 ClearEdge Power, Inc. and ClearEdge Power LLC, including but not limited to Kohlberg Ventures
3 LLC.” Kohlberg Ventures was not involved in the bankruptcy proceedings or in settlement
4 negotiations. The bankruptcy court approved the settlement agreement, the ClearEdge bankruptcy
5 estate paid a portion of the class members’ WARN Act wages and benefits, and the case closed
6 soon thereafter.

7 Wojciechowski then filed this putative class action on November 11, 2016, ECF. No. 1,
8 seeking from Kohlberg Ventures, as a “single employer” with ClearEdge, an award for the balance
9 of the WARN Act wages and benefits, i.e., what the Class is owed under the Act less the amount
10 received from the ClearEdge estate. On February 7, 2017, Kohlberg Ventures moved to dismiss
11 Wojciechowski’s claim on the basis of claim preclusion, ECF No. 20, and, on April 11, 2017, the
12 district court granted Kohlberg’s motion with prejudice. ECF No. 35.

13 The Ninth Circuit reversed. In *Wojciechowski v. Kohlberg Ventures, LLC*, 923 F.3d 685
14 (9th Cir.), *cert. denied sub nom. Kohlberg Ventures, LLC v. Wojciechowski*, 140 S. Ct. 491, 205 L.
15 Ed. 2d 319 (2019), the Ninth Circuit held that claim preclusion does not bar Wojciechowski’s
16 current claim because the settlement agreement — in particular, the intent of the settling parties —
17 determines the preclusive effect of the previous action and the settlement agreement explicitly did
18 not release Wojciechowski and the class’ claims against Kohlberg. ECF Nos. 41 and 44. The
19 Ninth Circuit stated in a footnote that, while liability under the WARN Act extends only to a
20 person’s “employer,” 29 U.S.C. § 2104(a)(1), the term “employer” may include “parent and
21 subsidiary companies ‘depending on the degree of their independence’ from one another and
22 considering ‘(i) common ownership, (ii) common directors and/or officers, (iii) de facto exercise
23 of control, (iv) unity of personnel policies emanating from a common source, and (v) the
24 dependency of operations.’” *Wojciechowski*, 923 F.3d at 688, n.3, (citing *Childress v. Darby*
25 *Lumber, Inc.*, 357 F.3d 1000, 1006 (9th Cir. 2004), quoting *Int’l Bd. of Teamsters v. Am. Delivery*
26 *Serv. Co.*, 50 F.3d 770, 775 (9th Cir. 1995)).

27 On May 8, 2019, the case was remanded and reassigned to the undersigned. ECF No. 42.
28 On November 4, 2019, Wojciechowski’s Class Certification Motion was granted, certifying a

1 class comprised of Wojciechowski and all similarly situated former employees who worked at or
2 reported to one of ClearEdge Power’s Facilities in Connecticut, who were terminated without
3 cause on or about April 25, 2014 and within 30 days of that date or who were terminated without
4 cause as the reasonably foreseeable consequence of the mass layoffs and/or plant closings ordered
5 on or about April 25, 2014. ECF No. 61.

6 Kohlberg Ventures has made the instant motion seeking an order granting summary
7 judgment as a matter of law on the grounds that “single employer” status is not a basis for
8 imposing joint liability pursuant to the WARN Act and that, in any event, Kohlberg Ventures was
9 not the employer of Wojciechowski or the class.

10 **C. Factual Background**

11 **1. Nature of the relationship between ClearEdge and Kohlberg Ventures**

12 Kohlberg Ventures avers that the day-to-day management of ClearEdge’s business was
13 controlled by CEP Inc.’s officers and managers under the leadership of David Wright, the Chief
14 Executive Officer (“CEO”) of CEP Inc. Hilderbrand Decl. ¶ 8; Eastburn Decl. ¶ 9. However, it is
15 undisputed that Kohlberg Ventures Manager Eastburn twice served as the interim Chief Operating
16 Officer (“COO”) of CEP Inc. From January to April 2012, Eastburn was hired by then-CEO Russ
17 Ford to be the interim COO. Eastburn Decl. ¶ 6. On or around April 7, 2014, following the
18 resignation of ClearEdge’s COO Joseph Triompo, Eastburn again became CEP Inc.’s interim
19 COO and President for approximately three weeks until ClearEdge’s bankruptcy filing on May 1,
20 2014. *Id.*

21 Other than Eastburn, Kohlberg Ventures asserts that neither Kohlberg, nor any other
22 Kohlberg Ventures or Kohlberg Entities employees or representatives were officers or employees
23 of ClearEdge. *Id.* Even so, Wojciechowski claims that Eastburn was involved in the day-to-day
24 operations and management of ClearEdge by (1) preparing bonus recommendations for ClearEdge
25 employees, which Kohlberg Ventures asserts was in his capacity as one of three members of the
26 Compensation Committee of the ClearEdge Board of Directors (the “ClearEdge Board” or the
27 “Board”), Reply Declaration of John S. Eastburn, Jr. in support of Defendant’s Motion for
28 Summary Judgment (“Eastburn Reply Decl.”) ¶ 6, Roupinian Decl., Ex. 4, (2) setting agendas for

1 ClearEdge board meetings, which Kohlberg Ventures asserts was part of his role as Secretary and
2 for ClearEdge management meetings after he became interim COO and President in April 2014,
3 and (3) advising on next steps regarding ClearEdge's intellectual property counsel in a April 30,
4 2014 email, Roupinian Decl. Ex. 4, which Kohlberg Ventures asserts was performed as
5 ClearEdge's interim COO and President, with the knowledge of ClearEdge's Chief Financial
6 Officer, Gloria Fan, and only because ClearEdge's in-house counsel, Jennifer Adamy, was no
7 longer employed by ClearEdge. Roupinian Decl. Ex. 4, Eastburn Reply Decl. ¶ 9.

8 Kohlberg Ventures asserts that ClearEdge's CEO David Wright did not work for Kohlberg
9 Ventures or any entity affiliated with James Kohlberg. Eastburn Decl. ¶ 9. Wojciechowski
10 disputes this, claiming that Wright's employment was ultimately controlled by James Kohlberg,
11 who directed his firing. Roupinian Decl. Ex. 5. On March 31, 2014, Kohlberg and Steven
12 Gerbsman of Gerbsman Partners, an independent consultant engaged by the Board to assist with
13 bankruptcy preparations, had an email exchange where Kohlberg's opinion and decision was
14 sought concerning Wright's retention or termination. *Id.*

15 **2. Constitution of ClearEdge Board**

16 James Kohlberg was the Chairman of the ClearEdge Board beginning in 2004 and
17 remained in that position until after ClearEdge's bankruptcy filing in 2014, but he was not an
18 officer or employee of either CEP Inc. or CEP LLC. Eastburn Decl. ¶ 6. On September 26, 2006,
19 John Eastburn became a Member of the ClearEdge Board and remained a Board member until
20 after ClearEdge's bankruptcy filing in 2014. *Id.* On January 22, 2008, the ClearEdge Board
21 appointed Eastburn as its Secretary. *Id.*

22 As of February 18, 2014, two of the three seats on the ClearEdge Board's executive and
23 compensation committees were held by Kohlberg Ventures' Kohlberg and Eastburn and Kohlberg
24 Ventures held one of the three seats on both the Board's nominating committee and audit
25 committee by Kohlberg and Eastburn, respectively. Roupinian Decl. Ex. 18.

