UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION
AT PIKEVILLE

TALLAKOY LP, et al., **Plaintiffs,** **V.** **BLACK FIRE ENERGY, INC., et al.,** **Defendants.**	**CIVIL NO. 7:14-CV-180-KKC-EBA** **ORDER**

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This matter is before the Court pursuant to plaintiffs Renewed Motion to Confirm Arbitration Award (DE 159) following remand from the United States Court of Appeals for the Sixth Circuit (DE 153). For the following reasons, the Court **GRANTS** the motion.

I. INTRODUCTION

This case originally involved a dispute between the parties over a mining investment—the case has evolved into a dispute regarding the filing and delivery requirements of the Federal Arbitration Act ("FAA"). Previously, the Court has described the long procedural road to the case's current posture as follows:

> In 2013, four plaintiffs—Tallakoy LP, Tallakoy GP, Inc., Tallawah, Inc., and Akoya Group, Ltd. (collectively, "Tallakoy")—sued two defendants—Black Fire Energy, Inc., and Black Fire Mining LLC (collectively, "Black Fire")—for defrauding them of over $1,000,000 in an investment deal. *See Tallakoy LP, et al., v. Black Fire Energy, Inc*., *et al.*, 7:13-cv-00057, DE 1 ("Tallakoy I"). The Court dismissed that suit because the parties had a binding arbitration clause. (*Tallakoy I*, DE 73). Tallakoy initiated an arbitration and [allegedly] sent notice to Black Fire. (DE 1-1) (arbitration award findings of fact). Black Fire failed to attend. *Id*. The arbitrator, following the Rules of the American Arbitration Association ("AAA"), took evidence, heard testimony, and ultimately entered an award in favor of Tallakoy. (DE 1 ¶ 17; DE 1-1).
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> A month later, Tallakoy brought that award to this Court and filed a motion to enforce it. (*Tallakoy I*, DE 76). But Tallakoy filed the motion to enforce the arbitration award in the previous Tallakoy case, which had already been closed. *See id*. So the Court

> dismissed that motion, noting that Tallakoy "remain[ed] free to file a new action to enforce the arbitration award." (*Tallakoy I*, DE 82 at 2).
>
> On December 23, 2014, Tallakoy did just that, filing a complaint to enforce the arbitration award. *See* (DE 1). In March, 2015, Black Fire filed a motion to dismiss that complaint, arguing that Tallakoy's award was "invalid and unenforceable." (DE 13-1 at 1).

(DE 86 at 1-2). After construing the motion to dismiss as a motion to vacate,[1] the Court denied the motion as untimely. *See* (DE 21 at 4-5). According to the FAA, a party must file a motion to vacate an award within three months "after the award is filed or delivered." 9 U.S.C. § 12; *In re Robinson,* 326 F.3d 767, 772 (6th Cir. 2003). The Court found that Tallakoy filed the arbitration award on October 24, 2014, and Black Fire filed its motion to dismiss on March 4, 2015. (DE 21 at 5). Thus, Black Fire's motion fell outside of the three-month period. As a result of that finding, the Court entered a judgment confirming Tallakoy's arbitration award against Black Fire on July 30, 2015. (DE 24). Black Fire then filed a motion under Federal Rules of Civil Procedure 59 and 60(b), asking the Court to amend, alter, or set aside the judgment. (DE 75).

The Court denied Black Fire's motion, finding no grounds for relief under Rules 59 or 60(b). (DE 86). However, the Court held that its previous finding as to the start date of Black Fire's three-month window to challenge the arbitration award was wrong—the Court now found that the window began on September 23, 2014, rather than the previously endorsed date of October 24, 2014. (DE 86 at 5). This was consistent with the Court's new finding that an award is "filed and delivered" under the FAA when it is issued by an arbiter. (DE 86 at 4). In this case, the arbitrator issued the award on September 23, 2014, meaning Black Fire's

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[1] Sections 10 and 11 of the Federal Arbitration Act provide the only means by which a party can challenge an arbitration award. *See Hall St. Assoc., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 582 (2008) (citing 9 U.S.C. §§ 10, 11); *Corey v. NYSE*, 691 F.2d 1205, 1212 (6th Cir. 1982) (holding that, outside of §§ 10 and 11, the FAA "provides no other avenue by which an arbitration award may be challenged").

original motion to dismiss was untimely and thus their subsequent motion to alter was without grounds.

