

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
February 24, 2026 Session

FILED

10/09/2026

Clerk of the
Appellate Courts

**NYRSTAR TENNESSEE MINES-STRAWBERRY PLAINS, LLC v. MOSSY
CREEK MINING, LLC**

**Appeal from the Circuit Court for Knox County
No. 3-213-24 Deborah C. Stevens, Judge**

No. E2025-00247-COA-R3-CV

The dispute in this case is over the interpretation and meaning of the indemnity provision in a settlement agreement. The trial court denied the plaintiff's motion to compel arbitration. We affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court
Affirmed; Case Remanded**

JOHN W. MCCLARTY, P.J., E.S., delivered the opinion of the court, in which THOMAS R. FRIERSON, II, and KRISTI M. DAVIS, JJ., joined.

W. Edward Shipe and Avery C. Lovingfoss, Knoxville, Tennessee, and William M. Katz, Jr., Dallas, Texas, for the appellant, Nyrstar Tennessee Mines-Strawberry Plains LLC.

W. Kyle Carpenter, Dean T. Howell, and Kaitlin F. Tweel, Knoxville, Tennessee, for the appellee, Mossy Creek Mining, LLC.

OPINION

I. BACKGROUND

This matter initially arose out of a dispute regarding certain costs at the Young Mine and Mill ("Young Mine"), a zinc processing facility currently owned by appellant Nyrstar Tennessee Mines-Strawberry Plains, LLC ("Strawberry Plains"). Appellee Mossy Creek Mining, LLC ("Mossy Creek") and Strawberry Plains are parties to a series of agreements known as the "Young Mine Agreements," which contain an arbitration provision and govern Mossy Creek's use of and operations on property at the Young Mine. Mossy Creek,

engaged in the business of selling limestone, utilizes the tailings (leftover materials from the processing of the mined ore) stockpiled on the Young Mine property. The Young Mine Agreements consist of the following contracts:

1. The Young Mine Tailings and Access Easement Agreement, October 24, 2002 (“Original Easement”). Parties to the Original Easement are Mossy Creek and ASARCO Incorporated (“ASARCO”), a predecessor-in-interest to Strawberry Plains.
2. The Young Mine Agreement, May 19, 2006 (“Young Mine Agreement”). Parties to the Young Mine Agreement are Mossy Creek and Glencore Ltd. (“Glencore”), a predecessor-in-interest to Strawberry Plains.
3. The Amendment to Young Mine Agreement, dated February of 2007. Parties to the Amendment to Young Mine Agreement are Mossy Creek and East Tennessee Zinc Company, LLC (“ETZC”), a predecessor-in-interest to Strawberry Plains.
4. The Supplemental Easement Agreement, June 11, 2007 (“Supplemental Easement”). Parties to the Supplemental Easement are Mossy Creek, the Industrial Development Board of Jefferson County, Tennessee (“Jefferson County”), and ETZC.
5. The Agreement Amending Young Mine Agreement, December 19, 2012 (“Amending Agreement”). Parties to the Amending Agreement are Mossy Creek, Strawberry Plains, and Jefferson County.

Nyrstar IDB and Nyrstar NV are not parties to any of the agreements.

2002 ORIGINAL EASEMENT

The Original Easement was signed by ASARCO, a New Jersey Corporation, and Mossy Creek. Entered into in 2002, it was prepared when ASARCO owned the Young Mine but was not actively mining zinc. The Original Easement provided for Mossy Creek to have five easements at the Young Mine:

- (i): Easement to enter the property and “use the Property for purposes of removing and selling the Tailings from the Property and for maintaining the existing Tailings’ impoundment located thereon, including all sediment

control structures ('Tailings Easement').”¹

(ii): Easement for use of the roadway and the railroad spur owned by Mossy Creek.

(iii): Easement for storage of Mossy Creek’s equipment and vehicles used in the removal of tailings from the Young Mine.

(iv): Easement for Mossy Creek to have signage at the Young Mine.

(v): Easement for Mossy Creek to use the scales and scale house at the Young Mine.

Pursuant to Section 14(c) of the Original Easement, the parties agreed to resolve disputes in arbitration:

Any dispute arising out of or relating to this [Original Easement], including without limitation, the breach, termination or validity thereof . . . will be settled by binding arbitration pursuant to the Commercial Arbitration Rules of the AAA,² as in effect on the date thereof. . . .

