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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DAWN KNEPPER,
Plaintiff,

v.

OGLETREE, DEAKINS, NASH, SMOAK
& STEWART, P.C., et al.,
Defendants.

Case No. [18-cv-00303-WHO](#)
Case No. 18-cv-00304-WHO

**ORDER GRANTING MOTIONS TO
TRANSFER**

Plaintiff Dawn Knepper was a non-equity shareholder of defendant Ogletree, Deakins, Nash, Smoak & Stewart, P.C. (Ogletree), specializing in employment law, when she received three notices that she would be bound by the firm’s Arbitration Agreement if she did not opt out of it by March 1, 2016. She did not opt out. For that reason, as discussed below, Ogletree’s motions to transfer these cases to the Central District of California, where arbitration can be compelled pursuant to the Agreement, is GRANTED. The question of whether plaintiff should be allowed to amend her FAC in Case No. 18-cv-00303 is deferred for resolution by the transferee court.

BACKGROUND

I. PROCEDURAL BACKGROUND

In Case No. 18-cv-00303, under the operative First Amended Complaint (FAC), Knepper seeks to represent a class of current and former non-equity shareholders of defendant Ogletree. She claims that Ogletree engaged in systematic gender discrimination and asserts claims for violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq. (“Title VII”), violation of the Equal Pay Act of 1963, 29 U.S.C. §§ 206 et seq. (“EPA”), and violation of related California statutes. First Amended Complaint in Case No. 18-cv-00303 (Dkt. No. 33) ¶ 4.

On the same day that Knepper filed her class and collective action, she also filed a

1 declaratory relief action. *See* Case No. 18-cv-00304. In that case, she seeks a declaration that she
2 is not bound by any agreement to arbitrate with respect to the claims asserted in Case No. 18-
3 00303, that she did not waive her right to bring a class or collective action, and that she did not
4 delegate to an arbitrator the issue of arbitrability. In the alternative, if an agreement was formed,
5 Knepper seeks a declaratory judgment that any provisions purporting to waive her right to bring a
6 class or collective action or delegate issues of arbitrability to an arbitrator are unenforceable.
7 Case. No. 18-cv-00304, Complaint ¶ 4.

8 Ogletree moved to transfer venue in both cases to the Central District of California. It
9 argued that Knepper was covered by an Arbitration Agreement that is dispositive of the motions to
10 transfer and mandates transfer to the Central District. It also pointed out that, on the facts alleged
11 by Knepper as well as facts it provided, transfer was appropriate because Knepper was a non-
12 equity shareholder in Ogletree’s Orange County office and the majority of defense witnesses were
13 based in the Central District.

14 Knepper opposed the motions to transfer. She argued that she was not bound by and did
15 not agree to an Arbitration Agreement. Given the nationwide scope of her allegations on behalf of
16 non-equity shareholders across the country and Ogletree’s alleged policy of discrimination as
17 applied to those disperse non-equity shareholders, she asserted that venue was as proper in the
18 Northern District (where Ogletree did substantial business) as it was in the Central District (where
19 Knepper last worked and where many of the complained-of decisions as to Knepper were made).

20 At the hearing on the motions to transfer venue, I explained my tentative view that
21 regardless of whether a binding Arbitration Agreement existed between Knepper and Ogletree that
22 required disputes to be arbitrated in the Central District, transfer appeared appropriate given that
23 the vast majority of operative facts in Knepper’s First Amended Complaint – namely the decisions
24 regarding Knepper’s compensation and the terms of her non-equity shareholder arrangement, as
25 well as claims regarding a hostile environment directed towards Knepper specifically – were made
26 and taken in the Central District. However, during the hearing, Knepper’s counsel asked to file a
27 Second Amended Complaint (“proposed SAC”) in Case No. 18-00303, arguing that the
28 amendment would strengthen her position that venue was appropriate in the Northern District. I

1 deferred ruling and allowed Knepper to file a motion seeking leave to file the proposed SAC. She
2 promptly filed that motion, attaching her proposed SAC. Dkt. No. 52. The proposed SAC would
3 add as named plaintiffs additional current and former non-equity shareholders (based outside of
4 California), additional defendants (based within and outside of California), and one equity
5 shareholder (also based outside of California) as a named plaintiff. *See* Dkt. No. 52-1.¹ Ogletree
6 opposed leave to amend, arguing that amendment was futile because: (i) Knepper’s claims were
7 subject to mandatory arbitration in the Central District, (ii) the claims of the proposed additional
8 non-California non-equity shareholders were irrelevant to venue (as those claims were likely
9 subject to arbitration in venues outside of California), and (iii) the proposed named equity
10 shareholder plaintiff’s claims were likewise subject to binding arbitration. Dkt. No. 59.