Black Fire appealed this denial to the United States Court of Appeals for the Sixth Circuit. The Sixth Circuit reversed the denial and remanded for further proceedings. (DE 153). Specifically, the Sixth Circuit disagreed with the district court's conclusion that issuance by an arbitrator, without more, deemed an award "filed" or "delivered" under the FAA. (DE 153 at 6). Further, the Sixth Circuit pointed out that Tallakoy had adduced no evidence of actual delivery of the arbitration award on September 23, 2014, and no evidence of delivery on that date appeared in the limited factual record. (DE 153 at 9). The district Court's decision was reversed, and the matter was remanded for further factual findings as to when filing or delivery of the arbitration award occurred. (DE 153 at 10-11).

II. ANALYSIS

a. Threshold Issues

In response to the Sixth Circuit's remand, Plaintiffs have filed a renewed motion to confirm the arbitration award. (DE 159). In this current motion, Plaintiffs once again argue that Defendants' motion to vacate was untimely, and therefore the arbitration award should be confirmed. *Id.* In light of this Court's previous ruling that the filing of the arbitration award in *Tallakoy I* on October 24, 2014, could not serve as the "filing" date under the FAA since *Tallakoy I* was already a closed case, and given the Sixth Circuit's foreclosure of the date of issuance automatically becoming the date of "filing" under the FAA, the Plaintiffs now only argue as to the dates the award was "delivered" to the Defendants. (DE 159 at 8-9).

The FAA does not define "delivered," but the AAA rules, which the parties agreed to follow in their RPA (DE 13-3 at 5), provide that:

> Parties shall accept as notice and delivery of the award the placing of the award or a true copy thereof in the mail addressed to the parties or their representatives at their

> last known address, personal or electronic service of the award, or the filing of the award in any other manner that is permitted by law.

See Am. Arb. Ass'n Com. Arb. R. & Mediation Proc. R. 49, available at https://www.adr.org/aaa/faces/rules/searchrules/rulesdetail?doc=ADRSTG_004130 ("AAA R. 49"). Thus, delivery can be completed by mailing the arbitration award to the parties or their representative. Under the AAA rules, parties designate a "representative" as follows:

> Any party may participate without representation (*pro se*), or by counsel or any other representative of the party's choosing, unless such choice is prohibited by applicable law. A party intending to be so represented shall notify the other party and the AAA of the name, telephone number and address, and email address if available, of the representative at least seven calendar days prior to the date set for the hearing at which that person is first to appear. When such a representative initiates an arbitration or responds for a party, notice is deemed to have been given.

See id. at R. 26. Thus, a party that intends to be represented must either notify the other party and the AAA of the representative, or the representative must initiate an arbitration or respond for the party. *Id.; see also Choice Hotels Int'l, Inc. v. Niteen Hotels (Rochester) LLC*, 103 F. App'x 489, 492–93 (4th Cir. 2004) ("a person does not qualify as a representative of a party unless the notice requirements of Rule 26 have been complied with"). In this case, no party alleges that the defendants designated a representative through Rule 26. Quite the opposite, this litigation continues to exist because no one—not the defendants themselves nor a noticed representative under Rule 26—answered for the claims, or attended the arbitration. (DE 159 at 2-3).

Against this backdrop, the Court addresses whether proper delivery occurred on the dates supplied by the Plaintiffs.

b. October 24, 2014

Plaintiffs filed a motion to enforce the arbitration award in *Tallakoy I,* on October 24, 2014, and included a copy of the arbitration award with the filing. This Court has previously held, and the Sixth Circuit has agreed, the filing in *Tallakoy I* did not satisfy the filing

requirements of the FAA. *See* (DE 153 at 9, Sixth Circuit Information) ("The award was not filed in a 'manner that is permitted by law,' because the complaint in *Tallakoy I* had been dismissed and the case had been administratively closed") (citing AAA Rule 49). Plaintiffs now argue that, while it may not have constituted proper "filing," their motion to enforce constituted "delivery" under the FAA. (DE 159 at 10). But the Sixth Circuit has already spoken to delivery on this date. (DE 153 at 9) ("Tallakoy's motion to enforce the Award was not served on the unrepresented parties, including Black Fire, so it was not 'delivered' under the FAA on October 24, 2014).