26 During 2013 and 2014, there were five other members of the ClearEdge Board in addition
27 to John Eastburn and James Kohlberg: Frank Marshall, Phil Angelides, Kenneth DeFontes, Andy
28 Geisse, and David B. Wright. Eastburn Decl. ¶ 7. Kohlberg Ventures states that Marshall,

1 Angelides, DeFontes, Geisse, and Wright were selected as Board members based on their subject
2 matter expertise and perceived value to ClearEdge. *Id.* None of them were ever employed or
3 retained by Kohlberg Ventures or any Kohlberg Entity. *Id.* An outside search firm was retained
4 to locate potential Board members and it recommended DeFontes. *Id.* Kohlberg Ventures
5 contends that, as a result, a supermajority of the ClearEdge Board of Directors – five of the seven
6 members – was unaffiliated with Kohlberg Ventures or James Kohlberg. *Id.* Eastburn avers that
7 neither he, Kohlberg Ventures, James Kohlberg, nor any entity affiliated with James Kohlberg had
8 an agreement with any member of the ClearEdge Board to vote any particular way on matters
9 subject to a ClearEdge Board vote. *Id.* ¶ 10.

10 Nevertheless, Wojciechowski asserts that Board members Angelides, Geisse and Wright
11 had prior business and/or personal relationships with Kohlberg and were recommended to join the
12 ClearEdge board by Kohlberg.¹ Roupinian Decl. Ex. 7, Kohlberg Depo. 33:2-34:5, 35:3-15;
13 Roupinian Decl. Ex. 8, Kohlberg Depo. 30:15-31:23.

14 Wojciechowski further claims that ClearEdge’s board of directors failed to observe
15 corporate formalities, including operating without board committees, Roupinian Decl. Ex. 18, and
16 keeping minutes of its meetings. Roupinian Decl. Ex. 17. Kohlberg Ventures objects that the
17 email Wojciechowski relies upon shows only that Eastburn said he did not have certain
18 ClearEdge’s Board minutes in his possession. Kohlberg Ventures further asserts that ClearEdge
19 maintained minutes of its Board meetings since at least 2006 through 2013 and that it previously
20 had Board committees and re-started them in February 2014. Eastburn Reply Decl. ¶ 2.

21 **3. No Shared Personnel or Human Resources Policies**

22 ClearEdge had its own Human Resources department and employed its own Human
23 Resources staff that did not work for or provide services to Kohlberg Ventures. Hilderbrand Decl.
24 ¶ 6; Eastburn Decl. ¶ 9. At various times, ClearEdge had a Vice President of Human Resources
25 who, along with the Human Resources department, managed ClearEdge’s labor relations.

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27 _____
28 ¹ Wojciechowski claims Kohlberg was also responsible for Frank Marshall being on the
ClearEdge Board, but Kohlberg testified that Marshall was “connected to the company before our
investment.” Kohlberg Depo. 34:22-35:2.

1 Eastburn Decl. ¶ 9. Neither Kohlberg Ventures nor any entity affiliated with James Kohlberg ever
2 shared a human resource information system or other personnel, benefits, recordkeeping, or
3 payroll system with ClearEdge, nor otherwise had any shared or common personnel practices.
4 Hilderbrand Decl. ¶ 6, Eastburn Decl. ¶ 9.

5 ClearEdge maintained an employee handbook that established the employment terms and
6 conditions governing its employees. Hilderbrand Decl. ¶ 8. Kohlberg Ventures was not involved
7 in the drafting or enforcement of the ClearEdge employee handbook. *Id.* Neither Kohlberg
8 Ventures nor any entity affiliated with James Kohlberg ever had a Shared Services Agreement
9 with ClearEdge. Eastburn Decl. ¶ 9. ClearEdge employed its own in-house legal counsel,
10 Jennifer Adamy, who was based in South Windsor, Connecticut. Hilderbrand Decl. ¶ 6; Eastburn
11 Decl. ¶ 9.

12 Kohlberg Ventures and ClearEdge did not jointly train their employees, nor did they share
13 training or instruction policies or practices. Hilderbrand Decl. ¶ 6. ClearEdge trained its own
14 employees without assistance from Kohlberg Ventures. *Id.* Neither Kohlberg Ventures nor any
15 entity affiliated with James Kohlberg ever had any involvement in hiring, training, disciplining or
16 supervising ClearEdge employees or otherwise provided training or instruction policies or
17 practices. Eastburn Decl. ¶ 8. At no time did Kohlberg Ventures employ, retain or utilize any
18 ClearEdge employee to provide services at Kohlberg Ventures. *Id.* ¶ 9.

19 Kohlberg Ventures asserts that ClearEdge controlled all of its own labor and employee
20 relations without involvement by Kohlberg Ventures, Eastburn Decl. ¶ 8, and that ClearEdge was
21 not required to and did not seek approval from Kohlberg Ventures before making operational or
22 employee relations related decisions, including the hiring and firing of employees. Hilderbrand
23 Decl. ¶ 7. Any activities performed on behalf of ClearEdge, Kohlberg Ventures states, were
24 performed in the capacity of Kohlberg and Eastburn as ClearEdge Board members (and for
25 Eastburn as interim COO and President after April 7, 2014) and alongside other Board members.
26 Roupinian Decl. Ex. 33; Eastburn Reply Decl. ¶ 8.

27 **4. Operational Connections Between ClearEdge and Kohlberg Ventures**

28 Neither Kohlberg Ventures nor any entity affiliated with James Kohlberg ever shared

1 administrative or purchasing systems with ClearEdge, ever interchanged supervisors or equipment
2 with ClearEdge, or ever commingled finances with ClearEdge. Hilderbrand Decl. ¶ 6; Eastburn
3 Decl. ¶ 9. Neither Kohlberg Ventures nor any entity affiliated with James Kohlberg ever had joint
4 bank accounts with ClearEdge nor did the businesses have the ability to access each other's bank
5 accounts or finances. Eastburn Decl. ¶ 9. Neither Kohlberg Ventures nor any entity affiliated
6 with James Kohlberg ever served as a guarantor of loans or credit extended to ClearEdge, or vice
7 versa, *id.* ¶ 10, nor did they own any real property or equipment together with ClearEdge, nor did
8 they rent or lease real property or equipment to or from ClearEdge. Hilderbrand Decl. ¶ 7;
9 Eastburn Decl. ¶ 9. ClearEdge did not purchase goods from or sell goods to Kohlberg Ventures,
10 nor did it share equipment or other property with Kohlberg Ventures. Hilderbrand Decl. ¶ 7.

11 Kohlberg Ventures asserts that neither it nor any entity affiliated with James Kohlberg
12 ever had any involvement in writing, approving, or negotiating purchase orders, bidding on
13 projects, approving projects, facilitating sales, or procuring equipment or materials for ClearEdge.
14 Hilderbrand Decl. ¶ 7; Eastburn Decl. ¶ 8. Other than during the time Eastburn was appointed
15 Interim COO and President between April 7, 2014 and May 1, 2014, he did not have or perform an
16 operational role with ClearEdge. Eastburn Reply Decl. ¶ 4.

17 Wojciechowski, for his part, asserts that in 2014, Eastburn was involved in the operations
18 of ClearEdge, including management of the sales process and contractors. He points to an email
19 to ClearEdge personnel on March 10, 2014 in which Eastburn wrote: "I've been asked to review
20 the cycle – what we buy, from whom, controls, how we change part #s, inventory, required
21 purchasing timeframes etc. In our meeting I'd like to dig in to the relevant processes, review the
22 agreements with our vendors, understand your organization, map to engineering resources etc."
23 Roupinian Decl. Ex. 9.

