

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

AVRAHAM MILLER on behalf of himself
and all other similarly situated consumers

Plaintiff,

Case No.

-against-

KIRSCHENBAUM & PHILLIPS, PC

Defendant.

CLASS ACTION COMPLAINT

Introduction

Plaintiff, Avraham Miller, brings this action against Kirschenbaum & Phillips, PC for violations of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, *et seq.* (“FDCPA”). The FDCPA prohibits debt collectors from engaging in abusive, deceptive and unfair collection practices while attempting to collect on debts.

Parties

1. Plaintiff is a citizen of the State of New York who resides within this District.
2. Plaintiff is a consumer as that term is defined by Section 1692(a)(3) of the FDCPA, in that the alleged debt that Defendant sought to collect from Plaintiff a consumer debt.
3. Upon information and belief, Defendant's principal place of business is located in Farmingdale, New York.
4. Defendant is regularly engaged, for profit, in the collection of debts allegedly owed by consumers.
5. Defendant is a “debt collector” as that term is defined by the FDCPA, 15 U.S.C. § 1692(a)(6).

Jurisdiction and Venue

6. This Court has federal question jurisdiction under 15 U.S.C. § 1692k(d) and 28 U.S.C. § 1331.
7. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b), as the acts and transactions that give rise to this action occurred, in substantial part, in this district.

Allegations Particular to Avraham Miller

8. Upon information and belief, on a date better known by Defendant, Defendant began to attempt to collect an alleged consumer debt from the Plaintiff.
9. On or about March 29th, 2017, Defendant sent the Plaintiff a collection letter.
10. The March 29th, 2017 letter stated in part: “The amount reflected above is the amount you owe as of the date of this letter. This amount may vary from day to day, due to interest and other charges added to your account after the date of this letter. Hence if you pay the amount shown above, an adjustment may be necessary after we receive your payment, in which even we will inform you before depositing the payment for collection.”
11. A debt collector has the obligation not just to convey the amount of the debt, but to convey such clearly.
12. 15 U.S.C. § 1692e prohibits a debt collector from using any false, deceptive, or misleading representation or means in connection with the collection of any debt.
13. The question of whether a collection letter is deceptive is determined from the perspective of the “least sophisticated consumer.”
14. While § 1692e specifically prohibits certain practices, the list is non-exhaustive, and does not preclude a claim of falsity or deception based on any non-enumerated practice.
15. A collection letter is deceptive under 15 U.S.C. § 1692e if it can reasonably be read by the least sophisticated consumer to have two or more meanings, one of which is inaccurate.

16. A collection letter is also deceptive under 15 U.S.C. § 1692e if it is reasonable susceptible to an inaccurate reading by the least sophisticated consumer.
17. The March 29th, 2017 letter failed to inform Plaintiff whether the amount listed already includes “interest.”
18. The March 29th, 2017 letter failed to inform Plaintiff whether the amount listed already includes “other charges.”
19. The March 29th, 2017 letter failed to advise Plaintiff what portion of the amount listed is principal.
20. The March 29th, 2017 letter failed to inform Plaintiff what “other charges” might apply.
21. The March 29th, 2017 letter failed to inform Plaintiff if “other charges” are applied, when such “other charges” will be applied.
22. The March 29th, 2017 letter failed to inform Plaintiff if “other charges” are applied, what the amount of those “other charges” will be.
23. The March 29th, 2017 letter failed to inform Plaintiff of the nature of the “other charges.
24. The March 29th, 2017 letter failed to inform Plaintiff if there is “interest,” what the amount of the accrued interest will be.
25. The March 29th, 2017 letter failed to inform Plaintiff if there is “interest,” when such interest will be applied.
26. The March 29th, 2017 letter failed to inform Plaintiff if there is “interest,” what the interest rate is.
27. The March 29th, 2017 letter failed to inform Plaintiff if there is “interest,” the amount of money the amount listed will increase per day.
28. The March 29th, 2017 letter failed to inform Plaintiff if there is “interest,” the amount of money the amount listed will increase per week.

