



## Jennie Darrow v. InGenesis Inc., et al

2020 | Cited 0 times | W.D. Texas | July 2, 2020

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

SAN ANTONIO DIVISION

JENNIE DARROW, Plaintiff, v. INGENESIS INC., DR. VERONICA MUZQUIZ EDWARDS, Defendants.

§ § § § § § §

SA-20-CV-00530-XR

ORDER On this date, the Court considered The Court also considered the oral arguments of the parties made in open court on June 30, 2020. After careful consideration, the Court will GRANT motion.

### BACKGROUND I. Procedural Background

This case arises out of an employment-related dispute between Plaintiff Jennie Darrow EO and

InGenesis is a staffing company that provides staffing-related services for large institutional and corporate clients. The company is a Texas corporation based in San Antonio. InGenesis hired Plaintiff in July 2018 to serve as its Executive Director of Managed Service Provider Programs. The parties agreed that Plaintiff would perform her job remotely from her home in New Jersey.

Plaintiff alleges that she enjoyed success in her role with InGenesis and managed some of According to Plaintiff, a few months into her employment, she discovered InGenesis was consciously failing to conduct mandatory background checks and drug screenings on candidates that it helped staff to highly sensitive hospital and prison positions at UT and the State of Ohio. Plaintiff alleges InGenesis had both a contractual and a moral duty to ensure these background checks and drug tests were completed, and that the clients relied upon InGenesis to perform these checks. Plaintiff claims that she repeatedly complained to InGenesis officials but was met with inaction and retaliation in the form of removal from the UT account and eventual termination of her employment without explanation on May 24, 2019.

Plaintiff filed suit on August 21, 2019 in the U.S. District Court for the District of New Jersey,



## Jennie Darrow v. Ingenesis Inc., et al

2020 | Cited 0 times | W.D. Texas | July 2, 2020

alleging a single cause of action against both Defendants: retaliation in violation of the Defendants filed a motion to dismiss or to compel arbitration and to transfer the case to this Court. ECF No. 6. After briefing on the issue, Judge Kevin McNulty issued an opinion finding that the parties had agreed to a forum- selection clause that designated the Western District of Texas as the appropriate forum. ECF No. , but declined to e case to Id. at 11; ECF No. 29. The case was transferred to this Court on April 29, 2020, and the Court ordered Defendants to file any further motion to compel arbitration, stay, or dismiss no later than June 1, 2020. ECF No. 33.

On June 1, Defendants filed their present motion to dismiss and compel arbitration, or alternatively, to stay proceedings pending arbitration. ECF No. 42. Defendants argue that Plaintiff executed a binding Arbitration Agreement requiring arbitration of the claim asserted in this litigation. Id. at 2. They further argue that case should be dismissed after the Court compels arbitration, or alternatively stayed pending the outcome of arbitration. Id. at 7. In response, Plaintiff argues that there is no valid agreement to arbitrate. ECF No. 45 at 1 3. Plaintiff further urges there is a conflict within the Arbitration Agreement regarding the amount of arbitration expense to be paid by Plaintiff, and that this Court Id. at 4. Finally, Plaintiff asks that if the motion to compel arbitration is granted, this lawsuit be stayed rather than dismissed. Id.

### II. Contracts at Issue

upon the Arbitration Agreement executed by the parties on July 2, 2018. ECF No. 42-2. Plaintiff and Defendant Edwards electronically signed that two-page agreement. Id. at 2. In paragraph 1, the Arbitration Agreement provides, in relevant part:

This Arbitration Agreement modifies the legal and equitable rights and obl as InGenesis and Employee are bound by these provisions regarding past, current and future matters and issues, acts and/or omissions. Enforcement of the Arbitration Agreement shall be governed by the Federal Arbitration Act. Employer InGenesis and Employee agree that, for many reasons, lawsuits and court actions are disadvantageous to both. Therefore, they agree that any claim or dispute between them or against the other or any agent or employee of the other, whether related to the employment relationship or otherwise, including those created by practice, common law, court decision, or statute, now existing or created later, including any related to allegations of violations of state or federal statutes related to discrimination, harassment, and/or retaliation (collectively referred to as Arbitration Association, under the rules of procedure in effect at the time any claim is made Any disputes shall be arbitrated by an arbitrator pursuant to the Employment Rules The decision of the arbitrator shall be final and conclusive on the parties and shall be a bar to any suit, action or proceeding instituted in any federal, state or local court Each party shall pay its own costs of arbitration, except that the Employer agrees to pay for one day of arbitration hearings. Fees paid are subject to (including attorneys award of the arbitrator may be entered as a judgment in any court of competent jurisdiction. By signing this Agreement, the parties are giving up any right they might have to a jury trial.