2006 YOUNG MINE AGREEMENT

Mossy Creek later entered into an agreement with Glencore, a Swiss company, in connection with Glencore’s anticipated purchase at auction of the Young Mine from ASARCO and assumption of ASARCO’s rights and obligations under the Original Easement. It appeared Glencore and its affiliate ETZC would restart zinc mining. In the May 2006 Young Mine Agreement, Mossy Creek obtained title to the tailings produced at the Young Mine “without charge . . . upon deposit onto the Tailings Dam.” The Young Mine Agreement further confirmed that Mossy Creek would continue “to have the right of access to, and an easement permitting Mossy Creek to remove tailings currently located in the Easement Areas,” which included the TSF, to access tailings either stored at or produced at the Young Mine. The Young Mine Agreement stated that the “Old Tailings” – those tailings that had been previously stored in the TSF – “are owned by Mossy Creek and upon deposit, the New Tailings shall immediately become the Property of Mossy

¹ The tailings impoundment dam is known as the Tailings Storage Facility or “TSF.” The by-products can be classified and used as either agricultural lime (“ag lime”), sand, or tailings. The TSF is designed for the safe and long-term storage of tailings materials, to settle out the tailings, and to decant clear water off the top of the TSF to be reused in the mill. The TSF is approximately 100 feet tall and 100 acres. The Tennessee Safe Dams Act provides the legal requirements and recognized dam safety criteria for the tailings and by-product storage facilities.

² American Arbitration Association.

Creek; however, Glencore shall have the right to deposit New Tailings in the tailings dam on top of the Old Tailings.”

2007 SUPPLEMENTAL EASEMENT

After buying the Young Mine and assuming the Original Easement, Glencore transferred its rights and obligations under the Original Easement to ETZC, a wholly owned Delaware subsidiary with its principal place of business in Tennessee. The 2007 Supplemental Easement confirmed the parties’ agreement in the Young Mine Agreement: “The tailings in existence as of November 20, 2001 (the “Old Tailings”) are owned by Mossy Creek and upon deposit, new tailings (“New Tailings”) shall immediately become the property of Mossy Creek; however, [ETZC] shall have the right to deposit New Tailings in the tailings dam on top of the Old Tailings.”

In December 2009, ETZC sold the Young Mine to Strawberry Plains, which assumed ETZC’s rights and obligations under the Original Easement.

2012 SETTLEMENT AGREEMENT

A confidential Settlement Agreement and Release of Claims (“Settlement Agreement”) was reached on December 19, 2012, because the parties wished to resolve all claims asserted or that could have been asserted by Mossy Creek against Strawberry Plains, Nyrstar IDB, and Nyrstar NV in the following matters:

- 1) *Mossy Creek Mining, LLC v. Glencore Ltd., East Tennessee Zinc Co., LLC, Nyrstar IDB, LLC, Nyrstar Tennessee Mines – Strawberry Plains, LLC, and NV*, No. 50 489 T 000 73 12, International Centre for Dispute Resolution in Chicago (“2012 Arbitration”);
- 2) *Mossy Creek Mining, LLC v. Nyrstar IDB, LLC, Nyrstar Tennessee Mines – Strawberry Plains, LLC, and Nyrstar NV*, No. 3:10-CV-328 (E.D. Tenn.); and
- 3) *Mossy Creek Mining, LLC v. Nyrstar IDB, LLC, Nyrstar Tennessee Mines – Strawberry Plains, LLC, and Nyrstar NV*, No. 1:11-cv-06938 (N.D. Ill.).

In each of these matters, Mossy Creek claimed that Glencore, ETZC, and Strawberry Plains contaminated the tailings by depositing rock onto the tailings in the TSF. According to Mossy Creek, these actions made the tailings economically unusable as a future source of ag lime or caused added costs of screening and removing the rock from the tailings to produce ag lime.

