

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss

**SUPERIOR COURT
TRIAL DEPT.**

**Mario Silva, individually and on behalf
of all others similarly situated**

Plaintiff

CIVIL ACTION NO.

vs.

**Smart Transportation, Inc., Wow Transportation,
Inc., Mobile Transportation Etc, LLC, Mikhail
Bezvitny, and Olga Bezvitnaya**

Defendants

CLASS ACTION COMPLAINT

Plaintiff Mario Silva (“Plaintiff” or “Silva”) brings this action individually and on behalf of all other similarly situated persons against Smart Transportation, Inc., Wow Transportation, Inc., Mobile Transportation Etc, LLC, and their Presidents, Treasurers and Managers, Mikhail Bezvitny and Olga Bezvitnaya (collectively “Defendants”) upon information and belief, except as to his own actions, the investigation of his counsel, and facts that are a matter of public record, as follows:

OVERVIEW

1. Through this action, the Plaintiff, on behalf of himself and all others similarly situated, seeks to recover damages arising from the Defendants’ illegal misclassification of him and other workers as independent contractors, rather than employees.
2. Plaintiff and the putative class seek to recover unpaid overtime wages, unlawful deductions taken from their wages, unreimbursed transportation expenses, benefits to which they would have been entitled had they been properly classified as

employees, statutory treble damages, prejudgment interest, attorneys' fees and costs, and any other relief permitted by law.

3. As set forth below, the Defendants' misclassification of the Plaintiff and putative class as independent contractors rather than employees constitutes a violation of M.G.L. c. 149, § 148B.
4. The Defendants exercised and continue to exercise substantial control and direction over the Plaintiff and putative class in the performance of their services.
5. The services that the Plaintiff and the putative class performed and continue to perform constitute a regular and continuing part of the Defendants' usual business.
6. The Plaintiff and putative class are not and have not been customarily engaged in an independently established trade, occupation, profession or business of the same nature as the services they perform for the Defendants.

THE PLAINTIFF

7. Plaintiff Mario Silva is a resident of Taunton, Massachusetts and was employed by the Defendants out of Quincy, Massachusetts.

THE DEFENDANTS

8. Defendant, Smart Transportation, Inc. ("Smart") is a Massachusetts domestic profit corporation with a principal place of business located in Quincy, Massachusetts.
9. Defendant, Wow Transportation, Inc. ("Wow") is a Massachusetts domestic profit corporation with a principal place of business in Quincy, Massachusetts.
10. Defendant Mobile Transportation Etc, LLC ("Mobile") is a domestic limited liability company with a principal place of business in Quincy, Massachusetts.
11. Defendant Mikhail Bezvityny ("Bezvityny"), is the President and Treasurer of Smart, the Secretary and Director of Wow, the sole Manager of Mobile, and upon information and belief, a resident of Quincy, Massachusetts. Bezvityny controls, directs, and participates to a substantial degree in the formulation and

determination of all Smart, Wow and Mobile policies, including but not limited to their policies regarding the payment of wages.

12. Olga Bezvitnaya (“Bezvitnaya”) is the President and Treasurer of Wow, and upon information and belief, a resident of Quincy, Massachusetts.

FACTUAL ALLEGATIONS

13. Smart, Wow and Mobile provide non-emergency medical transportation services to individuals.
14. These services generally include driving individuals to and from doctor’s appointments, to and from clinical facilities, and to and from other related non-emergency medical appointments.
15. Smart, Wow and Mobile engage individuals, such as the Plaintiff, who perform/performed non-emergency medical transportation driving services on behalf of Smart, Wow and Mobile who the Defendants purport to classify as independent contractors.
16. When the Defendants hire individuals to perform non-emergency medical transportation driving services, the Defendants compensate these individuals at one hourly rate if the driver uses a vehicle owned by the Defendants, or at a higher hourly rate if the driver supplies his or her own vehicle.
17. If the driver supplies his or her own vehicle, the Defendants do not reimburse the individual for any transportation expenses that the individual incurs in performing his or her services for the Defendants, including but not limited to gasoline expenses and vehicle depreciation.
18. On or about December 21, 2015, Plaintiff Silva was hired by the Defendants as a driver to perform non-emergency medical transportation services.
19. As a driver, Silva drove individuals to and from doctor’s appointments, to and from clinical facilities, and to and from other related non-emergency medical appointments.