## Jennie Darrow v. Ingenesis Inc., et al

2020 | Cited 0 times | W.D. Texas | July 2, 2020

Id. at 1 (emphasis in original). The Arbitration Agreement also contains a be construed and enforced in accordance with the laws of the State of Texas Id. Finally, the

provision:

Subject to paragraph 1, the parties further agree that all actions or proceedings arising in connection with this Agreement, including injunctive relief, shall be tried and litigated exclusively in the Federal Courts of the Western District of Texas, San Antonio Division, or in the State District Courts of Texas located in Bexar County, Texas. The aforementioned choice of venue is intended by the parties to be mandatory and not permissive in nature, thereby precluding the possibility of litigation between the parties with respect to or arising out of this Agreement in any jurisdiction other than that specified in this paragraph Id. at 1 2.

Plaintiff also claim and the amendments thereto, both signed by the parties and executed on July 10,

2018. ECF Nos. 45-2, 45-3. including agreements of non-disclosure of proprietary and confidential information,

non-solicitation of employees or clients of InGenesis, and non-competition. ECF No. 45-2 at 1 3. The Restrictive Agreements document also contains a provision regarding choice of law and

forum selection:

These Agreements shall be governed by the laws of the State of Texas Any litigation or proceeding brought by either party involving the enforcement of these Agreements or the rights, duties, or obligations of any party shall be brought exclusively in the state or federal courts sitting in San Antonio, Bexar County, Texas. If either party shall commence any action or proceeding against the other party related to a breach or alleged breach of this Agreement, including without limitation any action for injunctive or equitable relief or for a judicial declaration of rights hereunder, the prevailing party in such action shall be entitled to recover

Id. ¶ 8. The Amendment to Restrictive Agreements, also signed by the parties on July 10, 2018, modifies the non-competition provisions and provides for an application for waiver or modification of any provision of the Agreements. ECF No. 45-3. The Amendment further states Id. ¶ 3.

### DISCUSSION I.

irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation

9 U.S.C. § 2. shall direct the parties to Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218 (1985) (emphasis in original). designed to overrule the judiciary s long-standing refusal to enforce



## Jennie Darrow v. Ingenesis Inc., et al

2020 | Cited 0 times | W.D. Texas | July 2, 2020

agreements to arbitrate and to

Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 478 (1989) (internal quotations and citations)

CompuCredit Corp. v. Greenwood, 565 U.S. 95, 97 (2012) (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).

Although there is a strong federal policy favoring arbitration, that policy does not apply Will- Drill Res., Inc. v. Samson Res. Co., 352 F.3d 211, 214 (5th Cir. 2003). T parties to arbitrate when they have not ag Volt, 489 U.S. at 478. In other words, United Steelworkers of Am. v. Warrior & Gulf

Nav. Co., 363 U.S. 574, 582 (1960). Rather, t Volt, 489 U.S. at 478.

arbitration requires the application of a two-pronged test. Fleetwood Enters., Inc. v. Gaskamp, 280 F.3d 1069, 1073 (5th Cir. 2002), opinion supplemented on denial of reh'g, 303 F.3d 570 (5th Cir. 2002). The first prong is aimed at determining whether the parties agreed to arbitrate the dispute in question. Klein v. Nabors Drilling USA L.P., 710 F.3d 234, 236 (5th Cir. 2013). This prong involves two sub-inquiries: 1) whether a valid agreement to arbitrate exists between the parties, and 2) whether the agreement covers the dispute in question. Id. Under this prong, the court, not the arbitrator, typically decides whether the parties have agreed to arbitrate the dispute in question. AT&T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 651 (1986). 1

T parties Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985). If the first prong is satisfied, arbitration must be compelled unless some federal statute or policy Primerica Life Ins. Co. v. Brown, 304 F.3d 469, 471 (5th Cir. 2002). The party seeking to compel

arbitration bears the initial burden of establishing the existence of an arbitration agreement (and

