

BEFORE THE AMERICAN ARBITRATION ASSOCIATION

BRIAN A. WILKINS,

Claimant,

v.

PAYPAL, INC.,

Respondent.

AAA No. 01-22-0000-9181

ANSWERING STATEMENT AND COUNTERCLAIM OF PAYPAL, INC.

Respondent PayPal, Inc. (“PayPal”), by and through its counsel Dentons Davis Brown, P.C., hereby files this Answering Statement and Counterclaim in response to Claimant’s Amended Demand for Arbitration. PayPal reserves the right to amend this Answering Statement to assert additional facts, defenses, or counterclaims that are not yet known to PayPal. PayPal generally denies all allegations in the Demand for Arbitration, and by way of further response, states as follows:

I. ANSWERING STATEMENT

1. PayPal is a digital payment service that allows its users to manage and move their money securely over the Internet.

2. On January 14, 2021, Brian Wilkins (on behalf of Veracity Objectives, LLC) opened a PayPal account associated with account number 1975682695226964400 and the following email address: support@veracityobjectives.com.

3. All users agree to PayPal’s User Agreement as a condition of opening a PayPal account and using PayPal’s services. Attached hereto as Exhibit A is a true and correct copy of PayPal’s Account User Agreement effective November 9, 2020 (the “User Agreement”). (Ex. A at 1).

4. PayPal periodically updates its User Agreement and provides its users with advance notice of substantive changes. The User Agreement provides that “[b]y continuing to use our services after any changes to this user agreement, you agree to abide and be bound by those changes.” (Ex. A at 1).¹

5. PayPal provides all users a copy of the User Agreement upon opening a PayPal Account, and it is also available on their website.

6. The User Agreement Contains the terms and conditions for using PayPal’s services. (Ex. A at 1).²

7. The User Agreement identifies certain “Restricted Activities” that all users agree to refrain from engaging in, including but not limited to violation of PayPal’s Acceptable Use Policy (“AUP”).³ (Ex. A at 41–43).

8. PayPal’s AUP prohibits the use of the PayPal services “for activities that . . . violate any law, statute, ordinance or regulation,” or “relate to transactions involving . . . products that present a risk to consumer safety . . . [or] items that encourage, promote, facilitate or instruct others to engage in illegal activity” or that “involve the sales of products or services identified by government agencies to have a high likelihood of being fraudulent.” Attached hereto as Exhibit B is a true and correct copy of PayPal’s AUP effective March 19, 2020.⁴

¹ As set forth below, Claimant voluntarily and continuously used his account through and until it was limited on August 9, 2021. The most updated draft of the user agreement at the time Claimant’s account was limited went into effect on August 2, 2021. This updated User Agreement contains the same provision that continued use of PayPal’s services manifests agreement to be bound by changes to the User Agreement.

² The most recent applicable User Agreement contains the same provision.

³ The most recent applicable User Agreement contains the same provision.

⁴ The most recent applicable Acceptable Use Policy, effective as of May 6, 2021, contains the same provisions.

9. Similarly, the Restricted Activities section of the User Agreement states that “you must not . . . sell counterfeit goods” or “[p]rovide false, inaccurate or misleading information”⁵ (Ex. A at 41–42).

10. If PayPal believes a user has engaged in any “Restricted Activities,” the User Agreement provides PayPal may, among other things, terminate the user agreement, limit the user’s PayPal account or any of the PayPal services, and hold the balance in the business PayPal Account.⁶ (Ex. A at 43–44).

11. “Limitations are implemented to help protect PayPal buyers and sellers when [PayPal] notice[s] restricted activities, an increased financial risk, or activity that appears to [PayPal] as unusual or suspicious.”⁷ (Ex. A at 47). This includes a user’s breach of the User Agreement or violation of the AUP.⁸ (*Id.*).

12. PayPal is not obligated to disclose the details of decisions to place a hold, limitation, or reserve on a customer’s account.⁹ (Ex. A at 45).