20. For the duration of Silva's employment with Defendants, his average work week was 50-60 hours per week.
21. When hired, Silva was initially paid \$12.00/hr for all hours worked and was provided a company vehicle to perform his services.
22. The Defendants never paid Silva time and one half his regular hourly rate of \$12.00/hr for any hours he worked over 40 in a workweek.
23. From February 21, 2016 through the end of Silva's employment, the Defendants paid Silva \$18.00/hr, and Silva provided his own vehicle to perform services for the Defendants.
24. The Defendants never paid Silva time and one half his regular hourly rate of \$18.00/hr for any hours he worked over 40 in a work week.
25. The Defendants never reimbursed Silva for any transportation expenses he incurred when he used his own vehicle to perform services for the Defendants.
26. The Defendants classified Silva and all drivers/putative Class Members as independent contractors despite the fact that they regularly work/worked 50-60 plus hours per week, despite the fact that the Defendants control/controlled virtually every aspect of their employment, despite the fact that services they perform/performed constitute a regular and continuing part of Smart's, Wow's and Mobile's usual business, and despite the fact that they are not and have not been customarily engaged in an independently established trade, occupation, profession or business of the same nature as the services they perform for the Smart, Wow and Mobile.
27. The Defendants exert/exerted substantial control over the Plaintiff and other putative Class Members throughout the course of their employment. Such control includes, but is not limited to, the following:
 - a. The Defendants set the Plaintiff's and all other drivers/putative Class Members' work schedules.

- b. The Plaintiff and all other drivers/ putative Class Members receive an email or text message twice a day from the Defendants informing them of their work schedule that they are required to follow.
- c. The Plaintiff and all other drivers/ putative Class Members are required to provide the Defendants with a copy of a valid Massachusetts driver's license, clean CORI check, clean RMV record, medical letter from a physician, and letters of reference.
- d. The Plaintiff and all other drivers/ putative Class Members are required to report all delays to the Defendants' dispatcher no later than 15 minutes before the scheduled pick-up time.
- e. The Plaintiff and all other drivers/ putative Class Members are required to report all requests for delay submitted by a client to the Defendants' dispatcher.
- f. The Plaintiff and all other drivers/ putative Class Members are prohibited from making any unauthorized stops for the Defendants' clients. If a driver wants to make a stop that is not on the schedule, the driver must report a client's request for a stop to the dispatcher and all further instructions must be followed.
- g. The Plaintiff and all other drivers/ putative Class Members are required to immediately report all client "no shows" to the Defendants' dispatcher.
- h. The Plaintiff and all other drivers/ putative Class Members are required to immediately report to the Defendants' dispatcher if a client has an excess number of escorts accompanying the client.
- i. The Plaintiff and all other drivers/ putative Class Members are required to confirm the client's name and appointment address prior to the trip, and report any discrepancies to the Defendants' dispatcher.
- j. The Plaintiff and all other drivers/ putative Class Members are required to report all accidents ASAP.

- k. If a driver/Putative Class Member does not show up to work for the day, the Defendants impose a \$200 fine.
- l. The Plaintiff and all other drivers/ putative Class Members are required to provide the Defendants with two weeks notice if they wish to stop performing services for the Defendants, otherwise the Defendants will impose a \$400 fine.
- m. If a driver/Putative Class Member is ten or more minutes late without a reasonable excuse, the Defendants impose a \$200 fine.
- n. If a driver/Putative Class Member fails to follow the schedule, the Defendants impose a \$25 fine.
- o. If an inspector detects any kind of violation (e.g. missing safety equipment, drink/food in console, etc.), the Defendants impose a \$100 fine.
- p. If a driver/putative Class Member takes a day off without providing the Defendants with three days notice, the Defendants impose a \$50 fine.
- q. If a client submits a complaint about a driver/putative Class Member, the Defendants impose a \$50 fine.
- r. If the Defendants “detect any deception” by a driver/putative Class Member of any kind, the Defendants impose a \$50 fine.
- s. If a driver/putative Class Member forgets his or her cell phone/radio at home, locks the keys inside the car, or fails to print the daily schedule, the Defendants impose a \$25 fine.
- t. The Plaintiff and all other drivers/ putative Class Members typically work between 50-60 hours plus each week for the Defendants.
- u. The Plaintiff and all other drivers/ putative Class Members are not permitted to determine the price of the services they provide for the Defendants’ clients.
- v. The Plaintiff and all other drivers/ putative Class Members are not permitted to invoice any of the Defendants’ clients for the services they provide.

