

Brian A. Wilkins
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Paypal, Inc. (Delaware corporation)
330 N. Brand Blvd. Ste. 700
Glendale, CA 91203

DEMAND FOR ARBITRATION

March 3, 2022

Dear Counsel:

Please be advised that Brian A. Wilkins, owner of Veracity Objectives, LLC. (“Claimant”), hereby submits this Demand For Arbitration for (1) breach of contract, (2) violations of California Business & Professions Code § 17529 et seq., and (3) violations of Nevada code NRS 41.730.

Veracity Objectives, LLC. (EIN 86-1346064, tax status: Partnership) is a New Mexico LLC. with offices in Las Vegas, Nevada and West Des Moines, Iowa. Though the PayPal account was supposed to be in the name of the business, all email correspondence to the Claimant from PayPal, and the PayPal Business Debit Card issued to the Claimant, had the name “Brian Wilkins” on them.

PayPal, Inc. (“Respondent” or “PayPal”) is a Delaware corporation with its corporate headquarters located at 2211 North First Street, San Jose, CA 95131. The above address is the registered agent for PayPal, Inc.

This Demand for Arbitration is supported by the following memorandum of points and authorities.

Background

Claimant opened a PayPal business account on January 14, 2021. PayPal required one of the LLC member's names to be on the account, which is Brian Wilkins, who owns 99% of the partnership. Despite trying to open the account in the business name, all email correspondence and the PayPal Business Debit Card issued by the Respondent were in the name "Brian Wilkins."

Claimant used PayPal without issue for the next seven months, fulfilling hundreds of transactions. Claimant issued three refunds out of those hundreds of transactions. There was one customer dispute, which Claimant immediately issued a refund. Our account was always in good standing.

Suddenly and unexpectedly, on August 9, 2021, Claimant received an email from the Respondent stating "You can't use PayPal anymore." The email further stated:

"After a review of your account activity, we've determined that you're in violation of PayPal's Acceptable Use Policy. As a result, your account has been permanently limited and you won't be able to conduct any further business with PayPal."

See EXHIBIT A (PayPal terminates account). Thus Respondent voluntarily, on its own volition, severed all business ties with Claimant on August 9, 2021. Claimant called the Respondent that day to ask for an explanation. The representative said that the Claimant "would need a subpoena" to learn why PayPal terminated the business relationship. PayPal has the right to terminate the business relationship, pursuant to its User Agreement. Claimant agreed, did not pursue further action, and found alternatives for collecting payments.

However, Respondent continued sending Claimant spam/advertising emails almost daily at Claimant's primary email address (support@veracityobjectives.com). Claimant reasonably felt that perhaps the Respondent's email system needed time to catch up (perhaps a week) and remove Claimant from its system, after the Respondent terminated the account on its own volition. That's a reasonable amount of time for the Respondent to get its act together. But the spam emails continued.

Claimant replied to one of the emails on August 17, 2021 stating, “We will be filing a lawsuit if you send one more spam email.” **SEE EXHIBIT B.** The spam emails continued despite the communication from the Claimant to the Respondent to stop. Respondent has no “unsubscribe” option in these spam emails.

Respondent has a provision in its User Agreement called “Electronic Communication Delivery Policy (E-Sign Disclosure and Consent).” **SEE EXHIBIT C.** That provision of the User Agreement specifically states, “You may withdraw your consent to receive Communications electronically by ... contacting us via the ‘Contact Us’ link at the bottom of each page of the PayPal website.”

The Contact Us link takes you to a page where there is a “Message Us” cloud at the bottom of said page. **SEE EXHIBIT D.** To ensure there was documentation of this communication, Claimant chose this means to contact Respondent and opt-out of receiving any further spam emails.

After several clicks, the Message Us cloud takes you to the PayPal internal Messaging Center. Claimant sent the following message to the Respondent via said Messaging Center on August 22, 2021:

“We continually receive spam emails from your company. Please cease sending your email spam to us as we no longer do business with PayPal. You are violating Iowa Code Chapter 714E.1 and we will pursue legal action if we receive just one more spam email or any email from you. Consider this a Notice of Claim.”

See EXHIBIT E (Official communication to stop spam). Claimant also attempted removing his email address from the account to stop the spam/ advertising emails that day. But PayPal has no functionality that allowed Claimant to remove or change the email address from the defunct account.