Further, any additional evidence presented by the Plaintiffs here does not support the notion that delivery was completed on October 24, 2014. Plaintiffs point out that Defendants' former counsel in *Tallakoy I* filed a responsive motion to the Plaintiffs' motion to enforce—Plaintiffs use this as evidence that Defendants' counsel received the arbitration award since a copy of the award was filed as an attachment to the motion to enforce. Plaintiffs then advance two theories as to why receipt of the award by former counsel constitutes delivery to the Defendants: (1) even after the attorney-client relationship ended, defendants' former counsel remained a representative of the defendants for purposes of AAA Rule 49; and (2) defendants' former counsel still represented the defendants in unrelated matters, and delivery to counsel should thus still be imputed to the defendants. (DE 159 at 10-12).

Neither of these arguments is compelling. At the outset, and since former counsel was never designated as a representative under Rule 26, defendants' former counsel was never a representative for purposes of the AAA rules, including Rule 49. Further, any possible notion that former counsel acted as a representative at this time was dispelled by their filing in response to the motion to enforce. That filing was titled "Notice of Non-Representation By Former Attorneys of Former Defendants In This Closed Case." (*Tallakoy I,* DE 77). The document specifically stated, "[c]urrently, the Former Defense Counsel do not represent the

former defendants and do not make this statement with any authority to speak for the former defendants, and without the intention to do so." *Id.* at 1. Former counsel made it clear that they spoke "only as officers of the Court, and not as representatives of any 'party' in this closed case…." *Id.* at 4. By the Plaintiffs' own pleadings in this case, they were notified through email as early as November 21, 2013, that, "as it relates to the arbitration proceeding, [defendants' former counsel] will not be representing any of the parties or potential parties." (DE 167 at 2) (citing *Tallakoy I,* DE 79-1 at 1). Given this evidence, the Court cannot conclude that defendants' former counsel was defendants' representative for purposes of delivery of the arbitration award, or that delivery occurred through the filing in *Tallakoy I.*

As to Plaintiffs' second argument, even if former counsel represented the defendants in other matters, the result under the AAA Rules would not change, given noncompliance with Rule 26. AAA R. 26. In this case, there is no evidence that defendants were represented in arbitration by anyone, much less that former counsel constituted their representative for delivery purposes under AAA Rule 49. As such, the filing in *Tallakoy I* on October 24, 2014 did not constitute delivery.

c. October 27, 2014

The Plaintiffs argue that October 27, 2014, should be considered the date of delivery of the arbitration award to the defendants, since Mr. Stodin, a non-party to the judgment enforcing the arbitration, admits to receiving a copy of the award on that date. (DE 13-6 at 2). Plaintiffs argue that "Mr. Stodin's admitted agency relationship to the Defendants conclusively establishes that he was their 'representative' under AAA Rule 49 and imputes his knowledge of the Arbitration Award to Defendants as a matter of black-letter law." (DE 167 at 5). But this ignores the plain language of the AAA rules. As discussed above, Rule 49 contemplates delivery on a party or representative, and a party designates a representative

through compliance with Rule 26. In this case, there is no evidence that Stodin's "admitted agency relationship to the Defendants" complied with Rule 26, and the Court finds that Stodin was not the Defendant's representative under AAA Rule 49.

It is true that Defendants admit that, "[o]n November 4, 2014, Mr. Stodin, *on behalf of Defendants*, sent the AAA a letter requesting the AAA to confirm whether or not Plaintiffs had initiated arbitration proceedings. The AAA legal counsel responded that no such arbitration request had been received by the AAA." *See* (DE 13-1 at 3) (emphasis added) (citations omitted). But the Court finds that this inquiry does not evidence an intention for the Defendants to be represented by Stodin or provide notice to the AAA of such an intention, and it certainly did not initiate an arbitration or constitute a response within an existing arbitration. *See* AAA R. 26. Therefore, the requirements of Rule 26 are not satisfied, and delivery to Stodin, despite Plaintiffs' contentions, was not proper delivery to a party or representative under AAA Rule 49.