11 At that juncture, it was clear that I could not resolve the motions to transfer (as well as the
12 motion for leave to file the proposed SAC) without determining whether Knepper was at least
13 facially covered by an agreement to arbitrate with Ogletree. Ogletree had avoided filing a petition
14 to compel arbitration before me and rested instead on its motions to transfer venue. It contends
15 that under the Arbitration Agreement and applicable caselaw, the only district that could compel
16 arbitration to the appropriate forum (Orange County) is the Central District of California. Lacking
17 sufficient information regarding the dissemination of the Arbitration Agreement and to give the
18 parties the opportunity to focus on whether the Arbitration Agreement was at least facially
19 enforceable against Knepper, I ordered Ogletree to either file a motion under FRCP 12 (b)(1) to
20 determine the existence of the agreement or, alternatively, file supplemental briefing (allowing a
21 further opposition from Knepper), so that the issue of whether Knepper was covered by an
22 Arbitration Agreement would be adequately presented and considered in determining the pending
23 motions. Dkt. No. 63. The supplemental briefing is now complete and the issues are ready for
24 resolution.²

25 _____
26 ¹ Unless otherwise specified, the docket numbers cited are to the docket in Case No. 18-cv-00303.

27 ² In support of her opposition to defendant’s supplemental brief, Knepper seeks to file parts of the
28 Supplemental Declaration of Jill Sanford under seal. Finding compelling justifications exist to
seal the attorney-client privileged information, that request is GRANTED. Dkt. No. 72 in Case
No. 18-cv-00303 and Dkt. No. 60 in 18-cv-00304. Ogletree seeks leave to file a one-page

1 **II. RELEVANT FACTUAL BACKGROUND**

2 There is no dispute that on January 15, 2016 at 4:45 a.m. PST, Ogletree sent out an email
3 to staff, including Knepper, titled “IMPORTANT – Two New Programs for 2016,” that described
4 the firm’s new “Open Door Policy & Mutual Arbitration Agreement.” Declaration of Gary Berger
5 (Dkt. No. 28-1), Ex. A (“Email Notice 1”); Berger Decl. ¶¶ 4-6. Knepper opened Email Notice 1
6 on January 15, 2016, at 6:32 a.m. PST. *Id.* ¶ 6. Email Notice 1 explained that “the attached
7 Mutual Arbitration Agreement provides that you and the Firm both agree to submit such matters to
8 binding arbitration. The Mutual Arbitration Agreement builds on an arbitration program that was
9 implemented in January 2014 that has been applicable to all Equity Shareholders since that time.
10 The Firm is now expanding arbitration to apply to the rest of our community.” Email Notice 1 at
11 1. The Agreement is described as a “mutual agreement, and it is a binding contract.” *Id.* at 2.

12 The Notice went on:

13 You have the right to opt out of the arbitration program if you wish.
14 To do so, you must sign an Opt-Out form and return it to Kay
15 Straky, the Firm's Director of Human Resources via email to
16 Kay.Straky@ogletreedekins.com, on or before March 1, 2016. The
17 Opt-Out form is available under the “Resources” tab on the OD
18 Connect homepage of the Firm’s Human Resources Department. If
19 you do not return an Opt-Out form by March 1, 2016 and remain
20 employed by the Firm after that date, you will be deemed to have
21 accepted the terms of the Agreement.

18 *Id.* The section describing the Arbitration Agreement concluded:

19 ***Please sign and return a copy of the Mutual Arbitration***
20 ***Agreement to your Office Administrator. Signing the Agreement***
21 ***signifies that you understand you have the option to opt out and***
22 ***that if you do not opt out on or before March 1, 2016 you will be***
23 ***deemed to have accepted the Agreement.***

24 *Id.* at 3 (emphasis in original).

25 The attached Arbitration Agreement provided that:

26 Ogletree Deakins (the “Firm”) and the undersigned (“Individual”) recognize that disputes may arise in the workplace setting from time to time that cannot be resolved without the assistance of an outside party. Individual and the Firm (collectively “the Parties”) therefore enter into this Agreement to provide for arbitration as the forum for resolving any such disputes:

27
28 response, contesting some of the facts asserted in Sanford’s Supplemental Declaration. That request is also GRANTED. Dkt. No. 73 in 18-cv-00303, Dkt. No. 61 in 18-cv-00304.