29. The March 29th, 2017 letter failed to inform Plaintiff if there is “interest,” the amount of money the amount listed will increase per month.
30. The March 29th, 2017 letter failed to inform Plaintiff if there is “interest,” the amount of money the amount listed will increase per any measurable period.
31. The March 29th, 2017 letter, because of the aforementioned failures, would render the least sophisticated consumer unable to determine the amount of his or her debt.
32. The least sophisticated consumer could reasonably believe that the amount listed was accurate only on the date of the March 29th, 2017 letter.
33. If interest is continuing to accrue, the least sophisticated consumer would not know the amount of the debt because the letter fails to indicate the applicable interest rate.
34. If interest is continuing to accrue, the least sophisticated consumer would not know the amount of the debt because the letter fails to indicate what the amount of the accrued interest will be.
35. If interest is continuing to accrue, the least sophisticated consumer would not know the amount of the debt because the letter fails to indicate when such interest will be applied.
36. If interest is continuing to accrue, the least sophisticated consumer would not know the amount of the debt because the letter fails to indicate the amount of money the amount listed will increase at any measurable period.
37. If “other charges” are continuing to accrue, the least sophisticated consumer would not know the amount of the debt because the letter fails to indicate the nature of the “other charges.”¹

¹ Carlin v. Davidson Fink LLP, 852 F.3d 207 (2d Cir. 2017), Balke v. All. One Receivables Mgmt., No. 16-cv-5624(ADS)(AKT), 2017 U.S. Dist. LEXIS 94021, at *14 (E.D.N.Y. June 19, 2017) (“[T]he Collection Letter in this case refers with vagueness to “accrued interest or other charges,” without providing any information regarding the rate of interest; the nature of the “other charges”; how any such charges would be calculated; and what portion of the balance due, if any, reflects already-accrued interest and other charges. By failing to provide even the most basic level of specificity in this regard, the Court “cannot say whether those amounts are properly part of the amount of the debt,” for purposes of section 1692g. Carlin, 852 F.3d at 216. Further, as set forth in Carlin, without any clarifying details, the Collection Letter states only that these unspecified assessments may be added to the balance due, which the Court finds to be insufficient to “accurately inform[] the [Plaintiff] that the

38. The Defendant's failures are purposeful.
39. In order to induce payments from consumers that would not otherwise be made if the consumer knew the true amount due, Defendant does not inform the consumer what "other charges" might apply.
40. In order to induce payments from consumers that would not otherwise be made if the consumer knew the true amount due, Defendant does not inform the consumer when such "other charges" will be applied.
41. Defendant failed to clearly and unambiguously state the amount of the debt, in violation of 15 U.S.C. § 1692g(a)(1).
42. Defendant's conduct constitutes a false, deceptive and misleading means and representation in connection with the collection of the debt, in violation of 15 U.S.C. § 1692e.
43. The March 29th, 2017 letter can reasonably be read by the least sophisticated consumer to have two or more meanings concerning the actual balance due, one of which must be inaccurate, in violation of 15 U.S.C. § 1692e.
44. Defendant's conduct violated 15 U.S.C. § 1692e.
45. Plaintiff suffered injury in fact by being subjected to unfair and abusive practices of the Defendant.
46. Plaintiff suffered actual harm by being the target of the Defendant's misleading debt collection communications.
47. Defendant violated the Plaintiff's right not to be the target of misleading debt collection communications.
48. Defendant violated the Plaintiff's right to a truthful and fair debt collection process.

amount of the debt stated in the letter will increase over time.")

49. Defendant used materially false, deceptive, misleading representations and means in its attempted collection of Plaintiff's alleged debt.
50. Defendant's communications were designed to cause the debtor to suffer a harmful disadvantage in charting a course of action in response to Defendant's collection efforts.
51. The FDCPA ensures that consumers are fully and truthfully apprised of the facts and of their rights, the act enables them to understand, make informed decisions about, and participate fully and meaningfully in the debt collection process. The purpose of the FDCPA is to provide information that helps consumers to choose intelligently. The Defendant's false representations misled the Plaintiff in a manner that deprived him of his right to enjoy these benefits, these materially misleading statements trigger liability under section 1692e of the Act.
52. These deceptive communications additionally violated the FDCPA since they frustrate the consumer's ability to intelligently choose his or her response.
53. Plaintiff seeks to end these violations of the FDCPA. Plaintiff has suffered damages including but not limited to, fear, stress, mental anguish, emotional stress and acute embarrassment. Plaintiff and putative class members are entitled to preliminary and permanent injunctive relief, including, declaratory relief, and damages.

CLASS ALLEGATIONS

54. This action is brought as a class action. Plaintiff brings this action on behalf of himself and on behalf of all other persons similarly situated pursuant to Rule 23 of the Federal Rules of Civil Procedure.
55. The identities of all class members are readily ascertainable from the records of Kirschenbaum & Phillips, PC and those business and governmental entities on whose behalf it attempts to collect debts.