24 Leading up to the decision to file bankruptcy, Eastburn and Kohlberg along with
25 ClearEdge's CFO created "Plan C," an operational plan to achieve profitability by January 2015
26 by implementing cost reductions of between 30-50% in all areas, including plant overhead, service
27 and installation, research and development, and sales. Roupinian Decl. Ex. 9. In March and April
28 2014, Eastburn was involved in cost analysis of ClearEdge's equipment, installation and payments

1 processes, and discussions of pricing for parts, and he directed ClearEdge payments to vendors.
2 *Id.* Eastburn was also involved in discussions about how to convince ClearEdge’s vendors to
3 resume business with ClearEdge. *Id.*

4 On March 24, 2014, Eastburn sent out an email relaying what was discussed during a
5 Board call and outlining a “Go Forward Action Plan” that directed ClearEdge’s top executives to
6 call on ClearEdge’s twenty most critical vendors/creditors and to follow up with updates. *Id.* For
7 the initial call Eastburn wrote out a three-paragraph script that he instructed the three Chief
8 Officers of ClearEdge to read to vendors/creditors to “stabilize” them. *Id.*

9 **5. Demise of ClearEdge**

10 ClearEdge was not generating cash flow from its operations sufficient to sustain its
11 operations and growth and thus required occasional infusions of new equity or debt financing.
12 Eastburn Decl. ¶ 11. In January 2014, ClearEdge engaged Robert W. Baird & Co. Incorporated
13 (“Baird”), a major investment capital firm, to raise new equity capital. *Id.* ¶ 12. On March 10,
14 2014, Kohlberg Ventures loaned CEP Inc. \$5 million to address CEP Inc.’s near-term financing
15 needs. *Id.*

16 ClearEdge management provided projections to the Board at a March 17, 2014 meeting
17 reflecting an expected cash shortfall in April 2014 due, in part, to expected sales being delayed to
18 the May/June 2014 timeframe. *Id.* ¶ 13. At that time, ClearEdge was negotiating for financing
19 with affiliates of Macquarie Group Limited, an Australian multinational investment bank and
20 financial services company (“Macquarie”), for a \$20 million loan and with two entities affiliated
21 with James Kohlberg for a \$25 million loan (“Loan Proposals”). *Id.* Both Loan Proposals were
22 subject to conditions precedent that ultimately were not satisfied. *Id.* The Loan Proposal by the
23 two entities affiliated with James Kohlberg was subject to three conditions: (1) a firm purchase
24 order regarding a Samsung Everland project in South Korea with KHNP, a condition that was also
25 part of the Macquarie Loan Proposal;² (2) the Macquarie affiliate \$20 million loan funding; and

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27 ² The Macquarie loan did not originally include the same requirement as the Kohlberg-affiliated
28 entities that Samsung remove a contingency clause in its order. However, after its initial decision
to provide \$20 million in financing to ClearEdge, Macquarie subsequently made its financing
offer subject to the two Kohlberg Affiliates providing their \$25 million financing with the

1 (3) a purchase order from Verizon for a minimum of ten ClearEdge units. *Id.* ¶ 14. These three
2 funding conditions were not satisfied and the two entities affiliated with James Kohlberg did not
3 provide the loan. *Id.*

4 With regard to the first financing condition, on March 20, 2014, ClearEdge signed an
5 equipment purchase order with Samsung Everland in South Korea for 70 fuel cell units amounting
6 to approximately \$101,000,000 in new business. *Id.* ¶ 15. However, the Samsung Everland
7 purchase order contained a “Contingency Covenant,” which required that a public works project in
8 South Korea known as the “Busan Project” had to have been officially approved by the local
9 South Korean governmental entity (“KHNP”) and a Special Purpose Company be formed among
10 Samsung Everland, the government entity and the local power utility in order for the Samsung
11 Everland purchase order to be effective. *Id.* The Contingency Covenant provided that, unless
12 Busan Project was officially approved, the Samsung Everland purchase order was “void.” *Id.*

13 In anticipation of the March 22, 2014 Board meeting, Eastburn provided the Board with an
14 agenda that included a breakdown of Dorsey & Whitney LLP’s (“Dorsey’s”) billable rates for the
15 Board’s consideration depending on whether the law firm would be retained for advice only or for
16 the restructuring of the company, i.e., bankruptcy. Eastburn Reply Decl. Ex. A. The agenda also
17 provided some brief notes regarding why Dorsey was being recommended, including that the
18 partners had been practicing for over twenty years, they had labor counsel as part of their staff,
19 and they were recommended by Board advisor Gerbsman. Resumes of the Dorsey attorneys were
20 attached to the agenda email for the Board’s review and consideration. *Id.* On March 24, 2014,
21 only after the Board meeting, Eastburn asked Dorsey bankruptcy attorney Stephen T. O’Neill
22 (“O’Neill”) to send an engagement letter. Roupinian Decl. Ex. 6. On March 27, Kohlberg
23 authorized the retention of O’Neill as insolvency counsel. Roupinian Decl. Ex. 25.
24 Wojciechowski, however, asserts that Eastburn and Kohlberg directed O’Neill’s retention without
25 input from other members of the ClearEdge Board. *Id.*

26 In late March 2014, Neal Starling, ClearEdge’s Vice President of Sales and Marketing,
27

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Kohlberg affiliates’ contingencies satisfied. Eastburn Reply Decl. ¶ 14 & Ex. E.

1 CEO Wright, and Eastburn traveled to South Korea to negotiate with Samsung Everland for the
2 removal of the Contingency Covenant. Eastburn Decl. ¶ 16. This Samsung could not do.
3 Consequently, on March 31, 2014, Kohlberg sent an email to Eastburn saying, “Time to file,
4 Come home.” Roupinian Decl. Ex. 26. That same day, Kohlberg emailed O’Neill telling him to
5 prepare to file for bankruptcy for ClearEdge. Roupinian Decl. Ex. 12. Kohlberg then emailed the
6 Board to tell them he advised bankruptcy counsel to begin preparations file and said the Board
7 would “approve the necessary resolutions” at the meeting the next day. *Id.* Ex. 15.

8 Wright replied to Kohlberg and the Board the same day, saying he was “very disappointed
9 that we announced the company closing via email prior to holding the board meeting.” *Id.* Ex. 14.
10 He stated that “the company closure [] should have been a Board decision” and ended by
11 repeating that he was “extremely disappointed at this decision.” *Id.* Wright followed this with
12 another email to Kohlberg in which he wrote “Jim, I am absolutely amazed you made this decision
13 without looking at alternatives and by email.” *Id.* Ex. 16, Deposition of James A. Kohlberg
14 (“Kohlberg Depo.”) 93:14-95:7. Wright explained the reasons he thought bankruptcy was
15 premature and implored him to reconsider, saying, “Do not walk away.” Roupinian Decl. Ex. 16.

16 Although Kohlberg recommended that the Board pursue bankruptcy, at the next meeting
17 on April 1, 2014, the Board disregarded Kohlberg’s decision and did not vote to file for
18 bankruptcy protection. Instead, the Board “authorized the pursuit of three potential plans for
19 moving ClearEdge forward.” Eastburn Decl. ¶ 17.

20 Between March 31, when Wojciechowski alleges Kohlberg unilaterally decided to place
21 ClearEdge in bankruptcy, and April 22, when the Board actually decided to cease operations and
22 file for bankruptcy, the ClearEdge Board continued to engage in the decision-making process over
23 multiple Board meetings. Eastburn Decl., ¶¶ 19-20; Eastburn Reply Decl. ¶ 13, Exs. A-D. The
24 Board considered different ways to sustain ClearEdge’s business, including continued negotiations
25 with Samsung Everland to have the Contingency Covenant removed, pursuit of collections of cash
26 from customer invoices, delaying the payment of vendor accounts, and raising debt and
27 investment capital from multiple sources. *See, e.g.*, Eastburn Reply Decl., Ex. A-D. During this
28 time, ClearEdge regularly assessed these efforts and whether to proceed with bankruptcy. *See,*

1 e.g., Eastburn Reply Decl., Ex. B. For example, in the April 1, 2014 Board meeting agenda, the
2 topics of discussion included reports from Wright and Gerbsman, explore sale opportunities, board
3 duties and obligations, exercise of best good faith business judgment, exposure for breach of
4 fiduciary duty, and Chapter 11 process timing and possible outcomes. *Id.*

5 On April 6, 2014, Wright wrote a letter to the ClearEdge Board saying that he felt they
6 were receiving “prejudiced advice” from the bankruptcy attorneys about the urgency of filing and
7 stated that he will vote against a plan to file bankruptcy. Roupinian Decl. Exs. 13 and 16,
8 Kohlberg Depo. 108:5-110:3. At a meeting that same day, the Board again voted not to file for
9 bankruptcy at that time. Eastburn Reply Decl. ¶ 7. Instead, the Board asked Eastburn to draft
10 “Plan C,” which involved downsizing the business but continuing operations, as another option to
11 explore and requested that ClearEdge seek additional financing sources. *Id.*, Eastburn Decl. ¶¶ 17-
12 19. Thereafter, the Board worked on three plans pertaining to the future of ClearEdge: “Plan A”
13 was to obtain additional capital, “Plan B” was to file bankruptcy, and “Plan C” was the new
14 downsized business plan, which was delivered to the Board on April 18, 2014. Eastburn Decl. ¶
15 19. In the April 18, 2014 Board meeting agenda, too, topics of discussion included a review of the
16 recent sales activities and vendor accounts; the status of efforts to raise capital through Macquarie,
17 Herbert, Gerbsman, and Kohlberg Ventures; a “Decision Point” regarding whether to file for
18 bankruptcy; and the Plan C. Eastburn Reply Decl. Ex. C.