The spam emails continued unabated, even after the official opt-out pursuant to the User Agreement. Claimant replied to yet another PayPal spam email on September 8, 2021 simply stating “STOP SPAMMING US.” **SEE EXHIBIT F.**

Despite all of Claimant's efforts and hours put in to stop these spam/ advertising emails, Respondent sent a total of 91 spam/advertising emails to Claimant's primary email address from September 3, 2021 to November 19, 2021. All of the infringing emails were sent from "service@paypal.com," and from the company's primary place of business in San Jose, California. The spam emails finally ceased on November 19, 2021 only after the Respondent was served a Notice of Claim on October 29, 2021.

Respondent, after a few phone calls and email exchanges, refused to participate in any genuine talks to resolve the claims. Thus arbitration is now demanded.

COUNT I - Breach of Contract

Claimant re-alleges the preceding paragraphs as if set forth fully herein.

A breach of contract is "[t]he wrongful, i.e., the unjustified or unexcused, failure to perform" the terms of a contract. 1 Witkin, Summary of Cal. Law (11th ed. 2017) Contracts, § 872. "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement." Restatement Second of Contracts § 205.

Respondent had the absolute right, pursuant to the User Agreement, to terminate the Claimant's account, even if the Claimant did not agree and Respondent gave no reasons for doing so. Frankly the Claimant would have preferred pursuing this case in the U.S. District Courts. However, there is also an arbitration provision in the User Agreement. There is also a very specific provision in the User Agreement to stop electronic communications, in this case, relentless, endless spam emails, once the Claimant exercises that right contained in the User Agreement.

Respondent, inexcusably and in bad faith, continued spamming the Claimant even after the Claimant exercised his rights pursuant to the User Agreement that are supposed to force the Respondent to stop the spamming. Respondent's behavior was simply malicious, deliberate and wanton, presumably to harass and harm the Claimant further after inexcusably (but within Respondent's rights) cutting off a major financial artery, i.e. the Claimant PayPal account.

California and Nevada law enumerate very specific, ascertainable damages for spamming, particularly when said spamming is a result of a breach of contract.

COUNT II - Violations of California Business & Professions Code § 17529(a)(3).

“A person or entity **may not initiate** or advertise in an unsolicited commercial e-mail advertisement from California or advertise in an unsolicited commercial e-mail advertisement sent from California.” Cal. Business & Professions Code § 17529.2(a). Emphasis added.

Commercial e-mail advertisements sent pursuant to the exemption provided for a preexisting or current business relationship shall provide the recipient of the commercial e-mail advertisement with the ability to “opt-out” from receiving further commercial e-mail advertisements by calling a toll-free telephone number or by sending an “unsubscribe” e-mail to the advertiser offering the products or services in the commercial e-mail advertisement. *Id.* At § 17529.1(l).

The increase in spam is not only an annoyance but is also an increasing drain on corporate budgets and possibly a threat to the continued usefulness of the most successful tool of the computer age. Spam filters have not proven effective. Because of the above problems, it is necessary that spam be prohibited and that commercial advertising e-mails be regulated as set forth in this article. *Id.* at §§ 17529(b), 17529(f), and 17529(m).

Spam is typically understood to refer broadly to unsolicited e-mail messages (or “junk” e-mail), typically commercial in nature. See *United States v. Kelley*, 482 F.3d 1047, 1055 (9th Cir. 2007) (Thomas, J., dissenting).

“Commercial e-mail advertisement” means **any electronic mail message** initiated for the purpose of advertising or promoting the lease, sale, rental, gift offer, **or other disposition** of any property, goods, services, or extension of credit. Cal. Business & Professions Code § 17529.1(c).

The term “advertisement” as defined in the statute is somewhat ambiguous due to, *inter alia*, the “other disposition” language. Thus “as in any case involving statutory interpretation, our fundamental task is to determine the Legislature's intent so as to effectuate the law's purpose.” See *People v. Cole* (2006) 38 Cal.4th 964, 974-975; *People v. Murphy* (2001) 25 Cal.4th 136, 142 [105 Cal.Rptr.2d 387, 19 P.3d 1129]; *Kleffman v. Vonage Holdings Corp.*, 232 P.3d 625 (Cal. 2010).

State Senator Kevin Murray, D-Culver City, was the sponsor and author of SB 186, now codified as Cal. Business & Professions Code § 17529 *et seq.* Senator Murray said of the bill:

“We are saying that unsolicited e-mail cannot be sent and there are no loopholes.”

See EXHIBIT G.

A person or entity bringing an action pursuant to subparagraph A may recover both actual and liquidated damages of one thousand dollars (\$1,000) for each unsolicited commercial e-mail advertisement transmitted in violation of this section, up to one million dollars (\$1,000,000) per incident. The recipient may also recover reasonable attorney's fees and costs.” *Id.* at 17529.5(B)(i), (ii) and (C).