In accordance with the terms of the Settlement Agreement, Mossy Creek agreed to

the following:

* * *

3. . . . [T]he parties agree as follows:

(a) To amend the Young Mine Agreement . . . so that all of Mossy Creek's ownership interests in the limestone tailings in and on the Young Mine tailings dam are transferred to [Strawberry Plains];

(b) To amend and revoke the easements in the Young Mine Agreement . . . so that any casement allowing Mossy Creek access to the tailings dam is terminated. Easements in the Young Mine Agreement allowing Mossy Creek ingress and egress to the Young Mine property in order to load lime, rock, or other products, and to access the scale house, will remain in force according to the terms of the Young Mine Agreement.

(c) [Strawberry Plains] agrees that neither it nor its successors, affiliates, or assigns will sell, market, or distribute the limestone tailings in and on the Young Mine tailings dam as agricultural lime without the prior written consent of Mossy Creek. . . .

(d) [Strawberry Plains] agrees to indemnify and hold Mossy Creek harmless from any and all charges, claims, and/or obligations (including reasonable attorneys' fees and costs incurred) arising out of the condition of the tailings dam, the integrity thereof, any discharge, runoff, or leakage therefrom, and all claims of whatsoever kind or nature relating to or arising from [Strawberry Plains'] operation, ownership and/or maintenance of the tailings dam, with the exception that [Strawberry Plains] will not indemnify or hold Mossy Creek harmless for any claims, liabilities, obligations, promises, agreements, controversies, damages, actions, causes of action, suits, rights, demands, costs, losses, debts and expenses awarded to or made by [ETZC] or Glencore . . . in the 2012 Arbitration or in *East Tennessee Zinc Company, LLC v. Mossy Creek Mining, LLC*, Case No. 51 152 00932 08 (AAA, Chicago, IL) ("2008 Arbitration").

* * *

6. Except as specifically set forth herein, this Agreement constitutes the

entire agreement between the parties pertaining to the subject matter of this Agreement, and shall not be amended except in writing signed by all of the parties.

7. If any provision of this Agreement is held to be invalid, illegal or unenforceable, the parties agree that the enforceability of the remaining portions of this Agreement shall not be affected or impaired thereby. The Court shall rewrite the invalid, illegal, or unenforceable provision to the maximum extent permitted by law.

* * *

9. The Parties agree that this Agreement is made in Tennessee and that Tennessee law shall govern the validity, construction, interpretation and enforcement of this Agreement without regard to Tennessee's conflict of laws principles. **Should a dispute arise between or among the Parties concerning this Agreement, including, but not limited to, a dispute involving the interpretation, application, or compliance with any term or condition of this Agreement, the Parties hereby consent to jurisdiction over their persons by the state and federal courts of Tennessee. In the event a Party to this Agreement brings suit to enforce all or any part of this Agreement, the Parties agree that the prevailing party or parties in said suit will be entitled to recover their reasonable attorneys' fees, costs and expenses in prosecuting or defending such suit.**

* * *

11. The parties each warrant and represent that each respectively has read and understands this Agreement, has entered into it knowingly and voluntarily, and is duly authorized to sign this Agreement on its behalf. The Agreement is the result of negotiations between the parties, and this Agreement shall be interpreted in accordance with its plain meaning, and shall not be construed for or against any of the parties.

(Emphasis added.).

2012 AMENDING AGREEMENT

In accordance with the Settlement Agreement, the parties entered into the 2012 Amending Agreement, which provides as follows:

1. Mossy Creek hereby relinquishes all its rights, title and interests in the Tailings and the Tailings Dam referenced in the Young Mine Agreements

and transfers all such rights, title and interests to Strawberry Plains. Upon Mossy Creek's execution of this Agreement, Strawberry Plains, not Mossy Creek, will be the rightful owner of all Tailings and the Tailings Dam. In furtherance of the provisions of this paragraph, the Young Mine Agreements are hereby amended to delete Sections 4 and 7 of the Young Mine Agreement and Section 1 of the Supplemental Easement, and the Young Mine Agreements are hereby generally amended to provide that any provisions therein that are contrary to this paragraph shall be of no further force or effect.

2. The Tailings Easement (as defined in Section 2(a)(i) of the Original Easement), including, without limitation, the provisions of Sections 2(a)(i) and 3 of the Original Easement, is hereby terminated to the extent the same is used solely and exclusively for access to the Tailings and to the Tailings Dam. Such termination shall not affect any other easement rights granted to Mossy Creek in any of the Young Mine Agreements, including, without limitation, Mossy Creek's rights to use of the Tailings Easement to the extent necessary for use of any other easements granted to Mossy Creek under the Young Mine Agreements.