13. The User Agreement provides that, if a seller violates the AUP, they also agree to pay liquidated damages to PayPal of \$2,500 per violation:

If you are a seller and you violate the Acceptable Use Policy, then in addition to being subject to the above actions you will be liable to PayPal for the amount of PayPal’s damages caused by your violation of the Acceptable Use Policy. You acknowledge and agree that \$2,500.00 U.S. dollars per violation of the Acceptable Use Policy is presently a reasonable minimum estimate of PayPal’s actual damages considering all currently existing circumstances, including the relationship of the sum to the range of harm to PayPal that reasonably could be anticipated because, due to the nature of the violations of the Acceptable Use Policy, actual damages would be impractical or extremely difficult to calculate. PayPal may deduct such

⁵ The most recent applicable User Agreement contains the same provisions.

⁶ The most recent applicable User Agreement contains the same provision.

⁷ The most recent applicable User Agreement contains the same provision.

⁸ The most recent applicable User Agreement contains the same provision.

⁹ The most recent applicable User Agreement contains the same provision.

damages directly from any existing balance in any PayPal account you control.¹⁰

(Ex. A at 44).

14. The purpose of PayPal's assessment of liquidated damages is to cover damages resulting from AUP violations that are difficult, if not impossible to fully quantify, and are not easily estimated when PayPal enters into the User Agreement with a user.

15. Users consent to receive electronic communications from PayPal in connection with their PayPal account as set forth in the Electronic Communication Delivery Policy, adopted by reference in the User Agreement.¹¹ (Ex. A at 56). A true and correct copy of the Electronic Communication Delivery Policy is included here as Exhibit C.

16. The Electronic Communication Delivery Policy provides a procedure users must follow to withdraw their consent to electronic communications. They may withdraw their "consent to receive communications electronically by writing to [PayPal] at 'Attn: Electronic Communications Delivery Policy, P.O. Box 45950, Omaha, NE 68145-0950', or by contacting [PayPal] via the 'Contact Us' link at the bottom of each page of the PayPal website." (Ex. C).

17. On August 9, 2021, Claimant's account was limited for violating the AUP. PayPal sent Claimant a notice explaining that his account had been permanently limited due to violation of PayPal's AUP. Claimant had been actively using his PayPal account through and until August 9, 2021, when his account was limited. Claimant's voluntary, continuous use of PayPal's services affirmed his acceptance of the User Agreement in effect at the time his account was limited.

¹⁰ The most recent applicable User Agreement contains the same provision.

¹¹ The most recent applicable User Agreement contains the same provision.

18. Specifically, Claimant's account was limited for encouraging illegal activities— Claimant was running a blog that promulgated misleading information about COVID-19, including anti-COVID statements about masks and hydroxychloroquine.

19. Claimant was also selling white pine needles and marketed them on thecovidblog.com as a prevention and/or cure of the COVID-19 virus.

20. The notice of limitation on Claimant's account explained Claimant could still log in and see his account information, but he could not send or receive funds. Claimant's allegation that PayPal terminated his account and severed all ties with Claimant on August 9, 2021, are false. The limitation on the account did not terminate the User Agreement or the account.

21. After Claimant's account was limited, recurring payments from Claimant's customers continued to occur on Claimant's PayPal account. When these payments were made by Claimant's customers, PayPal emailed a notification to Claimant concerning this account activity.

22. Such electronic notifications to Claimant do not give rise to a cause of action for breach of contract.

23. Specifically, emails to Claimant notified him of attempted recurring payments by Claimant's customer, advised that the payments could not be processed, and advised of the buyer's contact information associated with the attempted transactions.

24. On two occasions—on August 17, 2021, and September 8, 2021—Claimant responded directly to email notifications demanding the "spam" emails be stopped. However, unsolicited email responses to email notifications, such as Claimant's communications on these dates, are not received and reviewed by an individual at PayPal as the User Agreement provides express instructions as to how communication with PayPal must be conducted. Further, the

notification emails to which Claimant replied on these dates explicitly advised, “Please don’t reply to this email. To get in touch with us, click Help & Contact.”

25. The User Agreement, by reference to the Electronic Communication Delivery Policy, provides a procedure for withdrawing consent to receive electronic communications; namely, by writing to PayPal at “Attn: Electronic Communications Delivery Policy, P.O. Box 45950, Omaha NE 68145-0950” or through the “Contact Us” link at the bottom of the PayPal webpage. (Ex. C) Claimant’s email response to the notifications did not comply with this contractual requirement.