1 Arbitration Agreement (Dkt. No. 28-1 at ECF page 10 of 40). Pertinent here, paragraph 11
2 provides:

3 11. Opt Out. Individual may opt out of this Agreement by delivering
4 a completed and signed Opt-Out Form to the Director of Human
5 Resources on or before March 1, 2016. Opt-Out Forms and
6 instructions on how to return them are available on the OD Connect
7 home page of the Human Resources Department, under the
8 “Resources” tab. Failure to deliver an executed Opt-Out Form on or
9 before March 1, 2016, and continued employment with the Firm
10 after that date, shall be deemed acceptance of the terms of this
11 Agreement.

12 *Id.* At the end of the Arbitration Agreement, above the signature line, is the following:

13 *Special Note: This Agreement is an important document that affects*
14 *your legal rights. You should familiarize yourself with it. By signing*
15 *below, you acknowledge that you understand you have the option to*
16 *opt out of this Agreement by returning an Opt Out form to the*
17 *Director of Human Resources on or before March 1, 2016 and that*
18 *failure to return an Opt Out form and remaining in the employment*
19 *of the Firm after that date will be deemed an acceptance of this*
20 *Agreement.*

21 *Id.* (emphasis in original).³

22 On January 27, 2016, at 4:31 p.m., Vicki Myers sent an e-mail to all Orange County non-
23 equity shareholders, of counsel, staff attorneys, associates, and staff (including the e-mail address
24 the Firm assigned to Dawn Knepper: Dawn.Knepper@ogletreedeakins.com). Berger Decl., Ex. D
25 (“Email Notice 2”); Berger Decl. ¶ 7. Email Notice 2 explained:

26 If you haven’t already done so, please sign and return a copy of the
27 Mutual Arbitration Agreement to me as soon as possible. Also,
28 please print your name under your signature to ensure that HR files
your document in the correct HR file.

As indicated below: *Signing the Agreement signifies that you
understand you have the option to opt out and that if you do not opt
out on or before March 1, 2016 you will be deemed to have accepted
the Agreement.*

You have the right to opt out of the arbitration program if you wish.
To do so, please read the instructions in the email below.

Dkt. No. 28-1 at ECF page 17 of 40 (emphasis in original). Email Notice 2 then included the full
text from Email Notice 1 as well as the attached Arbitration Agreement.

³ The Arbitration Agreement also provides that any arbitration be “held in or near the city in which individual is or was last employed.” Dkt. No. 58-4 (“Arbitration Agreement”), ¶ 4.

1 On March 1, 2016, at 3:41 p.m. PST, Vicki Myers sent an e-mail to all Orange County
2 non-equity shareholders, of counsel, staff attorneys, associates, and staff (including the e-mail
3 address the Firm assigned to Dawn Knepper: Dawn.Knepper@ogletreedeakins.com). Berger
4 Decl., Ex. E (“Email Notice 3”); Berger Decl. ¶ 8. Email Notice 3 explained:

5 As a reminder, if you haven’t already done so, today is the deadline
6 to sign and return a copy of the Mutual Arbitration Agreement to
7 me. Also, please print your name under your signature to ensure
8 that HR files your document in the correct HR file.

9 As indicated below: *Signing the Agreement signifies that you*
10 *understand you have the option to opt out and that if you do not opt*
11 *out on or before March 1, 2016 you will be deemed to have accepted*
12 *the Agreement.*

13 You have the right to opt out of the arbitration program if you wish.
14 To do so, please read the instructions in the email below.

15 Dkt. No. 28-1 at ECF pg. 24 Of 40 (emphasis in original).

16 On March 1, 2016 at 3:46 p.m. PST, Knepper responded to Myers’ email, saying “I will
17 turn mine in tomorrow. Thanks.” Berger Decl., Ex. F (Dkt. No. 28-1 at ECF pg. 31 of 40);
18 Berger Decl. ¶ 9. There is no dispute that Knepper did not turn in either a signed Arbitration
19 Agreement or an opt out form.