19 With the \$45 million in interim debt financing being uncertain, and not having obtained
20 other sources of short-term financing beyond the \$5 million loan from Kohlberg Ventures,
21 ClearEdge faced running out of the funds required to operate. Eastburn Decl. ¶ 18. In early April
22 2014, the ClearEdge Board directed its funding consultant Baird to focus its attention on six to
23 eight venture capital and private equity groups that might have an interest in investing in
24 ClearEdge and could make decisions to invest quickly. *Id.* ¶ 12. Starting in 2007, ClearEdge had
25 retained the law firm Davis Polk & Wardwell as its outside corporate counsel and, in April 2014,
26 again sought legal advice during the time period leading up to ClearEdge’s bankruptcy filing. *Id.*
27 ¶ 18. In addition, from April 6-8, 2014, Samsung Everland executives traveled to Northern
28 California to meet with James Kohlberg, John Eastburn, and ClearEdge executives to continue

1 discussions about the Contingency Covenant. *Id.* ¶ 17.

2 In connection with the Board’s Plan A, in early April 2014, Eastburn participated on a
3 conference call with Kohlberg, CFO Fan, Gavin Herbert, an existing ClearEdge shareholder not
4 affiliated with Kohlberg Ventures or any entity affiliated with James Kohlberg, and Bill Cox,
5 Herbert’s financial advisor. *Id.* ¶ 19. Following the early April 2014 call, ClearEdge worked with
6 one of Herbert’s affiliates, Shea Ventures, on due diligence for potential financing. *Id.* ¶ 19.
7 However, on April 22, 2014, Eastburn informed the Board by email that Shea Ventures declined
8 to invest in ClearEdge, explaining that in its experience with a clean-tech business with negative
9 gross margins, the amount and duration of the required financing commitment was indeterminate.
10 *Id.*

11 Finally, ClearEdge ran out of operating funds before it was able to satisfy the loan
12 conditions for the \$45 million in interim debt financing or locate other financing. *Id.* ¶ 20.
13 Wojciechowski points to a March 31, 2014 email from Fan to Wright, Kohlberg, Eastburn, and
14 Gerbsman to inform them that Macquarie Bank had approved the \$20 million loan to ClearEdge,
15 Roupinian Decl. Ex. 13, but this was premature, as Macquarie subsequently made its financing
16 offer subject to the \$25 million funding by the two Kohlberg Affiliates. Eastburn Reply Decl. ¶ 14
17 Ex. E.

18 On April 22, 2014, the full Board held a telephonic meeting and by unanimous Board vote,
19 made the decision to shut down ClearEdge’s operations, file for Chapter 11 bankruptcy, and
20 authorize the discharge of employees not needed to sustain ClearEdge through the bankruptcy
21 process, including Wojciechowski and other employees at its South Windsor Facilities. Eastburn
22 Decl. ¶ 20. Kohlberg Ventures avers that the decisions to shut down ClearEdge’s operations, file
23 for Chapter 11 bankruptcy, and implement the employment terminations at issue in this case were
24 made by a unanimous vote by the ClearEdge Board that followed Board procedures and not by
25 Kohlberg Ventures or any entity affiliated with James Kohlberg. *Id.* ¶ 20.

26 However, Wojciechowski disputes this, asserting that the April 22 Board vote was just a
27 formality after the decision to file bankruptcy had already been unilaterally made by Kohlberg on
28 behalf of Kohlberg Ventures. Roupinian Decl. Ex. 15. Wojciechowski also claims that the final

1 bankruptcy decision had already been made by Kohlberg Ventures over the objection of Wright,
2 as demonstrated by the March 31, 2014 email from Wright to Kohlberg in which he wrote, “Jim, I
3 am absolutely amazed you made this decision without looking at alternatives and by email.”
4 Deposition of James A. Kohlberg, 93:14-95:7, 108:5-110:3, Roupinian Decl. Ex. 16.

5 On April 24, 2014, ClearEdge closed its manufacturing operation in South Windsor,
6 Connecticut and terminated employees working there, after efforts to raise capital and financing
7 failed. Hilderbrand Decl. ¶ 9; Eastburn Decl. ¶ 21. Wojciechowski asserts ClearEdge did not shut
8 down on April 24, 2014 but kept operations open in order to market and sell itself in bankruptcy.

9 Along with other Board members, Kohlberg and Eastburn were involved in the preparation
10 of ClearEdge’s WARN notice to employees, including the selection of employees to be
11 terminated, the language, timing, means of giving the notice, and other communications to
12 employees. Roupinian Decl. Exs. 33 and 34; Eastburn Reply Decl. ¶ 8. Wojciechowski, however,
13 argues that Kohlberg Ventures was in control of the WARN Act notice and points to two email
14 chains in particular that show (1) on April 19, 2014, Eastburn directed ClearEdge employee
15 Arianna Kalian to proceed with the reduction in force mass layoff on April 22, 2014, Roupinian
16 Decl., Ex. 10, and (2) on April 29, 2014, Eastburn sent an email to ClearEdge CFO Gloria Fan in
17 which he declared, “We should make an additional cut [in ClearEdge personnel] as soon as the
18 bankruptcy is filed” and states “[h]ere are the names that I think should be on the list.” *Id.*
19 Kohlberg Ventures responds that these are not directives but recommendations regarding the
20 employees to be terminated.

21 On April 25, 2014, Wojciechowski and class members were terminated without any
22 advance notice. Plaintiff received a hand-delivered letter dated April 25, 2014 which states:
23 “Effective immediately, except to the extent there likely will be a small group involved in winding
24 up operations for the next 30 to 90 days, ClearEdge is permanently laying off all of its employees
25 at its South Windsor, Connecticut facilities, which includes you, and is closing its operations at
26 these locations... This unfortunately means that your employment is being terminated and has
27 ended at ClearEdge.” The April 25th Letter further states: “...ClearEdge has just learned that its
28 significant customer will not release its contract contingencies for many months. Moreover, the

1 Company’s potential lenders and equity investors similarly have declined to change their position
2 and finalize any additional financing or equity infusion. Because these efforts have not been
3 successful, the Company has found itself in business circumstances that were not reasonably
4 foreseeable at an earlier time, and it instead has been placed in a position that it meets the
5 standards for consideration as a “faltering company” under the WARN Act.” Letter dated April
6 25, 2014, Ex. 35.

7 On May 1, 2014, ClearEdge initiated its Chapter 11 bankruptcy in the U.S. District Court
8 for the Northern District of California. Hilderbrand Decl. ¶ 10.

9 **III. LEGAL STANDARD**

10 Summary judgment is proper where there is “no genuine dispute as to any material fact and
11 the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). The party moving
12 for summary judgment bears the initial burden of identifying those portions of the pleadings,
13 discovery and affidavits that demonstrate the absence of a genuine issue of material fact. *Celotex*
14 *Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Material facts are those that may affect the outcome
15 of the case, and a dispute as to a material fact is genuine if there is sufficient evidence for a
16 reasonable jury to return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477
17 U.S. 242, 248 (1986).

18 If the moving party meets its initial burden, the opposing party must then set forth specific
19 facts showing that there is some genuine issue for trial. Fed. R. Civ. P. 56(c)(1); *Anderson*, 477
20 U.S. at 250. All reasonable inferences must be drawn in the light most favorable to the
21 nonmoving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587
22 (1986); *Olsen v. Idaho State Bd. of Med.*, 363 F.3d 916, 922 (9th Cir. 2004). However, it is not
23 the task of the Court “to scour the record in search of a genuine issue of triable fact.” *Keenan v.*
24 *Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996). The nonmoving party has the burden “to identify with
25 reasonable particularity the evidence that precludes summary judgment.” *Id.* Thus, “[t]he district
26 court need not examine the entire file for evidence establishing a genuine issue of fact, where the
27 evidence is not set forth in the opposing papers with adequate references so that it could
28 conveniently be found.” *Carmen v. S.F. Unified Sch. Dist.*, 237 F.3d 1026, 1031 (9th Cir. 2001);

1 *Christian Legal Soc. Chapter of Univ. of Cal. v. Wu*, 626 F.3d 483, 488 (9th Cir. 2010) (“Judges
2 are not like pigs, hunting for truffles buried in briefs.”) (citations omitted).

3 “While the evidence presented at the summary judgment stage does not yet need to be in a
4 form that would be admissible at trial, the proponent must set out facts that it will be able to prove
5 through admissible evidence.” *Norse v. City of Santa Cruz*, 629 F.3d 966, 973 (9th Cir. 2010)
6 (citing Fed. R. Civ. P. 56(c) (“An affidavit or declaration used to support or oppose a motion must
7 be made on personal knowledge, set out facts that would be admissible in evidence, and show that
8 the affiant or declarant is competent to testify on the matters stated.”)). To survive summary
9 judgment, the nonmoving party “must set forth non-speculative evidence of specific facts, not
10 sweeping conclusory allegations.” *Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d
11 1047, 1061 (9th Cir. 2011) (citations omitted).

12 IV. DISCUSSION

13 A. The Requirements of the WARN Act

14 The WARN Act requires certain employers to provide sixty-days’ notice to employees
15 prior to a “plant closing” or a “mass layoff.” 29 U.S.C. § 2102(a). An employer who fails to
16 comply with the WARN Act’s provisions is liable to each affected former employee for back pay
17 and benefits for up to sixty days, plus attorney’s fees. *Id.* § 2104(a).

18 A “plant closing” means “the permanent or temporary shutdown of a single site of
19 employment ... if the shutdown results in an employment loss at the single site of employment
20 during any 30–day period for 50 or more employees excluding any part-time employees.” *Id.* §
21 2101(a)(2). A “mass layoff” means a reduction in force which—(A) is not the result of a plant
22 closing; and (B) results in an employment loss at the single site of employment during any 30–day
23 period for—(i) (I) at least 33 percent of the employees (excluding any part-time employees); and
24 (II) at least 50 employees (excluding any part-time employees); or (ii) at least 500 employees
25 (excluding any part-time employees). *Id.* § 2101(a)(3). Consequently, whether it is a plant closing
26 or a mass layoff, when at least fifty full-time employees are affected, the WARN Act’s notice
27 requirement is triggered.

28 There is no dispute that the reduction in force and subsequent closure of ClearEdge’s

1 South Windsor plant triggered the Act’s notice requirement and that such notice was not provided
2 to Wojciechowski and the class.

3 **B. “Single Employer” Status Determines Coverage by the WARN Act**

4 Under the “single employer” test, multiple companies may be treated as a single employer
5 under the WARN Act. *Childress v. Darby Lumber, Inc.*, 357 F.3d 1000, 1005–06 (9th Cir. 2004).
6 The WARN Act single employer doctrine incorporates the existing legal rules for this doctrine.
7 20 C.F.R. § 639.3(a)(2), *see also* DOL Preamble to 20 C.F.R. § 639.3(a), 54 Fed. Reg. 16,041, 045
8 (April 20, 1989) (“The intent of the regulatory provision relating to independent contractors and
9 subsidiaries . . . is intended only to summarize existing law that has developed under State
10 Corporations laws and such statutes as the [National Labor Relations Act] NLRA, the Fair Labor
11 Standards Act (FLSA) and the Employee Retirement Income Security Act (ERISA). . . . [T]he
12 regulation is not intended to foreclose any application of existing law or to identify the source of
13 legal authority for making determinations of whether related entities are separate...”).

14 The “single employer” determination neither confers nor precludes statutory liability: the
15 single employer test “does not determine joint liability . . . but instead determines whether a
16 defendant can meet the statutory criteria of an employer” for applicability of the relevant statutory
17 scheme. *Anderson v. Pacific Maritime Association*, 336 F.3d 924, 928, 929 (9th Cir. 2003) (in
18 assessing coverage under Title VII, stating, “We use the integrated enterprise test to judge the
19 magnitude of interconnectivity for determining statutory coverage”) (*citing Kang v. U. Lim. Am.,*
20 *Inc.*, 296 F.3d 810, 815–16 (9th Cir. 2002) (applying the “integrated enterprise” test in order to
21 determine whether two or more employers are so interrelated that they form an integrated
22 enterprise such that a defendant can meet the statutory criteria of an “employer” for Title VII
23 applicability)). Accordingly, if analysis of the factors results in finding that two businesses are
24 functionally a “single employer” and are therefore covered under the statute, then liability of the
25 “single employer” may subsequently be assessed within the statutory framework. *See, e.g., Chao*
26 *v. A-One Med. Servs., Inc.*, 346 F.3d 908, 917 (9th Cir. 2003) (affirming the district court’s
27 application of the three-element, FLSA-specific definition of “enterprise” contained in 29 U.S.C. §
28 203(r)(1) to analyze whether two different organizational units could be grouped together as a

1 “single enterprise” for the purpose of determining coverage under FLSA, § 207.)

2 Once the coverage determination has been made, then the analysis of liability for a
3 violation of the WARN Act may be made. *See, e.g., Childress*, 357 F. 3d at 1007 (stating that “the
4 relevant factors, taken as a whole, support the district court’s finding that [two companies]
5 operated as a single employer for the purposes of the WARN Act, and that the WARN Act applies
6 to their conduct.”). Hence, Kohlberg Ventures’ argument that a determination of status as a
7 “single employer” cannot form the basis of a subsequent finding of liability is going a step too far.
8 If the WARN Act applies to an employer’s conduct, then violation of the WARN Act subjects that
9 employer to liability to those hurt by such conduct.

10 Here, there is no dispute that the WARN Act applies to ClearEdge and that, with only one
11 Member and one Manager, Kohlberg Ventures would not, on its own, be covered by the Act.
12 However, if ClearEdge and Kohlberg Ventures are determined to be a single employer, the
13 WARN Act would apply equally to Kohlberg Ventures.

14 **C. The “Single Employer” Test**

15 Under the WARN Act, independent contractors and subsidiaries which are wholly or
16 partially owned by a parent company are treated as separate employers or as a part of the parent or
17 contracting company “depending upon the degree of their independence from the parent.” 20
18 C.F.R. § 639.3(a)(2). “Some of the factors to be considered in making this determination are (i)
19 common ownership, (ii) common directors and/or officers, (iii) de facto exercise of control, (iv)
20 unity of personnel policies emanating from a common source, and (v) the dependency of
21 operations.” *Id.* The first factor is the “least important,” and the other factors are “guideposts
22 only.” *Childress*, 357 F.3d at 1005. The inquiry “ultimately depends on all the circumstances of
23 the case and is characterized as an absence of an arms-length relationship found among
24 unintegrated companies.” *Id.* at 1005–06.