d. November 13, 2014

The Court finds delivery occurred on November 13, 2014. Specifically, the Plaintiffs have provided a sufficient amount of evidence showing mailing of the arbitration award to the defendants on this date. Certified Mail Receipts exist showing the mailing was sent to the parties of the arbitration. (DE 1-2). The declaration of Christine Trout, an attorney that formerly represented the Plaintiffs, states, "[o]n October 24, 2014, Plaintiffs filed a Motion to Enforce Arbitration Award, with a copy of the Arbitration Award attached thereto, in Eastern District Case No. 7:13-CV-57-ART. On November 13, 2014, Plaintiffs also served the Motion to Enforce on the Defendants via certified mail." (DE 160 at 2) (numbering omitted). Further, the declaration of Amy L. Neace, a paralegal previously employed by Plaintiffs' counsel, states that, "[o]n November 13, 2014, I mailed a complete copy of the Motion to Enforce filed in Case No. 7:13-CV-57-ART to the Defendants via Certified Mail." (DE 161). Given such

evidence, the Court finds that delivery occurred under AAA Rule 49 on November 13, 2014. *See* AAA R. 49 ("Parties shall accept as notice and delivery of the award the placing of the award or a true copy thereof in the mail addressed to the parties or their representatives at their last known address").

The Defendants' attacks on this evidence are not compelling. Defendants point out that the certificates of service do not evidence that the award itself was sent, but only that "something" was placed in the mail. (DE 165 at 9-10). Defendants advance this theory in two ways. First, they point out that neither Trout nor Neace specifically state that they sent the arbitration award, and instead only admit to sending the motion to enforce. But in light of Trout's assertion that the arbitration award was an attachment to the motion to enforce, and Neace's assertion that she mailed a "complete" copy of the motion to the Defendants, the Court finds the statements to be credible evidence that the arbitration award was sent.

Second, the Defendants supply the declaration of Alan Weed, the initial organizer of both Black Fire Energy, Inc. and Black Fire Mining, to cast doubt on whether the arbitration award was delivered on November 13, 2014. (DE 165-1). Mr. Weed states, "I did not receive a copy of the alleged Arbitration Award titled 'Findings of Fact And Award' from Arbitrator Karem at any time, and I did not receive a copy of such a document from the Plaintiffs at any time." But this statement is not entirely contradictory to the Plaintiffs' evidence, since the Certified Mail Receipts were signed by persons other than Mr. Weed at the Defendants' residences. (DE 1-2). AAA Rule 49 does not explicitly require receipt, and this statement by Mr. Weed does very little to attack Plaintiffs' evidence that the award was properly mailed to the last known address of the parties. AAA R. 49. In fact, the Defendants have provided no evidence attacking the addresses on the Certified Mail Receipts, or the Plaintiffs' declaration that those addresses were the Defendants' correct locations. *See* (DE 162). On this record, the Court finds delivery occurred on November 13, 2014.

e. November 19 and 28, 2014

The plain language of AAA Rule 49 does not require receipt for an arbitration award to be considered delivered. *See* AAA R. 49; *see also Webster v. A. T. Kearney, Inc.,* 507 F.3d 568, 573-574 (7th Cir. 2007) (explaining that requiring receipt would conflict with the, albeit now renumbered, AAA Rules). Thus, evidence that the Defendants received the above discussed mailings on November 19 and 28, 2014, is only relevant in that it further evidences Plaintiffs' "placing of the award or a true copy thereof in the mail addressed to the parties or their representatives at their last known address." AAA R. 49. Delivery itself occurred when Plaintiff did just that, on November 13, 2014.

III. CONCLUSION

Since delivery occurred on November 13, 2014, the Court once again finds that the defendants' challenge to the arbitration award in March of 2015 was untimely, and the Court's analysis of the effect of that untimeliness and of the general validity of the award remains undisturbed. *See* (DE 86; DE 21); *see also* (DE 153 at 11, Sixth Circuit Information) ("Consequently, we need not address whether the Award is valid, because the issues of 'filing' or 'delivery' are not yet resolved").

Accordingly, it is **ORDERED** that Plaintiffs' Renewed Motion to Confirm Arbitration Award (DE 159) is **GRANTED**. The arbitration award (DE 1-1) is **CONFIRMED** against defendants Black Fire Energy, Inc., Black Fire Mining LLC, and Gill Steven Brown. The Court will enter a separate judgment contemporaneously with this order.

Dated March 20, 2018.

Karen K. Caldwell

KAREN K. CALDWELL, CHIEF JUDGE
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY