

BENDAU & BENDAU PLLC
Clifford P. Bendau, II (030204)
Christopher J. Bendau (032981)
P.O. Box 97066
Phoenix, Arizona 85018
Telephone: (480) 382-5176
Facsimile: (480) 304-3805
Email: cliffordbendau@bendaulaw.com
chris@bendaulaw.com
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Henry Rojas, individually, and on behalf of
all others similarly situated,

Plaintiffs,

v.

VMS Data, LLC, an Arizona limited liability
company, and **Gerald Andrew Gilby and**
Jane Doe Gilby, a married couple

Defendants.

No. _____

**COLLECTIVE ACTION COMPLAINT
PURSUANT TO 29 U.S.C. § 201, ET SEQ.**

Plaintiff, Henry Rojas (“Plaintiff”), individually, and on behalf of all other persons
similarly situated, allege as follows:

PRELIMINARY STATEMENT

1. Plaintiff brings this action on behalf of themselves and all similarly-situated
current and former Inside Sales Associates¹ of Defendants VMS Data, LLC (“Defendant VMS”),

¹ For the purposes of this Complaint, “Inside Sales Associates” include Openers, Closers, Marketing Directors, and other similar job titles, but such job titles, used for the purpose of classifying the putative class of similarly situated individuals, are not necessarily the job title of Plaintiff and putative class, and has no bearing or relation to any specialization, skill, education, training, or other qualification that might otherwise be associated with such a job title.

BENDAU & BENDAU PLLC
P.O. Box 97066
Phoenix, AZ 85060

1 and Gerald Andrew Gilby and Jane Doe Gilby (collectively, “Defendants”) who were improperly
2 classified as 1099 independent contractors and denied overtime compensation for hours worked
3 in excess of 40 hours in a given workweek.

4 2. Plaintiff, individually, and on behalf of all others similarly-situated, brings this
5 action against Defendants for their unlawful failure to pay overtime in violation of the Fair Labor
6 Standards Act, 29 U.S.C. § 201-219 (the “FLSA”).

7 3. Plaintiff brings a collective action under the FLSA to recover the unpaid overtime
8 owed to him individually and on behalf of all other similarly-situated employees, current and
9 former, of Defendants. Members of the Collective Action are referred to as the “Collective
10 Members.”

11 4. The Collective Members are all current and former Inside Sales Associates who
12 were employed by Defendants at any time starting three years before this Complaint was filed,
13 up to the present.

14 5. This is an action for unpaid wages, liquidated damages, interest, attorneys’ fees,
15 and costs under the FLSA.

16 6. The FLSA was enacted “to protect all covered workers from substandard wages
17 and oppressive working hours.” Under the FLSA, employers must pay all non-exempt
18 employees an overtime premium for all time spent working in excess of 40 hours per week.

19 7. Defendants engaged in the regular policy and practice of misclassifying their
20 Inside Sales Associates as independent contractors rather than employees. Specifically,
21 Defendants subjected Plaintiff and the Collective Members to their policy and practice of
22 misclassifying their Inside Sales Associates, who were employees, as independent contractors
23
24
25
26
27

1 and then failing and/or refusing to pay them overtime for time they worked in excess of 40 hours
2 per week, in violation of 29 U.S.C. § 207(a).

3 8. Therefore, Defendants did not pay Plaintiff or the Collective Members the
4 applicable overtime rate, in violation of 29 U.S.C. § 207.

5 **JURISDICTION AND VENUE**

6 9. Plaintiff realleges and incorporates by reference all allegations in all preceding
7 paragraphs.

8 10. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and 29
9 U.S.C. § 201, *et seq.* because this action arises under the Constitution and laws of the United
10 States.

11 11. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b) and (c) because
12 acts giving rise to the claims of Plaintiff and the Collective Members occurred within the District
13 of Arizona, and Defendants regularly conduct business in and have engaged in the conduct
14 alleged in the Complaint – and, thus, are subject to personal jurisdiction in – this judicial district.
15

16 **PARTIES**

17 12. Plaintiff realleges and incorporate by reference all allegations in all preceding
18 paragraphs.
19

20 13. At all times material to the matters alleged in this Complaint, Plaintiff was an
21 individual residing in Maricopa County, Arizona, and is a former employee of Defendants.
22

23 14. At all material times, Plaintiff was a full-time, non-exempt employee of
24 Defendants from approximately September 1, 2016 through approximately December 31, 2019.

25 15. Specifically, Plaintiff worked for Defendants as an opener from approximately
26 September 1, 2016 through approximately January 31, 2017. Plaintiff worked for Defendants as
27

1 a closer from approximately February 1, 2017 through approximately August 1, 2017. Plaintiff
2 worked for Defendants as a marketing director from approximately August 1, 2017 through
3 approximately December 31, 2019.

4 16. While working as an opener, Plaintiff was compensated at a rate of \$10 per hour.

5 17. While working for Defendants as a closer, Plaintiff was compensated at a rate of
6 \$11.50 per hour.

7 18. While working for Defendants as a marketing director, Plaintiff was compensated
8 at a rate of \$11.50 per hour plus commission.

9 19. At all material times, Plaintiff was employed by Defendants but classified and
10 paid as an independent contractor. Defendants employed Plaintiff to perform inside sales-
11 related duties for the purpose of selling websites to customers.

12 20. At all material times, Plaintiff was an employee of Defendants as defined by the
13 FLSA, 29 U.S.C. § 203(e)(1) and was a non-exempt employee under 29 U.S.C. § 213(a)(1).
14

15 21. Plaintiff has given his written consent to be a party Plaintiff in this action pursuant
16 to 29 U.S.C. § 216(b), a true and accurate copy of which is attached to this Complaint as
17 “**Exhibit A.**”
18

19 22. Plaintiff brings this action on behalf of himself and on behalf of all other persons
20 similarly situated who are current or former Inside Sales Associates of Defendants, including but
21 not limited to Inside Sales Associates who agree in writing to join this action seeking recovery
22 under the FLSA.

23 23. Plaintiff brings this action on behalf of himself and on behalf of all other similarly
24 situated current and former employees of Defendants—specifically, Inside Sales Associates of
25
26
27

1 Defendants who were not paid overtime for time worked in excess of 40 hours in any given
2 workweek and whose wages, therefore, were non-compliant with the FLSA.

3 24. Defendant VMS Data, LLC is an Arizona limited liability company, authorized to
4 do business in the State of Arizona and was at all relevant times Plaintiff's and the Collective
5 Members' Employer as defined by 29 U.S.C. § 203(d).

6 25. At all relevant times, VMS Data, LLC owned and operated as VMS Data, an
7 online marketing company located in Maricopa County, Arizona.

8 26. Under the FLSA, VMS Data, LLC is an employer. The FLSA defines
9 "employer" as any individual who acts directly or indirectly in the interest of an employer in
10 relation to an employee. At all relevant times, Defendant VMS Data, LLC had the authority to
11 hire and fire employees, supervised and controlled work schedules or the conditions of
12 employment, determined the rate and method of payment, and maintained employment records
13 in connection with Plaintiff's and the Collective Members' employment with VMS Data, LLC.
14 Having acted in the interest of VMS Data, LLC in relation to their employees, including
15 Plaintiff, VMS Data, LLC is subject to liability under the FLSA.

16 27. Defendants Gerald Andrew Gilby and Jane Doe Gilby are, upon information and
17 belief, husband and wife. They have caused events to take place giving rise to the claims in this
18 Complaint as to which their marital community is fully liable. Gerald Andrew Gilby and Jane
19 Doe Gilby are owners of VMS Data, LLC, and were at all relevant times Plaintiff's and the
20 Collective Members' employer as defined by the FLSA, 29 U.S.C. § 203(d).