Such Termination of the Tailings Easement shall not affect Mossy Creek's rights of access, ingress and egress to the Scale House, and Mossy Creek's rights of access, ingress and egress, and rights to load Ag Lime or rock on the Young Mine property.

4. Section 8 of the Original Easement is hereby deleted in its entirety and shall be replaced with the following in lieu thereof "8. TERM. The term of the Easement Agreement ("Term") shall commence on October 25, 2002 and expire on October 24, 2052." The Young Mine Agreements are generally amended to provide that the term of the Young Mine Agreements shall be for a period of time commencing upon October 25, 2002, and expiring on October 24, 2052.

The Amending Agreement contains no explicit section entitled "Arbitration," along the lines of Section 14(c) of the Original Easement included in the Young Mine Agreements. Other relevant provisions from the Amending Agreement are as follows:

7. The Young Mine Agreements, as amended by this Agreement, are to remain in full force and effect and are to be deemed superseded by this Agreement only to the limited extent necessary to implement the terms hereof. In all other cases and for all other purposes the Young Mine Agreements, shall be construed and treated as a single instrument and, to the extent that they are not inconsistent therewith, all the terms and provisions herein contained shall be defined and interpreted in conjunction with all of

the terms and provisions of the Young Mine Agreements, as amended by this Agreement.

* * *

9. Except as specifically set forth herein, this Agreement constitutes the entire agreement between the parties as to the subject matter hereof, and shall not be amended except in writing signed by all of the parties.

10. If any provision of the Agreement is held to be invalid, illegal or unenforceable, the parties agree that the enforceability of the remaining portions of this Agreement shall not be affected or impaired thereby. Any court having jurisdiction and venue over the subject matter hereof, as described in Section 12 below, may rewrite the invalid, illegal, or unenforceable provision to the maximum extent permitted by law.

11. The validity, construction, interpretation and enforcement of this Agreement shall be governed by the laws of Tennessee without regard to its conflict of laws principles.

12. The parties hereby expressly agree that the Circuit and Chancery Courts for Jefferson County, Tennessee and the Federal District Court for the Eastern District of Tennessee shall have jurisdiction and venue over them and the subject matter hereof to enforce this Agreement.

2023 ARBITRATION

On June 26, 2023, Strawberry Plains filed for arbitration in *Nyrstar Tennessee Mines—Strawberry Plains, LLC v. Mossy Creek Mining, LLC*, No. 01-23-0002-8746. Strawberry Plains sought damages for (among other things) Mossy Creek's failure to clean and maintain certain areas for which it was allegedly responsible under the Original Easement. According to Strawberry Plains, Mossy Creek's contractual breaches generated additional solid waste in drainage ponds far from the TSF, which forced Strawberry Plains to remove, transport, and deposit those solids on the TSF, causing the TSF to fill up more quickly than it would have but for Mossy Creek's conduct. Strawberry Plains claimed that Mossy Creek's breaches forced it to expand the TSF's capacity to accept additional solid waste more quickly than would have been required if Mossy Creek had complied with its contractual obligations and minimized the solid waste it was generating.

Mossy Creek initially argued that Strawberry Plains' claims were not arbitrable, but the Arbitrator, in October 2023, found that the arbitration provision in the Young Mine Agreements gave her jurisdiction to decide arbitrability issues. She rejected Mossy Creek's

argument that the arbitration agreement was superseded by the Amending Agreement and determined that the arbitration provision of the Original Easement was in full force and effect. Interpretation of the Settlement Agreement was not addressed in the arbitration. Ultimately, the Arbitrator awarded Strawberry Plains declaratory relief and monetary damages against Mossy Creek in a March 2024 interim award (“Interim Award”) and a June 2024 final award (“Final Award”). The Arbitrator found that Mossy Creek was responsible for \$511,236 of costs associated with expanding the TSF’s capacity to accommodate more solid waste.