25 There must be a “fact-specific inquiry whereby the court must determine from a
26 multiplicity of criteria whether the operations of the parent and subsidiary are so interrelated as to
27 find an absence of an arm’s length relationship between unintegrated companies.” *Childress v.*
28 *Darby Lumber Inc.*, 126 F. Supp. 2d 1310, 1314 (D. Mont. 2001) (simplified), *aff’d*, 357 F.3d

1 1000 (9th Cir. 2004). “[T]he basic point of the inquiry is clear: has [the parent company]
2 structured its relationship with [the subsidiary company] in such a fashion as to control [the
3 subsidiary company] and, at the same time, avoid [the parent’s] obligations under federal law?”
4 *Int’l Bhd. of Teamsters v. American Delivery Service, Co.*, 50 F.3d 770, 776 (9th Cir. 1995).

5 The Court discusses each of the “single employer” factors, reserving the “de facto control”
6 discussion for last, and turning finally to what the inquiry “ultimately depends on,” that is,
7 whether the totality of circumstances demonstrate an arms-length relationship between the
8 companies.

9 **1. Common Ownership**

10 As to the first, “least important” factor, no issue of fact has been raised regarding common
11 ownership of the two companies. “[J]ust as a parent will not be held liable solely because of its
12 ownership of the subsidiary, so too a lender will not be liable solely because of the financial
13 dependence that necessitated the loan in the first place.” *Pearson v. Component Tech. Corp.*, 247
14 F.3d 471, 496 (3rd Cir. 2001) (affirming summary judgment dismissing WARN Act “single
15 employer” claim because the plaintiff’s evidence did not establish the “high degree of integration”
16 required). It is well established that stock ownership alone is not grounds for holding a parent
17 liable for its subsidiary’s actions. *See United States v. Bestfoods*, 524 U.S. 51, 61–62 (1998) (“the
18 exercise of the control which stock ownership gives to stockholders . . . will not create liability
19 beyond the assets of the subsidiary. That control includes the election of directors, the making of
20 by-laws . . . and the doing of all other acts incident to the legal status of stockholders.”)

21 Wojciechowski argues that Kohlberg Ventures controlled ClearEdge because other entities
22 that were affiliated with Kohlberg Ventures’ owner, James Kohlberg, collectively owned a
23 majority of ClearEdge’s shares. It is undisputed, though irrelevant, that James Kohlberg himself,
24 through various entities he controlled, owned around two-thirds³ of ClearEdge stock, including the
25 3% owned by Kohlberg Ventures. The only defendant in this case is Kohlberg Ventures, and the

26 _____
27 ³ The parties differ slightly on exactly how much of ClearEdge’s stock Kohlberg owned through
28 these entities. Plaintiffs say it amounted to 69% (Roupinian Decl., Ex. 2), and Kohlberg Ventures
states it was 66%. Eastburn Decl., ¶ 4. The difference between 69% and 66% is not material to
this motion.

1 sole issue to be determined in this motion is whether Wojciechowski can set forth specific facts
2 showing that there is some genuine issue for trial regarding whether *Kohlberg Ventures* and
3 ClearEdge were a “single employer” for purposes of coverage under the WARN Act.

4 It is undisputed that Kohlberg Ventures itself owned only 3% of ClearEdge stock, a small
5 ownership stake. Stock ownership alone, much less such minimal ownership, does not provide
6 grounds to hold the stock owner liable for the actions of the owned company.

7 It is likewise undisputed that Kohlberg Ventures made only one loan to ClearEdge of \$5
8 million, a fraction of the \$45 million sought to keep ClearEdge afloat in its last months and a tiny
9 fraction of the \$130 million already lent to ClearEdge by other Kohlberg-controlled entities. This
10 relatively low loan amount does not lend itself to a finding of liability just because ClearEdge had
11 some degree of financial dependence on Kohlberg Ventures. Accordingly, Kohlberg Ventures’
12 minimal ownership interest in ClearEdge and relatively small loan weigh against finding that
13 Kohlberg Ventures and ClearEdge were a “single employer.”

14 **2. Common Directors and/or Officers**

15 As to the second factor, it is undisputed that CEP Inc. and Kohlberg Ventures do share
16 some common directors and/or officers. This factor assesses “whether the two nominally separate
17 corporations: (1) actually have the same people occupying officer or director positions with both
18 companies; (2) repeatedly transfer management-level personnel between the companies; or (3)
19 have officers and directors of one company occupying some sort of formal management position
20 with respect to the second company.” *Pearson*, 247 F.3d at 494, 498.

21 In analyzing this factor, the Court bears in mind, as Kohlberg Ventures points out, that “the
22 corporation and its shareholders are distinct entities.” *Dole Food Co. v. Patrickson*, 538 U.S. 468,
23 474 (2003). Indeed, the U.S. Supreme Court has found that “it is entirely appropriate for directors
24 of a parent corporation to serve as directors of its subsidiary, and that fact alone may not serve to
25 expose the parent corporation to liability for its subsidiary’s acts.” *Bestfoods*, 524 U.S. at 69; *see*
26 *also Kingston Dry Dock Co. v. Lake Champlain Transp. Co.*, 31 F.2d 265, 267 (C.A.2 1929) (L.
27 Hand, J.) (“Control through the ownership of shares does not fuse the corporations, even when the
28 directors are common to each.”). Furthermore, “courts generally presume that the directors are

1 wearing their ‘subsidiary hats’ and not their ‘parent hats’ when acting for the subsidiary.”
2 *Bestfoods*, 524 U.S. at 69.

3 Wojciechowski asserts that Kohlberg Ventures exerted significant influence on
4 ClearEdge’s Board actions because both Kohlberg Ventures’ Kohlberg and Eastburn served on
5 multiple Board committees. As of February 18, 2014, two of the three seats on ClearEdge’s
6 executive and compensation committees were held by Kohlberg and Eastburn and they each held
7 one of the three seats on both ClearEdge’s nominating committee and audit committee.

8 However, there is a distinction between the roles Kohlberg and Eastburn occupied as
9 representatives of Kohlberg Ventures and as members of the Board. The fact that Kohlberg and
10 Eastburn were both affiliated with an entity that owned some ClearEdge stock, Kohlberg
11 Ventures, and that they also served as directors of the ClearEdge Board fails to weigh this factor in
12 favor of Wojciechowski for WARN Act purposes. Performing acts incident to the legal status of
13 stockholders, such as serving on the Board of Directors, does not create liability beyond the assets
14 of the subsidiary. Wojciechowski has put forth no evidence to show that these Board members
15 wore their ‘Kohlberg Ventures hats’ rather than their ‘ClearEdge hats’ when acting on behalf of
16 ClearEdge.

17 Neither has Wojciechowski produced any evidence that Kohlberg Ventures and ClearEdge
18 repeatedly transferred management-level personnel between the companies or that officers and
19 directors of one company occupied a formal management position at the second company.
20 Although Eastburn twice served as interim COO for CEP Inc., for four months in 2012 and three
21 weeks in 2014, there is no evidence that this temporary role was anything more than a pragmatic
22 effort to fill a personnel gap.

23 Wojciechowski asserts that Kohlberg Ventures exerted outsized control over ClearEdge
24 through Board members Angelides, Geisse, and Wright both because they had prior business
25 and/or personal relationships with Kohlberg and because Kohlberg recommended them for Board
26 membership. However, of the five Board members besides Eastburn and Kohlberg, none were
27 ever employed or retained by, or otherwise affiliated with, Kohlberg Ventures or any Kohlberg
28 Entity. Kohlberg Ventures asserts that Board members were selected based on their subject matter

1 expertise and perceived value to ClearEdge. ClearEdge hired a search firm to locate potential
2 Board members and Kohlberg introduced individuals to the Board only to see if the Board was
3 going to consider their membership.

4 Kohlberg Ventures contends that, as a result, a supermajority of the ClearEdge Board of
5 Directors – five of the seven members – was unaffiliated with Kohlberg Ventures or James
6 Kohlberg. Eastburn avers that neither he, Kohlberg Ventures, James Kohlberg, nor any entity
7 affiliated with James Kohlberg had an agreement with any member of the ClearEdge Board to
8 vote any particular way on matters subject to a ClearEdge Board vote.