21 28. Under the FLSA, Defendants Gerald Andrew Gilby and Jane Doe Gilby are
22 employers. The FLSA defines "employer" as any individual who acts directly or indirectly in
23 the interest of an employer in relation to an employee. Gerald Andrew Gilby and Jane Doe
24
25
26
27

1 Gilby are the owners of VMS Data, LLC. They had the authority to hire and fire employees,
2 supervised and controlled work schedules or the conditions of employment, determined the rate
3 and method of payment, and maintained employment records in connection with Plaintiff's and
4 the Collective Members' employment with VMS Data, LLC. As persons who acted in the
5 interest of VMS Data, LLC in relation to the company's employees, Gerald Andrew Gilby and
6 Jane Doe Gilby are subject to individual liability under the FLSA.

7
8 29. Plaintiff is further informed, believes, and therefore alleges that each of the
9 Defendants gave consent to, ratified, and authorized the acts of all other Defendants, as alleged
10 in this Complaint.

11 30. Defendants, and each of them, are sued in both their individual and corporate
12 capacities.

13 31. Defendants are jointly and severally liable for the injuries and damages sustained
14 by Plaintiff and the Collective Members.

15 32. At all relevant times, Plaintiff and the Collective Members were "employees" of
16 Defendants as defined by the FLSA, 29 U.S.C. § 201, *et seq.*

17 33. The provisions set forth in the FLSA, 29 U.S.C. § 201, *et seq.*, apply to
18 Defendants.

19 34. At all relevant times, Defendants were and continue to be "employers" as defined
20 by FLSA, 29 U.S.C. § 201, *et seq.*

21 35. Defendants individually and/or through an enterprise or agent, directed and
22 exercised control over Plaintiff's and the Collective Members' work and wages at all relevant
23 times.
24
25
26
27

1 44. On approximately February 1, 2017, Plaintiff began employment with Defendants
2 as a Closer, performing various sales duties such as attempting to sell customers on products
3 offered by VMS Data, LLC and finalizing sales transactions.

4 45. On approximately August 1, 2017, Plaintiff began employment with Defendants
5 as a Marketing Director, performing various inside sales-related duties, such as cold-calling and
6 emailing potential and current clients in an effort to sell them VMS Data LLC's products and
7 services.

8 46. In his work for Defendants, Plaintiff estimates that he worked between 35 and 45
9 hours per week on the clock.
10

11 47. In addition to work performed on the clock, Plaintiff estimates he worked an
12 additional approximately 20 hours per week off the clock.

13 48. Rather than classify their Inside Sales Associates as employees, Defendants
14 classified them as independent contractors.

15 49. Defendants misclassified all of their Inside Sales Associates, including Plaintiff
16 and the Collective Members, as independent contractors.
17

18 50. Despite Defendants having misclassified all of their Inside Sales Associates,
19 including Plaintiff and the Collective Members, as independent contractors, Plaintiff and the
20 Collective Members were actually employees, as defined by the FLSA, 29 U.S.C. § 201 et seq.

21 51. All of Defendants' Inside Sales Associates, including Plaintiff and the Collective
22 Members, in their work for Defendants, used Defendants' equipment and wore company
23 uniforms.
24

25 52. Defendants provide their Inside Sales Associates with a script to use when
26 attempting to sell potential customers on VMS Data's products.
27

1 53. Defendants required their Inside Sales Associates, including Plaintiff and the
2 Collective Members, to perform work off the clock. Specifically, whenever the Inside Sales
3 Associates performed work from home, they were required to perform work off the clock.

4 54. Defendants controlled their Inside Sales Associates' schedules, including those of
5 Plaintiff and the Collective Members.

6 55. At all relevant times, Plaintiff and the Collective Members were economically
7 dependent on Defendants.