20 In her declaration, Knepper states that she does not “recall receiving, viewing, or opening
21 any email from anyone at Ogletree that contained an arbitration agreement that would cover
22 disputes between the Firm and me,” she does not “recall receiving, viewing, or opening any email
23 from anyone at Ogletree that discussed opting-out of an arbitration agreement that would cover
24 disputes between the Firm and me,” and she “does not recall reviewing any arbitration agreement
25 that would cover disputes between the Firm and me, and I did not consider entering into any
26 arbitration agreement that would cover such disputes. I did not knowingly enter into any
27 arbitration agreement that would cover disputes between the Firm and me. Had I been aware that I
28 needed to opt-out of the agreement, I would have done so.” Knepper Decl. (Dkt. No. 70-6) ¶¶ 2-4.
Knepper does not recall sending and cannot recall what she meant or what the context was for her
March 1, 2016 response to Myers that “I will turn mine in tomorrow. Thanks.” Knepper Decl. ¶
6. She declares that given the attention demanded by her clients, other work, and family

1 obligations, it was not uncommon for her to “overlook administrative emails.” *Id.* ¶ 7. She has no
2 knowledge of whether the Arbitration program was discussed at Ogletree’s October 2015 attorney
3 retreat (which she did not attend) or at the January 2016 annual shareholder meeting (which she
4 did attend). *Id.* ¶ 8.

5 DISCUSSION

6 I. KNEPPER IS FACIALLY COVERED BY THE ARBITRATION AGREEMENT

7 A. Authority to Decide Whether an Agreement to Arbitrate Exists

8 Initially, Ogletree argues that any question as to the “enforceability” of the Arbitration
9 Agreement must be decided by an arbitrator because the Arbitration Agreement unambiguously
10 commits disputes regarding the “interpretation, applicability, enforceability, or formation of this
11 Agreement, including without limitation any claim that the Agreement is void or voidable,” to the
12 Arbitrator. Ogletree Supp. Brief (Dkt. No. 66) at 5-6. That may be, but the issue of *whether*
13 Knepper is covered by the Arbitration Agreement or was excused from failing to opt out are issues
14 to be decided by a court. *See, e.g., Cox v. Ocean View Hotel Corp.*, 533 F.3d 1114, 1120 (9th Cir.
15 2008) (noting “particular contractual defenses to enforcement of the arbitration clause . . . were
16 properly heard by the district court”); *Covillo v. Specialty's Cafe*, C-11-00594 DMR, 2012 WL
17 3537058, at *6 (N.D. Cal. Aug. 14, 2012) (“the court must determine as a threshold matter
18 whether a valid agreement to arbitrate exists”).

19 Ogletree’s authority is not to the contrary. *See, e.g., Mohamed v. Uber Techs., Inc.*, 848
20 F.3d 1201, 1206 (9th Cir. 2016) (noting that arguments as to enforceability of any arbitration
21 provision was within province of arbitrator where plaintiff “accepted the agreements and did not
22 opt out.”); *see also Brennan v. Opus Bank*, 796 F.3d 1125, 1130 (9th Cir. 2015) (noting there has
23 to be a “clear and unmistakable” agreement to confer on the arbitrator the question of arbitrability
24 before a court is precluded from deciding that issue). The issue of whether Knepper agreed to
25 arbitration when she did not sign the Agreement and failed to opt out, but then continued to work
26 at Ogletree are contract formation issues that must be decided by a court in the first instance.

27 B. Knepper’s Consent and Knowledge

28 Under the Federal Arbitration Act, a party may challenge the validity or applicability of an

1 arbitration provision by “raising the same defenses available to a party seeking to avoid the
2 enforcement of any contract.” *Cox v. Ocean View Hotel Corp.*, 533 F.3d 1114, 1121 (9th Cir.
3 2008) (internal citations omitted). These “contract-based challenges are governed by applicable
4 state law.” *Id.*

5 Knepper argues that she cannot be considered to have agreed to the Arbitration Agreement
6 because she was unaware Ogletree sent her the Arbitration Agreement by email prior to July 2017
7 and therefore her knowing assent is lacking. However, Ogletree’s records show that Knepper
8 opened Email Notice 1 and *responded* to Email Notice 3. That Knepper – an experienced
9 employment law attorney – may not have read or fully comprehended the contents of those emails
10 and their attachments does not preclude a determination that she is bound by the Arbitration
11 Agreement. *See, e.g., Mohamed v. Uber Techs., Inc.*, 109 F. Supp. 3d 1185, 1198 (N.D. Cal.
12 2015), *aff’d in part, rev’d in part and remanded*, 836 F.3d 1102 (9th Cir. 2016), and *aff’d in part,*
13 *rev’d in part and remanded*, 848 F.3d 1201 (9th Cir. 2016) (“it is essentially irrelevant whether a
14 party actually reads the contract or not, so long as the individual had a legitimate opportunity to
15 review it.”); *Cir. City Stores, Inc. v. Ahmed*, 283 F.3d 1198, 1200 (9th Cir. 2002) (rejecting
16 argument that arbitration agreement was procedurally unconscionable when plaintiff asserted he
17 “did not have the degree of sophistication necessary to recognize the meaning of the opt-out
18 provision or to know how to avoid it.”); *see also Brookwood v. Bank of Am.*, 45 Cal. App. 4th
19 1667, 1673 (Cal. App. 6th Dist. 1996) (rejecting argument that plaintiff could “rescind a contract
20 simply by proving her unilateral ignorance of the contractual terms” where plaintiff argued she
21 was unaware that security registration agreement contained arbitration provision).⁴