9 At this point, the Court must differentiate between reasonable inference and innuendo.
10 Whereas the former creates a genuine issue of material fact and precludes summary judgment, the
11 latter amounts to less than a scintilla of evidence. That Kohlberg knew or recommended some of
12 the other Board members, that Kohlberg and Eastburn served on multiple Board committees, that
13 Eastburn served for a few months as interim COO – none of these facts may reasonably be
14 interpreted to indicate the high degree of integration that would tip the common directors and
15 officers factor in favor of a finding that the companies were a “single employer.”

16 **3. Unity of Personnel Policies Emanating From A Common Source**

17 It is undisputed that Kohlberg Ventures and ClearEdge personnel policies emanated from
18 different sources. Kohlberg Ventures presented undisputed evidence that neither Kohlberg
19 Ventures nor any entity affiliated with James Kohlberg ever shared a human resource information
20 system or other personnel, benefits, recordkeeping, or payroll system with ClearEdge, nor did the
21 two companies otherwise share common personnel practices. Indeed, ClearEdge had its own
22 Human Resources department, employed its own Human Resources staff that did not work for or
23 provide services to Kohlberg Ventures and, at various times, employed a Vice President of Human
24 Resources who, along with the Human Resources department, managed ClearEdge’s labor
25 relations. ClearEdge established the employment terms and conditions governing its employees
26 through its employee handbook that Kohlberg Ventures was not involved in drafting or enforcing.

27 It is also undisputed that Kohlberg Ventures and ClearEdge did not jointly train their
28 employees, nor did they share training or instruction policies/practices. ClearEdge trained its own

1 employees without assistance from Kohlberg Ventures. Specifically, neither Kohlberg Ventures
2 nor any entity affiliated with James Kohlberg had any involvement in hiring, training, disciplining
3 or supervising ClearEdge employees or otherwise providing training or instruction
4 policies/practices. At no time has Kohlberg Ventures employed, retained or utilized any
5 ClearEdge employee to provide services at Kohlberg Ventures, and neither Kohlberg Ventures nor
6 any entity affiliated with James Kohlberg ever had a Shared Services Agreement with ClearEdge.

7 Wojciechowski asserts that Kohlberg Ventures, through Eastburn, dictated personnel
8 policies, while Kohlberg Ventures contends that Eastburn's involvement in these activities was
9 either in his role as a Board member or as the interim COO. Eastburn's activities about which
10 Wojciechowski complains and the role in which they were performed are: (1) preparing bonus
11 recommendations for ClearEdge employees in his capacity as a member of the Compensation
12 Committee of the Board, (2) setting agendas for ClearEdge management meetings and board
13 meetings in his role as Board Secretary and interim COO respectively, and (3) advising on next
14 steps regarding ClearEdge's intellectual property counsel performed as ClearEdge's interim COO,
15 with the knowledge of ClearEdge's CFO and only because ClearEdge's in-house counsel was no
16 longer employed by ClearEdge at the time.

17 Wojciechowski further claims that Kohlberg and Eastburn were involved in the preparation
18 of ClearEdge's purported WARN notice to employees, including the selection of which employees
19 would be terminated, the language and timing of the notice, and other related communications to
20 employees. Specifically, Wojciechowski argues that, on April 19, 2014, Eastburn directed
21 ClearEdge employee Arianna Kalian to proceed with the reduction in force mass layoff on April
22 22, 2014 and, on April 29, 2014, Eastburn sent an email to ClearEdge CFO Gloria Fan in which he
23 directs her to make more personnel cuts and who should be cut. There is no evidence, however,
24 that Eastburn's emails are directives but rather are recommendations with merely suggestive
25 language such as "[h]ere are the names that I think should be on the list."

26 Given the small number of people affiliated with Kohlberg Ventures (two people), the
27 small ClearEdge Board (seven people), and even smaller ClearEdge executive team (three people),
28 it is not surprising that multiple roles fell to the same people. Without even a scintilla of evidence

1 contradicting the presumption of actions taken in appropriate roles, Wojciechowski’s arguments
2 are no more than that, pure argument. In the absence of evidence to the contrary, the Court
3 presumes Eastburn conducted these activities while wearing his ClearEdge ‘hat.’ Hence,
4 Wojciechowski has raised no issues of material fact regarding this factor.

5 **4. Dependency of Operations: Financial Entanglements, Purchase and Sale of**
6 **Goods**

7 As to the degree the two companies’ operations were independent, Wojciechowski has
8 presented no evidence of dependence by either on the other. Kohlberg Ventures has submitted
9 undisputed testimony that neither Kohlberg Ventures nor any entity affiliated with James
10 Kohlberg ever shared administrative or purchasing systems with ClearEdge, interchanged
11 supervisors or equipment with ClearEdge, commingled finances with ClearEdge – no joint bank
12 accounts nor access to each other’s bank accounts or finances, never served as a guarantor of loans
13 or credit extended to ClearEdge or vice versa, never owned any real property or equipment
14 together with ClearEdge, and did not rented or leased real property or equipment to or from
15 ClearEdge. ClearEdge did not purchase goods from or sell goods to Kohlberg Ventures, nor did it
16 share equipment or property with Kohlberg Ventures. Neither Kohlberg Ventures nor any entity
17 affiliated with James Kohlberg ever had any involvement in writing, approving, or negotiating
18 purchase orders, bidding on projects, approving projects, facilitating sales, or procuring equipment
19 or materials with or for ClearEdge.

20 Wojciechowski, for his part, asserts that, in 2014, Eastburn was involved in the operations
21 of ClearEdge, including management of the sales process and contractors, attempting to imply
22 some level of dependence between Kohlberg Ventures and ClearEdge operations. For example,
23 he points to an email to ClearEdge personnel on March 10, 2014 in which Eastburn wrote, “I’ve
24 been asked to review the cycle - what we buy, from whom, controls, how we change part #s,
25 inventory, required purchasing timeframes etc. In our meeting I'd like to dig in to the relevant
26 processes, review the agreements with our vendors, understand your organization, map to
27 engineering.”

28 However, this scenario, along with many others about which Wojciechowski complains,

1 occurred during the period when Eastburn was acting COO and all occurred when he was a Board
2 member. Accordingly, Eastburn must have “been asked” to evaluate ClearEdge’s operations in
3 one or the other of these roles. Hence, with no evidence indicating otherwise, Wojciechowski
4 improperly attributes to Kohlberg Ventures the activities Eastburn performed in his capacity as a
5 ClearEdge Board member and/or as interim COO. No inference has thus been created that the two
6 companies’ operations bore any relationship whatsoever to each other, much less a relationship of
7 dependency. Accordingly, no reasonable fact finder could find that this factor weighs in
8 Wojciechowski’s favor.

9 **5. De Facto Exercise of Control**

10 Wojciechowski has made many arguments regarding Kohlberg Ventures’ alleged control
11 over ClearEdge, many of which have already been addressed. However, the pith of his argument
12 concerning de facto control is that Kohlberg, as a representative of Kohlberg Ventures, made the
13 decision by himself, without consulting the ClearEdge Board or its CEO, to file bankruptcy and
14 put ClearEdge out of business, the very action giving rise to the violation of the notice requirement
15 of the WARN Act. The evidence submitted, however, proves otherwise.

16 Wojciechowski argues that Kohlberg consulted with bankruptcy counsel without input
17 from other members of the ClearEdge Board but, in making this claim, he ignores the March 22
18 Board meeting at which the experience and credentials of the Dorsey lawyers were presented to
19 the Board. Only after that Board meeting, on March 24, 2014, did Eastburn ask O’Neill to send an
20 engagement letter and only after another several days did Kohlberg authorize his formal retention.