26. Claimant’s Amended Demand for Arbitration Memorandum advises on page 3 that he messaged PayPal via the “Contact Us” link on August 22, 2021. However, instead of clearly withdrawing his consent to receive electronic communications from PayPal, Claimant asked to stop receiving alleged “spam messages” and also included an inapposite reference to Iowa Code section 714E.1.¹² Although Claimant also threatened legal action for receiving “any email,” this was stated in the context of two complaints about alleged spam messages specifically as well as a reference to an inapplicable Iowa Code section.

27. As described above, the emails to Claimant were not spam; they were notifications that customers were attempting to make payments through his PayPal account and that such payments could not be processed.

28. Claimant alleges the email notifications violated section 17529(a)(3) of the California Business and Professional Code as well as Nevada Revised Statutes (“NRS”) section 41.730.

¹²Iowa Code chapter 714E governs Foreclosure Consultants. Subsection 1 of chapter 714E is the definitions section.

29. PayPal disputes these assertions because these bodies of law do not apply in this case. Claimant agreed to a Governing Law provision in the User Agreement, which states “the laws of the State of Delaware . . . will govern this user agreement and any claim or dispute that has arisen or may arise between [Claimant] and PayPal.”¹³ (Ex. A at 68).

30. Even if California or Nevada law could be applied here, PayPal’s email notifications regarding attempted payment by Claimant’s customers do not violate the spam-control measures those statutes address.

31. California Business and Professional Code section 17529.2(a) holds, “[A] person or entity may not do any of the following: (a) initiate or advertise in an unsolicited commercial e-mail advertisement from California or advertise in an unsolicited commercial email advertisement sent from California.”

32. PayPal’s notifications of failed payments are not advertisements. California defines “Commercial e-mail advertisement” as “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. Bus. & Prof. Code § 17529.1(c). The notification emails were not “advertising or promoting” any of the items listed in this definition, and they were not initiated for those purposes.

33. PayPal’s notifications of failed payments are also not advertisements under the Nevada Statute cited by Claimant. Nevada Revised Statute (“NRS”) section 41.730 states, “if a person transmits or causes to be transmitted to a recipient an item of electronic mail that includes an advertisement, the person is liable to the recipient for civil damages,” and then goes on to list a series of exceptions.

¹³ The most recent applicable User Agreement contains the same provision.

34. NRS section 41.710 defines advertisement to mean “material that: . . . [a]dvertises for commercial purposes the availability or the quality of real property, goods or services; or . . . [i]s otherwise designed or intended to solicit a person to purchase real property, goods or services.” Email notifications about payments that could not be processed advertise nothing and are not intended to solicit the purchase of real property, goods or services.

35. Claimant has not and cannot identify any emails which constitute spam or advertisements. The emails to Claimant were notifications that customers were attempting to make payments through his PayPal account and that such payments could not be processed.

36. The Claimant’s claims lack merit and should be dismissed.

II. COUNTERCLAIM

COUNT I (Breach of Contract)

37. PayPal incorporates the allegations in its Answering Statement as if set forth fully herein.

38. On or about January 14, 2021, Respondent and Claimant entered into the User Agreement.

39. Under the terms of the User Agreement, Claimant had an obligation not to engage in any Restricted Activities, including not to violate PayPal’s AUP.

40. PayPal’s AUP prohibits the use of the PayPal services “for activities that . . . violate any law, statute, ordinance or regulation,” or “relate to transactions involving . . . products that present a risk to consumer safety . . . [or] items that encourage, promote, facilitate or instruct others to engage in illegal activity” or that “involve the sales of products or services identified by government agencies to have a high likelihood of being fraudulent.”¹⁴ (Ex. B).

¹⁴ The most recent applicable Acceptable Use Policy contains the same provisions.

41. Similarly, the Restricted Activities section of the User Agreement states that “you must not . . . sell counterfeit goods” or “[p]rovide false, inaccurate or misleading information”¹⁵ (Ex. A at 41–42).