1 In some cases, if a court makes the threshold determination that there is an agreement to arbitrate, the agreement may contain a valid delegation clause which requires the court to submit the question of whether the particular claim falls within the arbitration agreement to the arbitrator. See Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524, 527 (2019) by contract that an arbitrator, rather than a court, will resolve threshold arbitrability questions as well as underlying Kubala v. Supreme Prod. Servs., Inc., 830 F.3d 199, 202 (5th Cir. 2016). None of the parties here contend there is a delegation clause that requires this Court to submit the question of arbitrability to the arbitrator. that the asserted claims fall within its scope); the burden then shifts to the party resisting arbitration to present evidence showing why the arbitration agreement should not be enforced. Kershaw v. CB Restaurants, Inc., 5:15-CA-462-OLG, 2015 WL 12743609, at \*1 (W.D. Tex. Aug. 6, 2015) (citing Wachovia Sec., LLC v. Emery, 186 S.W.3d 107, 113 (Tex. App. Houston [1st Dist.] 2005, no pet.)).



## Jennie Darrow v. Ingenesis Inc., et al

2020 | Cited 0 times | W.D. Texas | July 2, 2020

a. Prong One: Did the parties agree to arbitrate the dispute in question?

i. Is there a valid agreement to arbitrate between the parties? *Doctor s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686 (1996). Under Texas law,

parties form a binding contract when there is (1) an offer, (2) an acceptance in strict compliance and (5) execution and delivery of the contract with the intent that it be mutual and binding. *Lucchese Boot Co. v. Licon*, 473 S.W.3d 390, 400 (Tex.App. El Paso 2015, no pet.).

Defendants contend that the Arbitration Agreement is a valid agreement between the parties under principles of contract law in Texas. ECF No. 42 at 5. Specifically, Defendants cite Texas law holding an employer may enforce an arbitration agreement entered into during an at- will employment relationship, and holding that a mutual obligation to arbitrate is sufficient consideration to support a valid and enforceable agreement. *Id.* at 6.

Plaintiff responds that there is no valid agreement to arbitrate because there was no and the forum selection provision within the Arbitration Agreement, and between the Arbitration

harmonize and give effect to all the provisions of the contract so that none will be rendered *Id.* at 2 (citing *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W. 3d 323, 333 (Tex. 2011)). Plaintiff also cites the well-known proposition that ambiguous language must be construed against the drafter. *Id.* at 3 (citing *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 63 (1995)). Additionally, Plaintiff cites an unpublished Fifth Circuit f a similar conflict within *Id.* at 3 (citing *Oils, L.C.*, No. 19-51169, 2020 WL 2078368 (5th Cir. Apr. 28, 2020)).

Defendants reply that the agreement to arbitrate is clear and unequivocal, and that 1 4.

The Court agrees with Defendants that there is a valid agreement to arbitrate between the parties. The Arbitration Agreement meets all of the elements required for an enforceable agreement, as demonstrated by the signature of both parties and the plain terms of the Agreement. Plaintiff does not dispute that she read and signed the Agreement, which clearly states that it -2 ¶ 1. The , in fact, inconsistencies. The provisions of the Arbitration Agreement and of the Restrictive Agreements can be read to *Mastrobuono*, 514 U.S. at 62

against InGenesis -2 ¶ 1. The federal or state court in San Antonio, Bexar County, Texas. *Id.* ¶ 3. And the Restrictive ted to choice of law and forum selection relate only

Agreements alone. ECF No. 45-2 ¶ 8. Read together, these agreements make clear that there was to retaliation, would be subject to arbitration; and that any questions about the enforcement of the

Arbitration Agreement or the Restrictive Agreements would be brought in federal or state court in



## Jennie Darrow v. Ingenesis Inc., et al

2020 | Cited 0 times | W.D. Texas | July 2, 2020

Texas. Bandera Cty. v. Hollingsworth, 419 S.W.3d 639, 645 (Tex.App. San Antonio 2013, no pet.) ).

The is wholly distinguishable from

ECF No. 45 at 3. In , the plaintiff joined a company as a member by signing an online member agreement. That member agreement contained choice of between the parties, and also incorporated by reference two other documents: the Policies and

Procedures and the Compensation Plan. The plaintiff was not required to sign either of the two incorporated documents. The Policies and Procedures document contained an arbitration clause and choice of law and foru Magistrate Judge Hightower found the member agreement and the arbitration clause in the Policies

d that there was no valid agreement to arbitrate under the applicable Utah law. hnessy v. Young Living Essential Oils, LC, No. 1:19-CV-412-LY, 2019 WL 5296359, at \*5 (W.D. Tex. Oct. 18, 2019), report and recommendation adopted No. 19-CV-412-LY, 2019 WL 8587182 (W.D. Tex. Nov. 27, 2019), No. 19-51169, 2020 WL 2078368 (5th Cir. Apr. 28, 2020). Judge Yeakel agreed, and the Fifth Circuit affirmed, 2020 WL 2078368, at \*6, reasoning that the pertinent arbitration clause in the Policies and Procedures document was in direct conflict with the choice of law and forum selection provision in the agreement itself that

Salt Lake City, Utah. Id. else in the Id.