22 Knepper also argues that because she did not sign the Arbitration Agreement, or otherwise
23

24 ⁴ That Knepper did not read or fully understand the Email Notices and Arbitration Agreement does
25 not make her agreement to it – through her failure to opt out – unknowing under Title VII. The
26 “knowing” agreement cases under Title VII relied on by Knepper address the inapposite
27 circumstance where an employee signs an “acknowledgment” form affirming receipt of a
28 handbook and an employee’s duty to become familiar with the handbook’s contents without
disclosing that the handbook contains an arbitration provision. *See, e.g., Ashbey v. Archstone
Prop. Mgt., Inc.*, 785 F.3d 1320, 1325 (9th Cir. 2015). Here, the Arbitration Agreement was
presented directly to Knepper, described in detail in Email Notice 1, and attached in full to all
three Email Notices.

1 manifest express consent to it, she cannot be bound by it. However, numerous courts (including
2 from this District) have concluded that employees can be bound by agreements to arbitrate where,
3 like the Notices and Agreement here, the relevant employer documents and communications
4 disclose that an employee’s failure to opt out manifests assent to an “implied-in-fact” arbitration
5 agreement. For example, in *Hicks v. Macy’s Dept. Stores, Inc.*, C 06-02345 CRB, 2006 WL
6 2595941 (N.D. Cal. Sept. 11, 2006) the company twice mailed a packet of information to plaintiff
7 explaining the company’s multi-step dispute resolution program. “Step 4” was mandatory
8 arbitration “if the employee agreed to be bound by arbitration.” *Id.* at *1. Both times the
9 employee was also mailed an “election” form to opt out of the Step 4 arbitration and advised he
10 would be bound unless he opted out. *Id.* Plaintiff did not return the opt out form either time. *Id.*
11 The court concluded that on those facts “plaintiff impliedly agreed to arbitrate his employment-
12 related claims. Plaintiff’s assertion that he did not intend to enter into an arbitration agreement
13 with Macy’s is incredible in light of plaintiff’s failure to explain why he did not return the opt out
14 form.” *Id.* at *2; *see also Castro v. Macy’s, Inc.*, C 16-5991 CRB, 2017 WL 344978, at *3 (N.D.
15 Cal. Jan. 24, 2017) (no affirmative agreement needed, agreement implied where employee failed
16 to opt out); *Aquino v. Toyota Motor Sales USA, Inc.*, 15-CV-05281-JST, 2016 WL 3055897, at *4
17 (N.D. Cal. May 31, 2016) (“it is undisputed that Ms. Aquino received the Agreement (at least via
18 email), that she failed to opt out of it, and that she continued to work at Toyota after the
19 Agreement went into effect. . . . Moreover, Ms. Aquino does not argue that she ever attempted to
20 communicate her lack of consent to the Agreement to Toyota in any way. Under California law,
21 these facts establish an enforceable agreement between Ms. Aquino and Toyota.”); *see also Davis*
22 *v. Nordstrom, Inc.*, 755 F.3d 1089, 1093 (9th Cir. 2014) (where the original arbitration program
23 was described in employee handbook and subsequently notice was provided to employees of a
24 new provision (barring class or collective claims), the court recognized that “[w]here an employee
25 continues in his or her employment after being given notice of the changed terms or conditions, he
26 or she has accepted those new terms or conditions.”).⁵

27 _____
28 ⁵ In *Castro*, the fact that the plaintiff “unequivocally denies receiving the arbitration agreement
and Opt Out Form in the mail” was insufficient to show lack of an agreement, where the company