56. Excluded from the Plaintiff's Class is the Defendant and all officers, members, partners, managers, directors, and employees of Kirschenbaum & Phillips, PC, and all of their respective immediate families, and legal counsel for all parties to this action and all members of their immediate families.
57. There are questions of law and fact common to the Plaintiff's Class, which common issues predominate over any issues involving only individual class members. The principal issues are whether Defendant's communications with the Plaintiff, such as the above stated claims, violate provisions of the Fair Debt Collection Practices Act.
58. The Plaintiff's claims are typical of the class members, as all are based upon the same facts and legal theories.
59. The Plaintiff will fairly and adequately protect the interests of the Plaintiff's Class defined in this complaint. The Plaintiff has retained counsel with experience in handling consumer lawsuits, complex legal issues, and class actions, and neither the Plaintiff nor his attorneys have any interests, which might cause them not to vigorously pursue this action.
60. This action has been brought, and may properly be maintained, as a class action pursuant to the provisions of Rule 23 of the Federal Rules of Civil Procedure because there is a well-defined community interest in the litigation:
 - (a) **Numerosity:** The Plaintiff is informed and believes, and on that basis alleges that the Plaintiff's Class defined above is so numerous that joinder of all members would be impractical.
 - (b) **Common Questions Predominate:** Common questions of law and fact exist as to all members of the Plaintiff's Class and those questions predominate over any questions or issues involving only individual class members. The principal issues are whether the Defendant's communications with the Plaintiff, such as

the above stated claims, violate provisions of the Fair Debt Collection Practices Act.

- (c) **Typicality:** The Plaintiff's claims are typical of the claims of the class members. Plaintiff and all members of the Plaintiff's Class defined in this complaint have claims arising out of the Defendant's common uniform course of conduct complained of herein.
- (d) **Adequacy:** The Plaintiff will fairly and adequately protect the interests of the class members insofar as Plaintiff has no interests that are adverse to the absent class members. The Plaintiff is committed to vigorously litigating this matter. Plaintiff has also retained counsel experienced in handling consumer lawsuits, complex legal issues, and class actions. Neither the Plaintiff nor his counsel have any interests, which might cause them not to vigorously pursue the instant class action lawsuit.
- (e) **Superiority:** A class action is superior to the other available means for the fair and efficient adjudication of this controversy because individual joinder of all members would be impracticable. Class action treatment will permit a large number of similarly situated persons to prosecute their common claims in a single forum efficiently and without unnecessary duplication of effort and expense that individual actions would engender. Certification of a class under Rule 23(b)(1)(A) of the Federal Rules of Civil Procedure is appropriate because adjudications with respect to individual members create a risk of inconsistent or varying adjudications which could establish incompatible standards of conduct for Defendant who, on information and belief, collects debts throughout the United States of America.

61. Certification of a class under Rule 23(b)(2) of the Federal Rules of Civil Procedure is also appropriate in that a determination that the above stated claims, violate provisions of the Fair Debt Collection Practices Act, and is tantamount to declaratory relief and any monetary relief under the FDCPA would be merely incidental to that determination.
62. Certification of a class under Rule 23(b)(3) of the Federal Rules of Civil Procedure is also appropriate in that the questions of law and fact common to members of the Plaintiff's Class predominate over any questions affecting an individual member, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.
63. Further, Defendant has acted, or failed to act, on grounds generally applicable to the Rule (b)(1)(A) and (b)(2) Class, thereby making appropriate final injunctive relief with respect to the Class as a whole.
64. Depending on the outcome of further investigation and discovery, Plaintiff may, at the time of class certification motion, seek to certify one or more classes only as to particular issues pursuant to Fed. R. Civ. P. 23(c)(4).

AS AND FOR A FIRST CAUSE OF ACTION

Violations of the Fair Debt Collection Practices Act brought by Plaintiff on behalf of himself and the members of a class, as against the Defendant.