On June 17, 2024, Mossy Creek paid a total of \$1,947,589.15 owed under the Final Award. Mossy Creek then sent a letter dated July 25, 2024, demanding that Strawberry Plains indemnify it for \$1,042,613.05 of the \$1,947,589.15 paid. Per the Arbitrator’s award, the amount related to the TSF Lifts constituted 54.55% of the total award. Mossy Creek argues that applying the same percentage to the Arbitrator’s award to Strawberry Plains for attorney fees, costs, pre-award interest, and post-award interest results in Strawberry Plains, Nyrstar IDB, and Nyrstar NV owing Mossy Creek \$344,272.99 for attorney fees, \$139,137.56 for costs, \$45,466.35 for pre-award interest, and \$2,500.15 for post-award interest. Mossy Creek relies on the indemnity clause in the 2012 Settlement Agreement which, again, provides in relevant part:

[Strawberry Plains] agrees to indemnify and hold Mossy Creek harmless from any and all charges, claims, and/or obligations (including reasonable attorneys’ fees and costs incurred) arising out of the condition of the tailings dam, the integrity thereof, any discharge, runoff, or leakage therefrom, and all claims of whatsoever kind or nature relating to or arising from [Strawberry Plains’] operation, ownership and/or maintenance of the tailings dam. . . .

On August 7, 2024, Strawberry Plains filed this action to confirm the Arbitrator’s Final Award. By an agreed order entered October 31, 2024, the Arbitrator’s Interim Award dated March 19, 2024, and the Arbitrator’s Final Award dated June 27, 2024, were confirmed and adopted by reference by the trial court.

On October 22, 2024, Mossy Creek submitted its counterclaim for indemnity for part of the payment it made to Strawberry Plains on July 17, 2024. At a hearing held on January 10, 2025, the trial court found the dispute at issue concerns, arises out of, and relates to indemnity obligations owed under the Confidential Settlement Agreement, and observed:

Nowhere in the confidential settlement agreement, as I read it, does it specifically reference that provision paragraph 14(c) of the original easement.

Strawberry Plains responded that meant the “provision still stays in effect; it’s not being amended, superseded, or done away with.” The court found the Arbitrator’s decisions were proper but provided:

I think as we get to the indemnification language arising out of the confidential settlement agreement, the arbitration agreement and its enforceability as to the confidential settlement agreement is a lot more fuzzy. And while this Court understands that the law says that I should give strong benefit to the arbitration agreement, I, having looked at it and read it and evaluated it, believe that there’s nothing in the confidential settlement agreement that says that or even suggests that any of the claims arising under the indemnification provision would be determined under the arbitration agreement of the original easement.

And so while both agreements give me room for pause on both sides, . . . I do believe that the confidential settlement agreement is the agreement that would control the indemnification provision, and that is not covered by the arbitration agreement set forth in paragraph 14(c) of the original easement agreement.

So I am going to deny the motion to compel arbitration. . . .

On January 27, 2025, the trial court entered an order denying Strawberry Plains’ motion to compel arbitration. This appeal was timely filed as a matter of right.

II. ISSUES

Strawberry Plains claims that the trial court erred in denying its motion to compel arbitration for two reasons. First, it asserts that any challenge to arbitration must be decided by the Arbitrator because the parties expressly delegated arbitrability questions to the Arbitrator. Second, Strawberry Plains alleges that Mossy Creek’s counterclaims “aris[e] out of or relat[e] to” the Original Easement, not the Settlement Agreement, so they must be arbitrated under the arbitration provision of the Original Easement in any event. It is the position of Strawberry Plains that Section 14(c) of the Original Easement is not inconsistent with, and therefore is not superseded by the Amending Agreement, and, thus, remains in full force and effect. As Strawberry Plains’ counsel asserted at the hearing:

Your Honor, we’re not asking you to invalidate or declare unenforceable any provision of the settlement agreement. Again, we’re not saying that the indemnity provision on which Mossy Creek is relying for its counterclaims is invalid, illegal, or unenforceable. All we’re saying is they have to resolve those claims in arbitration They are going to get their proverbial day in court so to speak. It’s just going to happen in an arbitration and not here in

this courtroom. . . .

Strawberry Plains therefore claims that we should reverse the trial court and remand with instructions for the trial court to enter an order granting Strawberry Plains' motion to compel arbitration.