Respondent sent 91 unsolicited spam emails to Claimant from September 3, 2021 through November 19, 2021, after the Claimant had clearly and unequivocally withdrawn consent (“opted-out”) of all emails from PayPal, pursuant to the provisions of the User Agreement (**Exhibit C**).

Attached herein are five exemplar spam emails from the Respondent. **See EXHIBIT H.** Claimant will provide all 91 emails to the Arbitrator upon request. All of said spam emails contain subject lines such as “We could not process your recurring payment,” “An automatic payment from (Customer X) failed,” etc. The body of said emails say something like “You did not get your money.”

These subject lines are clearly misleading to any reasonable person because 1) Respondent voluntarily and on their own volition, terminated the business agreement with the Claimant on August 9, 2021 (**Exhibit A**), thus there cannot and could not possibly be any transactions at all; and 2)

Claimant, pursuant to the provisions of the User Agreement, opted out of all electronic communications on August 22, 2021 (**Exhibit E**). There was clearly and unequivocally no direct consent from the Claimant for the Respondent to continue sending spam. Respondent had the obligation to, in good faith and in fair business practices, cease sending these spam email. Respondent clearly and unequivocally violated the opt-out provisions of the User Agreement.

The 91 spam emails from September 3, 2021 to November 19, 2021 total liquidated damages of \$91,000 pursuant to the foregoing statutes.

COUNT III: Violations of Nevada code NRS 41.730

Claimant re-alleges the preceding paragraphs as if set forth fully herein.

A person or company violates Nevada law if they “transmit or cause to be transmitted to a recipient an item of electronic mail that includes an advertisement.” NRS 41.730(1).

“If a person or company is liable to a recipient pursuant to subsection 1 and the person ignored requests made by the recipient to decline receiving additional electronic mail, then the recipient may recover actual damages or damages of \$500 per item of electronic mail received, whichever is greater, and attorney’s fees and costs.” *Id.* at 3(d).

Claimants principal place of business, as listed on the New Mexico Secretary of State website for Veracity Objectives, LLC., is 304 S. Jones Blvd., Las Vegas, NV 89107.

Respondent sent 91 spam emails despite Claimant opting out THREE times from electronic communication from the Claimant, pursuant to the User Agreement.

Respondent is liable for \$45,500 in damages pursuant to Nevada law.

Conclusion

Respondent had the absolute right to terminate the business relationship between itself and Claimant on August 9, 2021, for whatever reason,

pursuant to the User Agreement. Respondent also had the right to compel arbitration, pursuant to the User Agreement.

The Respondent had an obligation, pursuant to the User Agreement, to cease all electronic communications once the Claimant exercised the opt-out provision on August 22, 2021. Respondent breached clear provisions of the User Agreement. Respondent also blatantly and wantonly violated California and Nevada law related to spam.

This case could have been avoided had the Respondent honored the User Agreement in good faith. It still could have been resolved once the Notice of Claim was served on October 29, 2021. But the Respondent believes only consumers are bound to their User Agreement, while they may pick and choose which provisions to obey. That's not how contracts work and that's not good faith business.

Pursuant to Nevada and California law, Respondent is liable for \$136,500 in statutory damages; and that is the amount demanded in arbitration. Claimant also seeks damages for all costs related to the Notice of Claim, arbitration fees, spam filters, and legal costs.

On this 3rd day of March, 2022

/s/Brian Wilkins

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702-218-3225

CERTIFICATE OF SERVICE

I, Brian A. Wilkins, under penalty of perjury, hereby declare that a copy of this foregoing memorandum, along with the Demand for Arbitration (Consumer Arbitration Rules), Exhibits list, and Exhibits A through H were mailed On March 3, 2022 via UPS with signature and delivery confirmation to:

CT Corporation System
Paypal, Inc.
330 N. Brand Blvd. Ste. 700
Glendale, CA 91203

A copy of this foregoing memorandum, Demand for Arbitration (Consumer Arbitration Rules), Exhibits list, Exhibits A through H, a copy of PayPal User Agreement (Arbitration clause on pages 47-53), were filed electronically via <https://apps.adr.org/> on March 3, 2022. The \$200 filing fee was also paid electronically that day.

A courtesy copy of this foregoing memorandum, along with the Demand for Arbitration (Consumer Arbitration Rules), Exhibits list, and Exhibits A through H were emailed on March 3, 2022 to:

Patricia Brum
Snell & Wilmer
pbrum@swlaw.com