65. Plaintiff repeats, reiterates, and incorporates the allegations contained in paragraphs numbered one (1) through sixty-four (64) herein with the same force and effect as if the same were set forth at length herein.
66. This cause of action is brought on behalf of Plaintiff and the members of a class.
67. The class involves all individuals whom Defendant's records reflect resided in the State of New York and who were sent a collection letter in substantially the same form letter as the letter sent to the Plaintiff on or about March 29th, 2017; and (a) the collection letter

was sent to a consumer seeking payment of a personal debt; and (b) the collection letter was not returned by the postal service as undelivered; and (c) the Plaintiff asserts that the letter contained violations of 15 U.S.C. §§ 1692e for the use of any false representation or deceptive means to collect or attempt to collect any debt, for misrepresenting the amount of the debt owed by Plaintiff.

Violations of The Fair Debt Collection Practices Act

68. The Defendant's actions as set forth above in the within complaint violates the Fair Debt Collection Practices Act.

69. Because the Defendant violated the Fair Debt Collection Practices Act, the Plaintiff and the members of the class are entitled to damages in accordance with the Fair Debt Collection Practices Act.

WHEREFORE, Plaintiff, respectfully requests preliminary and permanent injunctive relief, and that this Court enter judgment in Plaintiff's favor and against the Defendant and award damages as follows:

- (a) Statutory damages provided under the FDCPA, 15 U.S.C. § 1692(k);
- (b) Attorney fees, litigation expenses and costs incurred in bringing this action; and
- (c) Any other relief that this Court deems appropriate and just under the circumstances.

Dated: Brooklyn, New York
July 30th, 2017

 /s/ Igor Litvak
Igor Litvak, Esq.
Attorneys for the Plaintiff
The Litvak Law Firm, PLLC
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Brooklyn, New York 11229
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Plaintiff requests trial by jury on all issues so triable.

 /s/ Igor Litvak
Igor Litvak, Esq.

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March 29, 2017

AVRAHAM MILLER
[REDACTED]
[REDACTED]

Re: Our File Number: [REDACTED]
Judgment Caption: DISCOVER BANK
vs.
Avraham Miller
Account Number: *****2146
Creditor: DISCOVER BANK
Current Balance:\$5,683.04

Dear AVRAHAM MILLER:

The amount reflected above is the amount you owe as of the date of this letter. This amount may vary from day to day, due to interest or other charges added to your account after the date of this letter. Hence if you pay the amount shown above, an adjustment may be necessary after we receive your payment, in which event we will inform you before depositing the payment for collection. For an exact amount owed or for further information, please contact our office at (866) 746-1144 or (516) 780-7388. You may also contact our office to setup a repayment plan on the full balance.

We are authorized to extend to you the opportunity to settle this debt by paying **50%** of the balance **\$2,841.52** in six (6) monthly payments of \$473.59 each. First payment of \$473.59 due on or before April 26, 2017 followed by five (5) consecutive payments of \$473.59 due on the same day each successive month. We are not obligated to renew this offer.

Please forward the payment payable to KIRSCHENBAUM & PHILLIPS, P.C., to P.O. Box 9000, Farmingdale, NY 11735-9000. Please be sure to include our file number DC13713 on the payment to ensure prompt crediting.

Settling a debt for less than the balance owed may have tax consequences and Discover may file a 1099C form. We cannot provide you with tax advice. If you have any questions Discover encourages you to consult a tax adviser of your choosing.

Very truly yours,

KIRSCHENBAUM & PHILLIPS, P.C.

A-TAX2

THIS COMMUNICATION IS FROM A DEBT COLLECTOR. THIS IS AN ATTEMPT TO COLLECT A DEBT AND ANY INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

AVRAHAM MILLER on behalf of himself
and all other similarly situated consumers

Plaintiff,

Case No.

-against-

KIRSCHENBAUM & PHILLIPS, PC

Defendant.

SUMMONS IN A CIVIL ACTION

TO: KIRSCHENBAUM & PHILLIPS, PC
40 DANIEL STREET, SUITE 7
FARMINGDALE, NY 11732-9000

YOU ARE HEREBY SUMMONED and required to file with the Clerk of this Court
and serve upon PLAINTIFF'S ATTORNEY:

IGOR B. LITVAK, ESQ.
THE LITVAK LAW FIRM, PLLC
1701 AVENUE P
BROOKLYN, NEW YORK 11229

an answer to the complaint which is herewith served upon you, with **21** days after service of this
summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will
be taken against you for the relief demanded in the complaint.