- w. The Defendants frequently terminate drivers'/putative Class Members' employment at their own subjective discretion.
- 28. The Plaintiff and putative Class Members performed and/or continue to perform the core tasks that make up the Smart, Wow and Mobile's business; i.e. providing non-emergency medical transportation services to individuals.
- 29. The services performed by the Plaintiff and putative Class Members are not outside the usual course of Smart, Wow or Mobile's business and are integral to their business. Indeed, the work performed by the Plaintiff and the putative Class Members is the whole of the Defendants' business.
- 30. Plaintiff and putative Class Members were/are not customarily engaged in an independently established trade, occupation, profession or business of the same nature of the services that they provide for the Defendants.
- 31. The Defendants never paid any putative Class Member time and one half their regular hourly rate for any hours worked over 40 in a workweek.
- 32. The Defendants have not reimbursed any putative Class Member for any transportation expenses incurred by putative Class Members in performing his or her services for the Defendants, including but not limited to gasoline expenses and vehicle depreciation.
- 33. The Defendants imposed unlawful deductions from the putative Class Members' wages as described in paragraph 27(k)-27(s).
- 34. Defendants unjustly failed to provide benefits to the Plaintiff and putative Class Members which include the following:
 - a. the employer's share of certain payroll taxes, including social security and Medicare;
 - b. sick, vacation, and holiday pay, as well as meal breaks and rest periods; and

- c. health insurance and other similar benefits, including without limitation life or disability insurance, Family Medical Leave Act benefits, access to a retirement plan, worker's compensation, and unemployment compensation.
35. Upon information and belief, within the three years preceding the filing of this complaint, the Defendants have misclassified approximately 40+ drivers as independent contractors.
36. Bezvitny routinely and customarily manages and holds out Smart, Wow and Mobile as a single integrated enterprise.
37. The Articles of Organization for Smart and Wow and the Certificate of Organization for Mobile all describe the nature of their business as non-emergency medical transportation.
38. The principal address for Smart, Wow and Mobile is the same.
39. Indeed, Bezvitny sets all policies for Smart, Wow and Mobile including the policies set forth in paragraph 27.
40. Bezvitny routinely tells all drivers that they work for Smart, Wow and Mobile.
41. Bezvitny required the Plaintiff, like he does all Smart, Wow and Mobile drivers, to carry and hand out business cards that state "Smart Wow Mobile"
42. The business cards contain contact information at which all three entities can be reached.
43. The Plaintiff received a 1099 from Smart but received daily emails from the email address mobile.inc.transportation@gmail.com (referring to the entity Mobile).

THE CLASS

44. M.G.L. c. 149, § 150 and M.G.L. c. 151, § 1B authorize employees to bring claims on behalf of themselves and all others similarly situated. These statutes implicitly acknowledge that plaintiffs bringing claims on behalf of others similarly situated need not establish the requirements of Mass.R.Civ.P. 23; rather they only must establish that they are similarly situated to those whom they seek to bring claims

on behalf of. See Kuehl v. D&R Paving, LLC, Middlesex Civ. Action No. 2009-0602. This issue notwithstanding, the Plaintiff asserts that his claims also meet the requirements of Mass.R.Civ.P. 23.

45. The “Class Members” are comprised of the following individuals: all individuals who worked for the Defendants as a driver within the three years preceding the filing of this complaint.
46. The Class Members are similarly situated to the Plaintiff and to each other, because they all were all subject to the Defendants’ unlawful practices as described above.
47. On information and belief, there are 40 plus Class Members affected by the Defendants conduct as described herein.
48. There are questions of law and fact common to the Plaintiff and Class Members that predominate over any questions affecting only individual members, including:
 - a. Whether the Defendants have misclassified the Plaintiff and Class Members as independent contractors.
 - b. Whether the Defendants failed to pay the Plaintiff and Class Members time and one half their regular hourly rate for all hours worked over 40 in a workweek.
 - c. Whether the Defendants took unlawful deductions from the Plaintiff’s and Class Members’ wages.
 - d. Whether the Defendants failed to reimburse the Plaintiff and Class Members for transportation expenses incurred in in the course of their employment with and for the benefit of the Defendants.
 - e. Whether the Defendants were unjustly enriched by failing to provide the Plaintiff and Class Members with employment benefits to which they were lawfully entitled, including but not limited to: the employer’s share of certain payroll taxes, including social security

and Medicare; sick, vacation, and holiday pay, as well as meal breaks and rest periods; and health insurance and other similar benefits, including without limitation life or disability insurance, Family Medical Leave Act benefits, access to a retirement plan, worker's compensation, and unemployment compensation.