1 Knepper attempts to distinguish the facts of the *Hicks* and *Castro* cases from this one,
2 emphasizing that in those cases the record reflected that the employers took steps to inform
3 employees about the arbitration agreement and opt out option that were not taken by Ogletree
4 here. *See, e.g., Hicks*, 2006 WL 2595941 at *1 (noting that defendant held daily meetings for its
5 employees about the new dispute resolution policy, provided brochures explaining the policy, and
6 posted signs regarding the policy in employee common areas). What constitutes sufficient notice
7 in the consumer context or in the more typical employer-employee context is not particularly
8 persuasive in this context, where a law firm specializing in employment law notifies non-equity
9 shareholders that it is extending an arbitration program to cover them. While Knepper’s
10 experience as an employment law attorney may not be dispositive, it is significant and weighs in
11 favor of concluding that she is facially covered by the Arbitration Agreement.⁶ Knepper’s attempt
12 to analogize Ogletree’s actions to situations where defendants attempt to impose arbitration on
13 unsophisticated workers or on consumers is not well-taken.

14 Close to the facts here, in *Circuit City Stores, Inc. v. Najd*, 294 F.3d 1104, 1106 (9th Cir.
15 2002), the company instituted a dispute resolution program (DRA) that was distributed to
16 employees in a packet with other materials, including an opt out form. The employees had to
17 acknowledge receipt of the packet but were not required to affirmatively agree to be bound by the
18 DRA. The acknowledgement form clearly explained the right to and consequence of failing to opt

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20 had evidence that the information packets and opt out forms were at least mailed to plaintiff (and
21 plaintiff did not dispute having received other mail at that address). *Castro*, 2017 WL 344978 at
22 *3. The evidence here is similar, although delivered and in one case responded to electronically.
23 *See also Craig v. Brown & Root, Inc.*, 84 Cal. App. 4th 416, 421 (Cal. App. 2d Dist. 2000)
(despite declaration from plaintiff that she did not receive mailed copy of arbitration agreement,
court of appeal affirmed trial court’s enforcement of arbitration agreement as defendant’s
“declarations and documents (mailing lists) are circumstantial evidence from which the court was
entitled to infer that Craig had received the memorandum and brochure.”).

24 ⁶ The repeated explanations of the consequences of failing to opt out, the explicit disclosure that
25 absent opt out continued employment will be deemed acceptance, as well as the consistent
26 limitation of the “signature” language to acknowledgment of the opportunity to opt out,
27 distinguish this case from *Gorlach v. Sports Club Co.*, 209 Cal.App.4th 1497 (2012). There,
28 where the employees were presented with a new employee handbook that contained a provision
stating that as a “condition of employment” all employees “must sign” an arbitration agreement
and plaintiff employee declined to sign the agreement and continued working, the court concluded
that plaintiff’s continued employment did not create an implied-in-fact agreement. *Id.* at 1507-10.

1 out. In those circumstances the Ninth Circuit held that “inaction is indistinguishable from overt
2 acceptance,” and the court “may conclude that the parties have come to agreement,” and “infer
3 that Najd assented to the DRA by failing to exercise his right to opt out of the program.” *Id.* at
4 1109.

5 Here, although Knepper did not sign the Agreement to acknowledge her understanding of
6 her right to opt out and did not submit the opt out form, she did – at least once – affirmatively
7 acknowledge receipt of notice about both the arbitration program and the right to opt out when she
8 responded on March 1, 2016 to Email Notice 3. She says that she cannot currently recall her
9 understanding of or knowledge of what she meant by that response, but that does not alter her
10 acknowledgement of receipt of the information on that date.⁷

11 Finally, and relatedly, Knepper argues that even if she could theoretically be bound to an
12 arbitration agreement sent by email without her affirmative assent, she cannot be considered to
13 have agreed to the Arbitration Agreement at issue. She argues that the Arbitration Agreement
14 contains language indicating that to be bound by it, the recipient was *required* to sign it; it is
15 undisputed that she did not.

16 Some of the language used by Ogletree in its Notices, as well as the internal emails sent
17 among Ogletree’s HR personnel, show that Ogletree wanted to have each covered individual sign
18 and return the Arbitration Agreement to their HR representative. *See, e.g.*, Dkt. No. 70-1 (January
19 15, 2016 Email from HR director to office administrators noting that “all” employees “have been
20 asked to return the signed Mutual Arbitration Agreement to their local Office Administrator” but
21