8 56. The following further demonstrate that their Inside Sales Agents, including
9 Plaintiff and the Collective Members, were employees:
10

- 11 a. Defendants had the exclusive right to hire and fire their Inside Sales
12 Associates, including Plaintiff and the Collective Members;
- 13 b. Defendants made the decision not to pay overtime to their Inside Sales
14 Associates, including Plaintiff and the Collective Members;
- 15 c. Defendants supervised their Inside Sales Associates, including Plaintiff
16 and the Collective Members, and subjected them to Defendants' rules;
- 17 d. Defendants' Inside Sales Associates, including Plaintiff and the Collective
18 Members, had no financial investment with Defendants' business;
- 19 e. Defendants' Inside Sales Associates, including Plaintiff and the Collective
20 Members, had no opportunity for profit or loss in the business;
- 21 f. The services rendered by Defendants' Inside Sales Associates, including
22 Plaintiff and the Collective Members, in their work for Defendants was
23 integral to Defendants' business;
24
25
26
27

1 g. Defendants' Inside Sales Associates, including Plaintiff and the Collective
2 Members, were hired as permanent employees, working for Defendants
3 for continuous unspecified amounts of time.

4 57. At all relevant times, Defendants did not pay Plaintiff or the Collective Members
5 one and one-half times their regular rates of pay for time spent working in excess of 40 hours in
6 a given workweek.

7 58. Defendants classified their Inside Sales Associates, including Plaintiff and the
8 Collective Members, as independent contractors to avoid Defendants' obligation to pay their
9 Inside Sales Associates, including Plaintiff and the Collective Members, one and one-half times
10 their regular rates of pay for all hours worked in excess of 40 hours per week.

11 59. Plaintiff and the Collective Members were non-exempt employees.

12 60. From the beginning of Plaintiff's and the Collective Members' employment
13 through the present day, Defendants failed to properly compensate Plaintiff and the Collective
14 Members for any of their overtime hours. During this time, Plaintiff and the Collective Members
15 worked approximately between fifty-five (55) and sixty-five (65) hours per week.

16 61. Plaintiff and the Collective Members were generally paid on an hourly.

17 62. Plaintiff and the Collective Members were not managers. Plaintiff and the
18 Collective Members did not have supervisory authority over any employees, did not possess the
19 authority to hire or fire employees, did not possess authority to make critical job decisions with
20 respect to any of Defendants' employees, did not direct the work of two or more employees, and
21 did not exercise discretion and independent judgment with respect to matters of significance.
22

23 63. Plaintiff's and the Collective Members' primary duty was not the management of
24 the enterprise in which he was employed or any recognized department of the enterprise.
25
26
27

1 64. From the beginning of Plaintiff's and the Collective Members' employment
2 through the present day, Defendants failed to properly compensate them for any of their overtime
3 hours.

4 65. Defendants knew that – or acted with reckless disregard as to whether – their
5 refusal or failure to properly compensate Plaintiff and the Collective Members over the course of
6 their employment would violate federal and state law, and Defendants were aware of the FLSA
7 overtime wage requirements during Plaintiff's and the Collective Members' employment. As
8 such, Defendants' conduct constitutes a willful violation of the FLSA.
9

10 66. Defendants refused and/or failed to properly disclose to or apprise Plaintiff and
11 the Collective Members of their rights under the FLSA.

12 67. Therefore, in a given workweek, and during each and every workweek of
13 Plaintiff's and the Collective Members' employment with Defendants, Plaintiff and the
14 Collective Members were subject to Defendants' policy and practice of not paying one and one-
15 half times Plaintiff's and the Collective Members' regular rates of pay.
16

17 68. In a given workweek, and during each and every workweek of Plaintiff's and the
18 Collective Members' employment with Defendants, Plaintiff and the Collective Members
19 worked more than 40 hours but were not paid the applicable one and one-half times Plaintiff's
20 and the Collective Members' regular rates of pay for time they spent working in excess of 40
21 hours.
22

23 69. Plaintiff believes and therefore claims that Defendants subjected each and every
24 Inside Sales Associate that they employed, including Plaintiff and the Collective Members, to its
25 policy and specific course of not paying one and one-half times Plaintiff's and the Collective
26 Members' regular rates of pay.
27

1 one and one-half times their regular rates of pay for time they spent working in excess of 40
2 hours in a given workweek, in violation of 29 U.S.C. § 207(a).