In contrast, in this case the relevant provisions are not in direct conflict and can be harmonized to give effect to the agreement to arbitrate; there is limiting language in the forum and the

Restrictive Agreements were not incorporated into the Arbitration Agreement, and can clearly be read as independent of the Arbitration Agreement and relate . For all of these reasons, the Court finds there was a valid agreement to arbitrate.

ii. Once a valid agreement to arbitrate is established, the second sub-inquiry asks: does the agreement cover the dispute in question? Defendants argue that subje or federal statutes related to discrimination, harassme -2. Defendants argue her claim is clearly subject to arbitration. Plaintiff does not contend in her response that her specific claim is not subject to the Arbitration Agreement just that in her view the agreement to arbitrate is not valid. See generally ECF No. 45. The Court agrees with EPA retaliation claim is one that is subject to the agreement to arbitrate.

b. Prong Two: Do any external legal constraints

claim? The parties do not specifically address the second prong of the



## Jennie Darrow v. Ingenesis Inc., et al

2020 | Cited 0 times | W.D. Texas | July 2, 2020

In fact, courts have consistently found claims brought under CEPA to be subject to arbitration under valid agreements. See, e.g., *Littman v. Morgan Stanley Dean Witter*, 337 N.J. Super. 134, 144 49 (App. Div. 2001) (enforcing arbitration of a CEPA claim); *Singer v. Commodities Corp.*, 292 N.J. Super. 391 (App. Div. 1996) (same); *Bleumer v. Parkway Ins. Co.*, 277 N.J. Super. 378 (App. Div. 1994) bject to arbitration under an arbitration clause in a private employment the arbitrability test are met, and parties.

### II. Should this case be dismissed or merely stayed?

The FAA provides that when an issue in a lawsuit is referable to arbitration, a federal arbitration has been had in accordance 9 U.S.C. § 3. However, *Alford v. Dean Witter Reynolds, Inc.*, 975

F.2d 1161, 1164 (5th Cir. 1992). rather, the district courts have discretion to do so, and also have discretion to stay the case or

*Glazer s Inc. v. Mark Anthony Brands Inc.*, SA-11-CV-977-XR, 2012 WL 2376899, at \*6 (W.D. Tex. June 22, 2012) (citing *Apache Bohai Corp., LDC v. Texaco China, B.V.*, 330 F.3d 307, 331 n.9 (5th Cir. 2003)). Entry of a stay as opposed to a dismissal may be the district court perceives that it might have more to do than execute the *Apache Bohai Corp.*, 330 F.3d at 309.

retaliation in violation of CEPA is arbitrable. ECF No. 42 at 7 (citing *Alford*, 975 F.2d at 1164).

In response, Plaintiff merely

The Court fi stay rather than a dismissal See *Mayton v. Tempoe, LLC*, No. SA-17-CV-179-XR, 2017 WL 2484849, at \*6 (W.D. Tex. June

7, 2017) (dismissing, rather than staying, an action that was wholly arbitrable).

CONCLUSION No. 42) is GRANTED claim against Defendants is compelled to arbitration, to be conducted consistent with the terms of

the Arbitration Agreement. 2

This case is DISMISSED WITH PREJUDICE. The Clerk is

2 In her response, Plaintiff raises an issue with the supposed inconsistency in the Arbitration Agreement regarding the portion of costs she is required to bear for arbitration. DIRECTED to enter judgment pursuant to Federal Rule of Civil Procedure 58 and to mark this case as closed.

It is so ORDERED. SIGNED this 2nd day of July, 2020.



## Jennie Darrow v. Ingenesis Inc., et al

2020 | Cited 0 times | W.D. Texas | July 2, 2020

XAVIER RODRIGUEZ UNITED STATES DISTRICT JUDGE

-2 ¶ 1. The AAA Employment Rules laying out the AAA Administrative Fees provide that, for a dispute filed by an individual, the individual must pay a non- -4. Plaintiff contends this is inconsistent with another provision of the Arbitration Agreement -2 ¶ 1. Defendants reply that there is no inconsistency because there is a difference the AAA rules. E moot.