CLERK

DATE

BY DEPUTY CLERK

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

AVRAHAM MILLER

(b) County of Residence of First Listed Plaintiff NASSAU COUNTY (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number) IGOR B. LITVAK, ESQ. THE LITVAK LAW FIRM, PLLC 1701 AVENUE P PHONE / FAX: (718) 989-2908 BROOKLYN, NEW YORK 11229 E-MAIL: IGOR@LITVAKLAWNY.COM

DEFENDANTS

KIRSCHENBAUM & PHILLIPS, PC

County of Residence of First Listed Defendant (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff
3 Federal Question (U.S. Government Not a Party)
2 U.S. Government Defendant
4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- Citizen of This State
Citizen of Another State
Citizen or Subject of a Foreign Country
PTF DEF
1 1 Incorporated or Principal Place of Business In This State
2 2 Incorporated and Principal Place of Business In Another State
3 3 Foreign Nation
4 4
5 5
6 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Table with 5 columns: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES. Includes various legal categories like Insurance, Personal Injury, Real Estate, etc.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding
2 Removed from State Court
3 Remanded from Appellate Court
4 Reinstated or Reopened
5 Transferred from Another District (specify)
6 Multidistrict Litigation - Transfer
8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): 15 U.S.C. SECTION 1692 -- FAIR DEBT COLLECTION PRACTICES ACT (FDCPA)
Brief description of cause: UNLAWFUL AND DECEITFUL DEBT COLLECTION BUSINESS PRACTICES

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE DOCKET NUMBER

DATE 07/30/2017 SIGNATURE OF ATTORNEY OF RECORD /S/ IGOR B. LITVAK, ESQ.

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

CERTIFICATION OF ARBITRATION ELIGIBILITY

Local Arbitration Rule 83.10 provides that with certain exceptions, actions seeking money damages only in an amount not in excess of \$150,000, exclusive of interest and costs, are eligible for compulsory arbitration. The amount of damages is presumed to be below the threshold amount unless a certification to the contrary is filed.

I, N/A, counsel for _____, do hereby certify that the above captioned civil action is ineligible for compulsory arbitration for the following reason(s):

- monetary damages sought are in excess of \$150,000, exclusive of interest and costs,
- the complaint seeks injunctive relief,
- the matter is otherwise ineligible for the following reason

DISCLOSURE STATEMENT - FEDERAL RULES CIVIL PROCEDURE 7.1

Identify any parent corporation and any publicly held corporation that owns 10% or more of its stocks:

N/A

RELATED CASE STATEMENT (Section VIII on the Front of this Form)

Please list all cases that are arguably related pursuant to Division of Business Rule 50.3.1 in Section VIII on the front of this form. Rule 50.3.1 (a) provides that "A civil case is "related" to another civil case for purposes of this guideline when, because of the similarity of facts and legal issues or because the cases arise from the same transactions or events, a substantial saving of judicial resources is likely to result from assigning both cases to the same judge and magistrate judge." Rule 50.3.1 (b) provides that " A civil case shall not be deemed "related" to another civil case merely because the civil case: (A) involves identical legal issues, or (B) involves the same parties." Rule 50.3.1 (c) further provides that "Presumptively, and subject to the power of a judge to determine otherwise pursuant to paragraph (d), civil cases shall not be deemed to be "related" unless both cases are still pending before the court."

NY-E DIVISION OF BUSINESS RULE 50.1(d)(2)

- 1.) Is the civil action being filed in the Eastern District removed from a New York State Court located in Nassau or Suffolk County? No
- 2.) If you answered "no" above:
 - a) Did the events or omissions giving rise to the claim or claims, or a substantial part thereof, occur in Nassau or Suffolk County? No
 - b) Did the events or omissions giving rise to the claim or claims, or a substantial part thereof, occur in the Eastern District? Yes

If your answer to question 2 (b) is "No," does the defendant (or a majority of the defendants, if there is more than one) reside in Nassau or Suffolk County, or, in an interpleader action, does the claimant (or a majority of the claimants, if there is more than one) reside in Nassau or Suffolk County? _____

(Note: A corporation shall be considered a resident of the County in which it has the most significant contacts).

BAR ADMISSION

I am currently admitted in the Eastern District of New York and currently a member in good standing of the bar of this court.

Yes No

Are you currently the subject of any disciplinary action (s) in this or any other state or federal court?

Yes (If yes, please explain) No

I certify the accuracy of all information provided above.

Signature: /S/ IGOR B. LITVAK, ESQ.

ClassAction.org

This complaint is part of ClassAction.org's searchable class action lawsuit database and can be found in this post: [NY Consumer Sues Kirschenbaum and Phillips Over 'Illegal' Collection Letter](#)