3 79. At all times material, Plaintiff and the Collective Members are and have been
4 similarly situated, have had substantially similar job requirements and pay provisions, and are
5 and have been subject to Defendants' decision, policy, plan, and common programs, practices,
6 procedures, protocols, routines, and rules of willfully subjecting Plaintiff and the Collective
7 Members to their policy and practice of not paying their Inside Sales Associates one and one-half
8 times their regular rates of pay for time they spent working in excess of 40 hours in a given
9 workweek, in violation of 29 U.S.C. § 207(a).

11 80. Plaintiff's claims stated in this complaint are essentially the same as those of the
12 Collective Members. This action is properly maintained as a collective action because in all
13 pertinent aspects the employment relationship of individuals similarly situated to Plaintiff are
14 identical or substantially similar.

16 81. Plaintiff and the Collective Members were each compensated on a fixed hourly
17 rate of compensation basis for the duration of their employment with Defendants.

18 82. The Collective Members perform or have performed the same or similar work as
19 Plaintiff.

20 83. Defendants' failure to pay overtime compensation required by the FLSA results
21 from generally applicable policies or practices and does not depend on the personal
22 circumstances of Plaintiff or the Collective Members.

24 84. While Plaintiff and Defendants have described Plaintiff's and the Collective
25 Members' job titles as Inside Sales Agents, the specific job titles or precise job responsibilities of
26 each Collective Member does not prevent collective treatment.

27

1 85. All Collective Members, irrespective of their particular job requirements and job
2 titles, are entitled to proper overtime wage compensation for all hours worked in excess of 40 in
3 a given workweek.

4 86. Although the exact amount of damages may vary among the Collective Members,
5 the damages for the Collective Members can be easily calculated by a simple formula. The
6 claims of all Collective Members arise from a common nucleus of facts. Liability is based on a
7 systematic course of wrongful conduct by the Defendants that caused harm to all of the
8 Collective Members.
9

10 87. As such, Plaintiff brings his FLSA overtime wage claim as a collective action on
11 behalf of the following class:

12 **The FLSA Collective Members are all of Defendants' current and**
13 **former Inside Sales Agents who were not paid one and one-half times**
14 **their regular rates of pay for time spent working in excess of 40 hours**
15 **in a given workweek, starting three years before this lawsuit was filed**
16 **up to the present.**

17 88. Defendants' unlawful conduct, as described in this Collective Action Complaint,
18 is pursuant to Defendants' corporate policy or practice of minimizing labor costs by refusing
19 and/or failing to properly compensate its employees according to the FLSA.

20 89. Defendants are aware or should have been aware that federal law prohibited them
21 from not paying their Inside Sales Agents –namely, Plaintiff and the Collective Members–an
22 overtime premium wage for time spent working in excess of 40 hours per given workweek.

23 90. Defendants' unlawful conduct has been widespread, repeated, and consistent.

24 91. This action is properly brought and maintained as an opt-in collective action
25 pursuant to 29 U.S.C. § 216(b).
26
27

1 99. At all relevant times, Defendants engaged in the regular policy and practice of
2 classifying their Inside Sales Agents, including Plaintiff and the Collective Members, as
3 independent contractors when they were in reality employees as defined by the FLSA.

4 100. At all relevant times, Defendants did not pay Plaintiff or the Collective Members
5 one and one-half times their regular rates of pay for time spent working in excess of 40 hours in a
6 given workweek.