21 Furthermore, while it is undisputed that on March 31, 2014 Kohlberg did take it upon
22 himself to tell O’Neill to prepare to file for bankruptcy, Kohlberg Ventures has indisputably
23 demonstrated through emails, Board agendas, and testimony that the ClearEdge Board essentially
24 disregarded Kohlberg’s decision and voted against declaring bankruptcy at the April 1, 2104
25 meeting. Kohlberg Ventures has presented ample evidence that the Board continued to engage in
26 the decision-making process over multiple Board meetings between March 31, when
27 Wojciechowski alleges Kohlberg – and therefore Kohlberg Ventures – unilaterally decided to
28 place ClearEdge in bankruptcy, and April 22, when the Board actually decided to cease operations

1 and file for bankruptcy.

2 The Board continued to formulate all three plans – A, B, and C – and to explore whatever
3 options they could think of. The Board pursued multiple ways to sustain ClearEdge’s business,
4 including continued negotiations with Samsung to have the Contingency Covenant removed,
5 pursuit of collections from customer invoices, delayed payment of vendor accounts, and raising
6 debt and investment capital from multiple sources, as well as regularly assessing whether to
7 proceed with Plan B, bankruptcy. The April 1, 2014 Board agenda, for example, included reports
8 from Wright and Gerbsman, exploration of sale opportunities, board duties and obligations,
9 exercise of best good faith business judgment, exposure for breach of fiduciary duty, and Chapter
10 11 process timing and possible outcomes.

11 At the April 6, 2014 meeting, the Board again voted not to file for bankruptcy at that time.
12 Instead, the Board asked Mr. Eastburn to draft a whole new plan, “Plan C,” a downsized business
13 plan to be delivered to the Board on April 18, 2014, and requested that ClearEdge seek additional
14 financing sources. In the April 18, 2014 Board meeting agenda, too, the topics of discussion
15 included a review of the recent sales activities and vendor accounts; the status of efforts to raise
16 capital through Macquarie, Herbert, Gerbsman, and Kohlberg Ventures; a “Decision Point”
17 regarding whether to file for bankruptcy; and discussion of the new Plan C.

18 Wojciechowski, in contrast, has presented no evidence that the ClearEdge Board bent to
19 pressure from Kohlberg Ventures, Kohlberg, or Eastburn to declare bankruptcy a moment sooner
20 than its members themselves unanimously decided it was time to do so. Accordingly,
21 Wojciechowski’s central argument for Kohlberg Ventures’ de facto control of ClearEdge fails, as
22 he has failed to establish any genuine issue of material fact with regard to this factor.

23 **6. Totality of the Circumstances**

24 Finally, there are no genuine issues of fact as to the totality of the circumstances and the
25 presence of an arms-length relationship between Kohlberg Ventures and ClearEdge. In the end,
26 the single employer inquiry “ultimately depends on all the circumstances of the case and is
27 characterized as an absence of an arms-length relationship found among unintegrated companies.”
28 *Pearson*, 247 F.3d at 505. The DOL single employer factors, like the integrated enterprise test,

1 require that two corporations be “highly integrated with respect to ownership and operations”
2 before they will be considered a single employer for WARN Act purposes. *Id.*

3 There is no question that Kohlberg Ventures and ClearEdge remained entirely separate
4 business entities at all times and that they did not rely on each other for personnel, equipment,
5 facilities, clients, administrative services, or any of the other various resources typically “shared”
6 between companies that are found to be entwined for purposes of shared liability. Once more,
7 Wojciechowski has presented no evidence to the contrary.

8 Wojciechowski attempts to paint a picture of a minor investor so dominating the company
9 in which it made a small investment that it eliminated the distinction between the two.
10 Wojciechowski repeatedly mischaracterizes evidence in order to make it appear that Kohlberg or
11 Eastburn made decisions on their own without consulting the Board, most importantly about the
12 decision to declare bankruptcy. This attempt ignores the abundant evidence that the Board –
13 including Kohlberg and Eastburn – worked as a team to explore options for how to continue
14 ClearEdge’s business, including continued negotiations with Samsung, collections of customer
15 invoices, delaying the payment of bills, and raising capital. The evidence also demonstrates a
16 robust back-and-forth among Kohlberg Ventures, ClearEdge Board and ClearEdge employees
17 regarding whether and when to declare bankruptcy. Particularly telling is Wright’s April 6, 2014
18 letter cautioning the Board saying that he felt they were receiving “prejudiced advice” about the
19 urgency of bankruptcy filing and that he will vote against filing. At the Board meeting that day
20 and at several others, the Board did not, in fact, vote to file for bankruptcy. A louder repudiation
21 of Kohlberg Ventures’ purported control is hard to imagine.

22 In addition, Wojciechowski resorts to assertions of questionable veracity designed to make
23 it appear that Kohlberg Ventures wielded a lot more power than it did, mischaracterizes evidence
24 and, at times, appears to make things up from whole cloth. Wojciechowski makes conclusory
25 arguments that Kohlberg Ventures was primarily responsible for the financial crisis that resulted in
26 ClearEdge’s eventual bankruptcy filing. For example, Wojciechowski asserts that, in a March 25,
27 2014 letter to an executive vice president of Samsung Everland, Wright informed him that
28 Kohlberg Ventures balked at the demand for its continued financial support of ClearEdge and

1 demanded that Samsung remove the contingency and sign an unconditional purchase order. This
2 assertion is untrue and seems designed to create a factual dispute where there is none.

3 In further attempts to cast Kohlberg Ventures as imposing ultimatums and unreasonable
4 funding conditions, Wojciechowski mischaracterizes an April 4th letter from Wright to Samsung
5 Everland as stating that it would have to consent to an unconditional purchase order without a
6 contingency clause. However, Wright's letter provided two alternatives for the Samsung Everland
7 and ClearEdge relationship to proceed. Similarly, Wojciechowski inserts into an April 5, 2014
8 email from Wright to his colleagues a claim about Kohlberg Ventures' insistence on an
9 unconditional binding commitment which simply does not appear in the email. Wojciechowski
10 also asserts inaccurately that on April 13, 2014, Kohlberg Ventures demanded that Samsung
11 Everland remove the Contingency Covenant when in fact it stated that Kohlberg Ventures was
12 ready to fund ClearEdge within days of Samsung Everland's unconditional offer. The April 14,
13 2014 letter from Samsung Everland likewise did not decline to remove the contingency but instead
14 stated that the irrevocable purchase order "should be issued by the end of May."

15 Wojciechowski's conclusory characterizations are not supported by the record. Indeed,
16 there is a dearth of evidence to support Wojciechowski's argument that Kohlberg Ventures exerted
17 a pervasive control over ClearEdge's functioning and the evidence submitted does not lend itself
18 to reasonable inferences to this effect. The evidence proffered by Wojciechowski simply does not
19 establish the high degree of integration required to find the companies are a single employer.
20 Even viewed in the light most favorable to Wojciechowski, the evidence submitted fails
21 demonstrate the absence of an arms-length relationship required to tip this factor in his favor.

22 No genuine issues of material fact remain as to whether these five factors and the totality
23 of circumstances weigh heavily against finding that ClearEdge and Kohlberg Ventures are a single
24 employer. As a result, the WARN Act does not apply to Kohlberg Ventures. Thus, Kohlberg
25 Ventures is not subject to liability alongside ClearEdge for failure to provide the statutorily
26 required notice.

27 V. CONCLUSION

28 Based on the analysis above, the Court hereby **GRANTS** Kohlberg Ventures' Motion for

1 Summary Judgment on Wojciechowski’s WARN Act claim. Wojciechowski’s Cross-Motion for
2 Summary Judgment is **DENIED** as moot.

3 The Court orders the parties to meet and confer and file a proposed form of judgment
4 within 14 days. *See* Fed. R. Civ. Proc. 23(c)(3). If they cannot agree on a proposed form of
5 judgment, then within 14 days they shall file competing proposed forms of judgment and a joint
6 letter brief not to exceed five pages setting forth their respective positions.

7 **IT IS SO ORDERED.**

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9 Dated: April 9, 2021

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THOMAS S. HIXSON
United States Magistrate Judge

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