49. The Plaintiff's claims are typical of the claims of the Class Members. The Plaintiff and all Class Members were subjected to and harmed by the Defendants conduct described above in the same manner.
50. The Plaintiff will fairly and adequately protect the interests of the Class and has retained an attorney experienced in class action wage and employment litigation.
51. Questions of law and fact common to all Class Members predominate over any questions affecting only individual Class Members.
52. A class action is therefore superior to other available methods for the fair and efficient adjudication of this controversy.
53. Plaintiff does not anticipate any difficulty in the management of this litigation.

COUNT 1

M.G.L. c. 149, § 148B (The Massachusetts Independent Contractor Act)

54. Plaintiff re-alleges and incorporates by reference ¶¶ 1-53 above as if fully set forth herein.
55. By their conduct as set forth herein, the Defendants have violated M.G.L. c. 149, § 148B.
56. The Plaintiff and Class Members have been damaged as a result of the Defendants' conduct.

COUNT 2

Violation of M.G.L. c. 149, § 148 (The Massachusetts Wage Act)

57. Plaintiff re-alleges and incorporates by reference ¶¶ 1- 56 above as if fully set forth herein.

58. By their conduct as set forth herein, the Defendants have violated M.G.L. c. 149, § 148.

59. The Defendants are liable for the full amount of the Plaintiff's and Class Members' unpaid wages and benefits, including unreimbursed transportation expenses and repayment of all unlawful deductions taken from the Plaintiff's and Class Members' wages, treble damages, plus interest and reasonable attorney's fees and expenses.

COUNT 3

Violation M.G.L. c. 151, §1A (The Massachusetts Overtime Act)

60. Plaintiff re-alleges and incorporates by reference ¶¶ 1-59 above as if fully set forth herein.

61. By their conduct as set forth herein, the Defendants have violated M.G.L. c. 151, § 1A.

62. The Defendants are liable for the full amount of the Plaintiff's and Class Members' unpaid overtime wages, treble damages, plus interest and reasonable attorney's fees and expenses.

COUNT 4

Unjust Enrichment

63. Plaintiff re-alleges and incorporates by reference ¶¶ 1-62 above as if fully set forth herein.

64. The Plaintiff and Class Members conferred a benefit upon the Defendants through their performance of services as employees of the Defendants.

65. The Defendants have/had knowledge of the benefits they received via the services performed by the Plaintiff and the Class Members as employees of the Defendants.

66. As a result of Defendants' misclassification of Plaintiff and Class Members as "independent contractors," the Defendants have failed to provide the Plaintiff and Class Members with the employment benefits they are lawfully entitled to receive, including but not limited to:

- a. Reimbursement for transportation expenses;
 - b. the employer's share of certain payroll taxes, including social security and Medicare;
 - c. sick, vacation, and holiday pay, as well as meal breaks and rest periods; and
 - d. health insurance and other similar benefits, including without limitation life or disability insurance, Family Medical Leave Act benefits, access to a retirement plan, worker's compensation, and unemployment compensation.
67. Acceptance or retention by the Defendants of the benefit conferred on them by the Plaintiff and Class Members without payment of their value to the Plaintiff and Class Members would be inequitable.
68. By misclassifying the Plaintiff and Class Members as "independent contractors," and by further requiring these individuals to cover the Defendants obligations the Defendants have been unjustly enriched.

WHEREFORE, the Plaintiff, on behalf of himself and all others similarly situated, pray for judgment against the Defendants as follows:

- A. A judgment and order certifying this case as a class action and appointing the Plaintiff and his counsel to represent the Class Members;
- B. A judgment and order declaring that the Defendants have misclassified the Plaintiff and Class Members as independent contractors;
- C. A judgment and order awarding Plaintiff and Class Members their unpaid wages and benefits, including unreimbursed transportation expenses and repayment of all unlawful deductions taken from the Plaintiff's and Class Members' wages;

- D. A judgment and order requiring the Defendants to immediately cease their wrongful conduct as set forth herein;
- E. A judgment and order requiring a certified, independent accounting at Defendants' expense of all payroll and financial records in the possession of the Defendants, and/or the appointment of a Master or Receiver to determine the correct compensation owed to the Plaintiff and Class Members;
- F. A judgment and order requiring the Defendants to pay the Plaintiff and Class Members all statutorily mandated treble damages;
- G. A judgment and order requiring Defendants to pay the Plaintiff's and Class Members' reasonable attorneys' fees and the costs of this action;
- H. A judgment and order requiring the Defendants to pay all legal interest permissible; and
- I. Such other relief as this Court may deem just and proper.

JURY DEMAND

Plaintiff demands a trial by jury on all causes of action so triable.

Respectfully submitted,

Mario Silva, individually and
on behalf of all others similarly
situated

By his attorney,

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