III. STANDARD OF REVIEW

This court's review of the denial of a motion to compel arbitration is "de novo, with no presumption of correctness." *Williams v. Smyrna Residential, LLC*, 685 S.W.3d 718, 723 (Tenn. Ct. App. 2024). Likewise, we must review the trial court's resolution of legal issues without a presumption of correctness. *Mitchell v. Kindred Healthcare Operating, Inc.*, 349 S.W.3d 492, 496 (Tenn. Ct. App. 2008). Ordinary principles of contract law must be applied to determine whether there is an enforceable agreement to arbitrate. Whether an arbitration agreement was formed is always a question to be resolved by the court, *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 296, 130 S. Ct. 2847 (2010). In any contract action, the court's task "is to ascertain the intention of the parties based upon the usual, natural, and ordinary meaning of the contractual language." *See Guiliano v. Cleo, Inc.*, 995 S.W.2d 88, 95 (Tenn. 1999). It is a fundamental principle of Tennessee contract law that unless there is "fraud, mistake, or some other defect, our courts are required to interpret contracts as written, giving the language used a natural meaning." *Eberbach v. Eberbach*, 535 S.W.3d 467, 478 (Tenn. 2017) (citing *U.S. Bank, N.A. v. Tenn. Farmers Mut. Ins. Co.*, 277 S.W.3d 381, 386-87 (Tenn. 2009)). "Courts may determine the intention of the parties 'by a fair construction of the terms and provisions of the contract, by the subject matter to which it has reference, by the circumstances of the particular transaction giving rise to the question, and by the construction placed on the agreement by the parties in carrying out its terms.'" *Frizzell Constr. Co. v. Gatlinburg, L.L.C.*, 9 S.W.3d 79, 85 (Tenn. 1999) (citing *Penske Truck Leasing Co. v. Huddleston*, 795 S.W.2d 669, 671 (Tenn. 1990)).

IV. DISCUSSION

Strawberry Plains first contends that Mossy Creek's counterclaims present a gateway "arbitrability" issue. Strawberry Plains maintains that the counterclaims "relat[e] to" the Original Easement. To "determine whether parties delegated arbitrability issues to the arbitrator, 'there must be "clear and unmistakable" evidence that the parties agreed to have an arbitrator decide such issues.'" *Blanton v. Domino's Pizza Franchising, LLC*, 962 F.3d 842, 844 (6th Cir. 2020) (citations omitted).

The Original Easement Arbitration text provides that an arbitrator must decide "[a]ny dispute arising out of or relating to the [Original] Easement . . . , including without limitation, the breach, termination or validity thereof" which has not been resolved by the procedure described in Section 14. Strawberry Plains claims that phrase "[a]ny dispute"

applies to all disputes, including ones regarding arbitrability. *See Lacy v. Vanderbilt Univ. Med. Ctr.*, No. M2016-02014-COA-R3-CV, 2017 WL 6273316, at *6 (Tenn. Ct. App. May 4, 2017) (“In its natural and ordinary usage, the phrase ‘related to’ simply means connected to in some way.”).

Strawberry Plains argues that the references to the Young Mine Agreements in the Settlement Agreement “confirm their ongoing validity” and asserts that there is no “express provision” in the Settlement Agreement “excluding [this] grievance from arbitration.” According to Strawberry Plains, the term “[e]xcept as specifically set forth herein” means that the arbitration provisions in the Young Mine Agreements were going to remain in place.

Further, Strawberry Plains maintains that the counterclaims at issue fall within the broad scope of the Original Easement, a “dispute arising out of or relating to” the Original Easement. It asserts that the Final Award forms the basis of the counterclaims, as Mossy Creek is seeking indemnity for funds that the Arbitrator ordered it to pay Strawberry Plains in the arbitration. Thus, Strawberry Plains stresses that “but for” the Final Award in the arbitration conducted pursuant to the Original Easement’s Arbitration Agreement, Mossy Creek would not be asserting the indemnity counterclaims.