7 101. Defendants misclassified their Inside Sales Agents, including Plaintiff and the
8 Collective Members, as independent contractors to avoid Defendants' obligation to pay their Inside
9 Sales Agents, including Plaintiff and the Collective Members, one and one-half times their regular
10 rates of pay for all hours worked in excess of 40 hours per week.

11 102. Defendants engaged in such conduct in direct violation of 29 U.S.C. § 207(a).

12 103. As such, unpaid overtime wages for such time Plaintiff and the Collective Members
13 worked in excess of 40 hours per given workweek is owed to Plaintiff and the Collective Members
14 for the entire time they were employed by Defendants.
15

16 104. Defendants knew that – or acted with reckless disregard as to whether – their refusal
17 or failure to properly compensate Plaintiff and the Collective Members over the course of their
18 employment would violate federal and state law, and Defendants were aware of the FLSA overtime
19 wage requirements during Plaintiff's and the Collective Members' employment. As such,
20 Defendants' conduct constitutes a willful violation of the FLSA.
21

22 105. Plaintiff and the Collective Members are therefore entitled to compensation for
23 their unpaid overtime wages at an hourly rate, to be proven at trial, plus an additional equal amount
24 as liquidated damages, together with interest, reasonable attorney's fees, and costs.
25
26
27

1 WHEREFORE, Plaintiff, Henry Rojas, individually, and on behalf of all other similarly
2 situated persons, requests that this Court grant the following relief in Plaintiff's and the Collective
3 Members' favor, and against Defendants:

4 A. For the Court to declare and find that the Defendants committed one or more of the
5 following acts:

- 6 i. violated overtime provisions of the FLSA, 29 U.S.C. § 207, by failing to
7 pay proper overtime wages;
8 ii. willfully violated overtime provisions of the FLSA, 29 U.S.C. § 207;

9 B. For the Court to award damages in the amounts of all unpaid overtime
10 compensation due and owing to Plaintiff and the Collective Members for time they
11 spent working in excess of 40 hours per given workweek;

12 C. For the Court to award compensatory damages, including liquidated damages
13 pursuant to 29 U.S.C. § 216(b), in amounts to be determined at trial;

14 D. For the Court to award prejudgment and post-judgment interest on any damages
15 awarded;

16 E. For the Court to award Plaintiff's and the Collective Members' reasonable
17 attorneys' fees and costs of the action pursuant to 29 U.S.C. § 216(b) and all other
18 causes of action set forth in this Complaint;

19 F. For the Court to provide reasonable incentive awards for Plaintiff to compensate
20 him for the time he spent attempting to recover wages for the Collective Members
21 and for the risks he took in doing so; and

22 G. Such other relief as this Court deems just and proper.
23
24
25
26
27

REQUEST FOR COLLECTIVE ACTION CERTIFICATION

1
2 As to Count I of this Complaint, Plaintiff requests that the Court designate this action as a
3 collective action on behalf of the FLSA Collective Members and promptly issue a notice pursuant
4 to 29 U.S.C. § 216(b) to all similarly situated members of the FLSA opt-in class, apprising them
5 of the pendency of this action, and permitting them to timely assert FLSA claims in this action by
6 filing individual Consent to Sue Forms pursuant to 29 U.S.C. § 216(b).
7

8
9 RESPECTFULLY SUBMITTED this 9th day of February, 2021.

10 BENDAU & BENDAU PLLC

11 By: /s/ Clifford P. Bendau, II

12 Clifford P. Bendau, II

13 Christopher J. Bendau

14 *Attorneys for Plaintiffs*
15
16
17
18
19
20
21
22
23
24
25
26
27

BENDAU & BENDAU PLLC
P.O. Box 97066
Phoenix, AZ 85060

ClassAction.org

This complaint is part of ClassAction.org's searchable class action lawsuit database and can be found in this post: [VMS Data Sales Agents Misclassified as Contractors, Denied Overtime Pay, Lawsuit Claims](#)