42. Because Claimant was actively using his PayPal account through and until August 9, 2021 when his account was limited, he therefore accepted the most current version of the User Agreement in effect at that time. A true and correct copy of this User Agreement is included herein as Exhibit D.

43. Claimant’s activities violated the User Agreement and AUP. Claimant was selling white pine needles as a preventative and/or cure for COVID-19 and receiving donations via thecovidblog.com. Claimant’s website promoted information about a “pine needle tea cure” and sold white pine needles for a “Pine Needle Tea.” Claimant’s site also claimed that masks do more harm than good and made unfounded claims about Hydroxychloroquine.

44. Claimant engaged in at least 152 transactions for the sale of pine needles.

45. Claimant’s acceptance of payments for this product in connection with Claimant’s promotion of a “pine needle tea cure” violated the User Agreement and AUP.¹⁶ (Ex. A at 41–42; Ex. B).

46. On August 9, 2021, Claimant’s account was limited for the above-described activity. This limitation, however, did not terminate or cancel the User Agreement. As to such limitations, the User Agreement states,

Limitations are implemented to help protect PayPal, buyers and sellers when we notice restricted activities, an increased financial risk, or activity that appears to us

¹⁵ The most recent applicable User Agreement contains the same provision.

¹⁶ The most recent applicable User Agreement and Acceptable Use Policy were likewise violated as they contain the same relevant provisions.

as unusual or suspicious. Limitations also help us collect information necessary for keeping your PayPal account open.¹⁷

(Ex. A at 47). Although limited, PayPal did not invoke the termination provision in the User Agreement that allows PayPal to terminate a user agreement for any reason at any time upon notice and payment of unrestricted funds.¹⁸ (Ex. A at 57).

47. The User Agreement gives PayPal the right to assess liquidated damages against a seller that violated its obligations under the AUP in the amount of \$2,500 per violation. (Ex. A at 44). The User Agreement in effect at the time Claimant's account was limited also contains this provision. (Ex. D at 42).

48. PayPal is entitled under the User Agreement to deduct the damages directly from any existing PayPal balance in Claimant's control or to bring legal action for damages. (Ex. A at 44; Ex. D at 42).

49. After Claimant's account was limited, Claimant withdrew the remaining funds, and PayPal has not recovered any liquidated damages from Claimant's account.

50. PayPal seeks to recover its damages for Claimant's Breach of Contract. For Claimant's 152 transactions involving the sale of pine needles, PayPal seeks damages in the amount of \$380,000. PayPal may be entitled to further damages if it determines any other transactions or donations through PayPal's services violated the User Agreement or Acceptable Use Policy.

51. PayPal reserves the right to seek any additional damages that may be identified if it is determined that any of Claimant's other transactions are confirmed to be violative of PayPal's User Agreement.

¹⁷ The most recent applicable User Agreement contains the same provision.

¹⁸ The most recent applicable User Agreement contains the same provision.

Respectfully submitted,

By: /s/ Tara Z. Hall

Tara Z. Hall, Esq.

Daniel J. Johnston, Esq.

Dentons Davis Brown, P.C.

215 10th Street, Suite 1300

Des Moines, IA 50309-3993

Phone: (515) 246-7998

Direct Fax: (515) 471-7998

Email: tara.hall@dentons.com

Email: daniel.johnston@dentons.com

By: /s/ Morgan J. Hanson

Morgan J. Hanson, Esq.

Dentons Cohen & Grigsby, P.C.

625 Liberty Avenue, 5th Floor

Pittsburgh, PA 15222-3152

Phone: (412) 297-4900

Direct Fax: (412) 209-1975

Email: morgan.hanson@dentons.com

Counsel for Respondent, PayPal, Inc.

COPY TO

Brian Wilkins

304 S. Jones Blvd, #1576

Las Vegas, NV 89107

Phone: 702-218-3225

Email: support@veracityobjectives.com

Claimant

PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses disclosed on the pleadings on April 12, 2022, by:

- U.S. Mail FAX
 Hand Delivered Overnight Courier
 Federal Express X Other: Email

Signature: /s/ Tara Z. Hall