Strawberry Plains relies on *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 U.S. 63, 39 S.Ct. 524 (2019) and *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 123 S.Ct. 588 (2002), involving the interpretation of arbitration provisions contained in the applicable contracts between the parties. In *Henry Schein*, the contract at issue between the parties contained an arbitration provision stating:

Any dispute arising under or related to this Agreement (except for actions seeking injunctive relief and disputes related to trademarks, trade secrets, or other intellectual property of [Schein]), shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association [(AAA)]. . . .

Henry Schein, 586 U.S. at 66. In *Howsam*, the contract at issue contained the following arbitration provision:

all controversies . . . concerning or arising from . . . any account . . . , any transaction . . . , or . . . the construction, performance or breach of . . . any . . . agreement between us . . . shall be determined by arbitration before any self-regulatory organization or exchange of which Dean Witter is a member.

Howsam, 537 U.S. at 81. The Settlement Agreement before us, however, has no such provisions, as there is no mention of arbitration. Rather, the Settlement Agreement provides:

Should a dispute arise between or among the Parties concerning this Agreement, including, but not limited to, a dispute involving the interpretation, application, or compliance with any term or condition of the Agreement, the Parties hereby consent to jurisdiction over their persons by the state and federal courts of Tennessee. In the event a Party to this Agreement brings suit to enforce all or any part of this Agreement, the Parties agree that the prevailing party or parties in said suit will be entitled to recover their reasonable attorneys' fees, costs and expenses in prosecuting or defending such suit.

We must agree with the trial court's decision that the evidence supporting arbitration is insufficient. As argued by Mossy Creek, there is no arbitration provision in the Settlement Agreement, and the agreement is replete with references to a "suit" being filed and with recovery of reasonable attorney's fees and costs in any such "suit." The Tennessee Supreme Court, in *Shelby County Health Care Corp. v. Nationwide Mutual Insurance Co.*, 325 S.W.3d 88, 97 (Tenn. 2010), cited Black's Law Dictionary for the definition of "suit" as "[a]ny proceeding by a party or parties against another in a court of law." As determined by the Arbitrator in this matter before us, an arbitration does not constitute a common-law action: "Although no Tennessee case on point has been located, the ordinary, plain meaning of the term 'actions' is that an arbitration does not constitute a common-law action." . . . See *Skidmore, Owings & Merrill v. Conn. Gen. Life Ins. Co.*, 197 A.2d 83, 86 (Conn. Super. Ct. 1963):

[a]n arbitration proceeding is not the bringing of any action within the meaning of the phrase as used in [the statute of limitations]. In a general sense, the word "action" means the lawful demand of one's right in a court of justice; and in this sense it may be said to include any proceedings in such a court for the purpose of obtaining such redress as the law provides. . . . an arbitration is not a common-law action, and the institution of arbitration proceedings is not the bringing of an action under any of our statutes of limitation."

As further argued by Mossy Creek, all of the parties agreed to litigate the dispute in a Tennessee state court in the event "suit" is brought to interpret, apply, or adjudge compliance with the terms of the Settlement Agreement; the Settlement Agreement grants the power to rewrite any of its provisions found to be invalid, illegal, or unenforceable to the "Court"—not an arbitrator; and no reference to or incorporation of the American Arbitration Association's Commercial Arbitration Rules and Mediation Procedures is found in the Settlement Agreement. The Settlement Agreement contains a provision establishing that it is the entire agreement between the parties, which indicates the parties' intent to "embody their complete and exclusive agreement." See *Individual Healthcare Specialists, Inc. v. BlueCross BlueShield of Tenn., Inc.*, 566 S.W.3d 671, 697 (Tenn. 2019).

As noted above, the trial court concluded “that there’s nothing in the confidential settlement agreement that . . . even suggests that any of the claims arising under the indemnification provision would be determined under the arbitration agreement of the original easement.” Any dispute over the indemnification provision is a dispute “between or among the Parties concerning this Agreement, including, but not limited to, a dispute involving the interpretation, application, or compliance with any term or condition of this Agreement.” We conclude that the trial court properly denied the motion to compel.

V. CONCLUSION

We affirm the trial court’s denial of the motion to compel arbitration and remand for further proceedings consistent with this opinion. Any unaddressed pending motions are denied as moot. Costs are assessed to the appellant, Nyrstar Tennessee Mines-Strawberry Plains, LLC.

s/John W. McClarty
JOHN W. McCLARTY, JUDGE