22 ⁷ To be clear, I am not endorsing a general “silence equals consent” position. As the Ninth Circuit
23 itself recognized, “[i]n other circumstances acceptance by silence may be troubling, and explicit
24 consent indispensable.” *Najd*, 294 F.3d at 1109. Here, however, there was not complete silence.
25 Knepper affirmatively acknowledged receipt on March 1, 2016. *See Hicks*, 2006 WL 2595941 at
26 *3 (concluding that the fact that “plaintiff never signed a form acknowledging receipt of the SIS
27 materials [] is immaterial as plaintiff does not dispute defendant’s evidence that he did in fact
28 receive such materials; indeed, he does not even dispute that he read the materials.”). Moreover,
Knepper is an experienced employment law attorney, and that she acknowledged receipt of the
materials at least once (in addition to Ogletree’s evidence that Knepper received the information at
least three times) makes a finding of implied consent appropriate. *Cf. Dotson v. Amgen, Inc.*, 181
Cal. App. 4th 975, 981 (Cal. App. 2d Dist. 2010) (taking into consideration, when determining
procedural unconscionability, the fact that plaintiff was not a “low-wage employee without the
ability to understand that he was agreeing to arbitration” but was “a highly educated attorney.”).

1 recognizing that because “the policy does allow current employees to opt-out of the arbitration
2 program so you may not receive an agreement from every employee.”). However, each of the
3 Email Notices, as well as the text above the signature line in the Arbitration Agreement, explain
4 that the signature indicates *only* that the signer understood that the signer had the right to opt out
5 of the arbitration program. See Arbitration Agreement (“***Special Note: This Agreement is an***
6 ***important document that affects your legal rights. You should familiarize yourself with it. By***
7 ***signing below, you acknowledge that you understand you have the option to opt out of this***
8 ***Agreement by returning an Opt Out form to the Director of Human Resources on or before March***
9 ***1, 2016 and that failure to return an Opt Out form and remaining in the employment of the Firm***
10 ***after that date will be deemed an acceptance of this Agreement.***”); see also Email Notice 1
11 (***Please sign and return a copy of the Mutual Arbitration Agreement to your Office***
12 ***Administrator. Signing the Agreement signifies that you understand you have the option to opt***
13 ***out and that if you do not opt out on or before March 1, 2016 you will be deemed to have***
14 ***accepted the Agreement.***”); Email Notice 2 (“As indicated below: *Signing the Agreement signifies*
15 *that you understand you have the option to opt out and that if you do not opt out on or before*
16 *March 1, 2016 you will be deemed to have accepted the Agreement.*”); Email Notice 3 (same).
17 The “signature” language applies to acknowledgment only of the right to opt out, not an
18 acknowledgement of an agreement to be bound.⁸

19 _____
20 ⁸ Knepper cites cases declining to enforce arbitration agreements where the employers expressly
21 sought or required employee consent to an arbitration agreement, in effect creating a bilateral as
22 opposed to a unilateral contract. However, the language and structure of the Arbitration
23 Agreement is starkly different than the language and structure of bilateral agreements in those
24 cases. See *Romo v. Y-3 Holdings, Inc.*, 87 Cal.App.4th 1153, 1160 (2001) (where employees
25 signed various provisions in their employment application, but did not sign the separate arbitration
26 section within that application, employees “did not assent” to arbitration); *Mitri v. Arnel*
27 *Management Co.*, 157 Cal.App.4th 1164, 1173 (2007) (where the employee handbook contained
28 an arbitration policy stating that employees would be required to sign a separate arbitration
agreement, and none of the affected employees signed the separate agreement, there was no
consent or effective agreement to arbitrate); *Recinos v. SBM Site Services LLC*, A151253, 2018
WL 3801844, at *5 (Cal. App. 1st Dist. Aug. 10, 2018) (where arbitration provision was
separately set forth in the job application with its own signature line, applicants did not sign the
arbitration provision, and there was no disclosure that arbitration was a term and condition of
employment, there was no agreement to arbitrate); *Stagner v. Luxottica Retail N.A., Inc.*, C 11-
02889 CW, 2011 WL 3667502, at *5 (N.D. Cal. Aug. 22, 2011) (rejecting motion to compel
arbitration where employee signed her agreement to terms and conditions of employment in
employee handbook but did not sign separate section expressly agreeing to be bound by dispute

1 Moreover, the language of Email Notices as well as the Arbitration Agreement itself
2 clearly explain that failure to opt out plus continued employment will be “deemed” agreement to
3 the Arbitration Agreement. *See* Email Notice 1 (“If you do not return an Opt-Out form by March
4 1, 2016 and remain employed by the Firm after that date, you will be deemed to have accepted the
5 terms of the Agreement.”); Email Notice 2 (“if you do not opt out on or before March 1, 2016 you
6 will be deemed to have accepted the Agreement”); Email Notice 3 (same). In these circumstances,
7 Knepper’s failure to sign the Agreement is not dispositive. It is her failure to opt out – the need
8 for which and consequences of were *clearly explained* to her in multiple emails received by
9 Knepper – and her continued employment which facially binds Knepper to the Arbitration
10 Agreement.

11 **C. Unconscionability**

12 Knepper argues that even if the Agreement applies to her, I should nonetheless deny the
13 motions to transfer venue because the Agreement is both procedurally and substantively
14 unconscionable and therefore unenforceable. However, the Agreement contains a delegation
15 clause providing that:

16 Except as provided below, the arbitrator shall have the authority to
17 resolved any dispute relating to the interpretation, applicability,
18 enforceability, or formation of this Agreement, including without
19 limitation any claim that the Agreement is void or voidable.

20 Agreement at ¶ 6. The “except as” language carves out from the arbitrator’s powers only the
21 ability to consolidate claims of other individuals into a single proceeding. *Id.* Under this clause,
22 disputes over the unconscionability of the Agreement – procedurally and substantively – are to be
23 decided by the arbitrator. *See Mohamed v. Uber Techs., Inc.*, 848 F.3d 1201, 1209 (9th Cir. 2016).

24 Knepper argues that the delegation clause does not preclude me from determining
25 unconscionability because there are serious doubts whether the Agreement applies to her and the
26 language in the delegation clause is confusing and contradictory. Both of those arguments are
27 meritless. I have already determined above that the Agreement facially applies to her. Despite her
28 protestations, the language of the delegation clause clearly conveys to the arbitrator the general

resolution agreement).

1 question of the Agreement’s enforceability as well as the narrower question of whether her claims
2 (individual or collective) are subject to arbitration.

3 In *Mohamed*, because the plaintiffs raised arguments concerning why the delegation clause
4 itself was procedurally or substantively unconscionable, the court resolved those challenges.
5 *Mohamed v. Uber Techs., Inc.*, 848 F.3d at 1210-1212 (addressing unconscionability narrowly as
6 to delegation clause only). Here, Knepper’s arguments for procedural unconscionability are the
7 unfairness, ambiguity, and surprise arguments to the existence of the Agreement that I addressed
8 and rejected above. Her substantive unconscionability arguments are based on “one-sided”
9 provisions in the Agreement itself, not the delegation provision. Those questions are to be
10 resolved by the arbitrator.

11 The delegation provision is clear and not unconscionable. Knepper’s arguments
12 challenging the Agreement must be resolved by the arbitrator.

13 For the foregoing reasons, I conclude that Ogletree has demonstrated that the Arbitration
14 Agreement facially applies to Knepper.

15 **II. MOTION TO TRANSFER**

16 In moving to transfer these cases to the Central District of California, Ogletree argued that
17 the existence of the Arbitration Agreement – requiring arbitration of Knepper’s claims in the
18 Central District – was dispositive and requires granting its motions to transfer. *See, e.g., Atlantic*
19 *Marine Const. Co., Inc. v. U.S. Dist. Ct. for W. Dist. of Texas*, 571 U.S. 49, 64 (2013) (“forum-
20 selection clauses should control except in unusual cases.”). In the extensive briefing to date in this
21 case, Knepper does not argue or explain why this case should not be transferred to the Central
22 District if she *is* at least facially bound by the Arbitration Agreement.

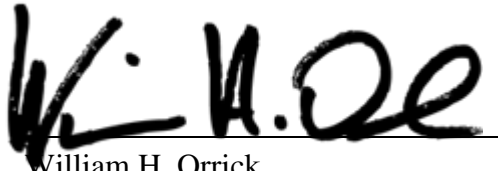
23 Given the showing that Knepper is at least facially bound to the Arbitration Agreement by
24 her failure to opt out, the forum selection clause in that Agreement mandates that these cases be
25 transferred to the Central District. *See* Arbitration Agreement ¶ 4 (“[t]he arbitration hearing shall
26 be held in or near the city in which individual is or was last employed by the Firm.”). The motions
27 to transfer these two cases are GRANTED. The motion for leave to file an amended complaint in
28 Case No. 18-00303 is deferred for resolution by the judge in the transferee district.

1 **CONCLUSION**

2 Defendant's motions to transfer Case Nos. 18-cv-00303 and 18-cv-00304 are GRANTED.
3 These cases are transferred to the Central District of California.

4 **IT IS SO ORDERED.**

5 Dated: January 9, 2019

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8 William H. Orrick
United States District Judge

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United States District Court
Northern District of California