

1 Rose F. Luzon (SBN 221544)  
 2 SHEPHERD, FINKELMAN, MILLER & SHAH, LLP  
 3 401 West "A" Street, Suite 2350  
 4 San Diego, CA 92101  
 Telephone: (619) 235-2416  
 Facsimile: (619) 234-7334  
 Email: [rluzon@sfmslaw.com](mailto:rluzon@sfmslaw.com)

5 Counsel for Plaintiffs Jeffrey Harper and Zachary Kummer  
 [Additional Counsel Listed on Signature Page]

7 **IN THE UNITED STATES DISTRICT COURT**  
 8 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

9 ANTHONY VENTURA, on behalf of himself  
 and all others similarly situated,

10 Plaintiff,

11 v.

12 SONY COMPUTER ENTERTAINMENT  
 13 AMERICA INC.,

14 Defendant.

Case No. 10-cv-01811-RS

**NOTICE OF MOTION AND MOTION OF  
 PLAINTIFFS JEFFREY HARPER AND  
 ZACHARY KUMMER FOR AN ORDER  
 (1) CONSOLIDATING CASES, AND (2)  
 APPOINTING CHIMICLES & TIKELLIS  
 LLP AS INTERIM, CO-LEAD CLASS  
 COUNSEL; MEMORANDUM OF POINTS  
 AND AUTHORITIES IN SUPPORT  
 THEREOF**

Date: July 15, 2010  
 Time: 1:30 p.m.  
 Courtroom: 3

The Honorable Richard Seeborg

19 JEFFREY HARPER and ZACHARY  
 20 KUMMER, individually and on behalf of all  
 others similarly situated,

21 Plaintiffs,

22 v.

23 SONY COMPUTER ENTERTAINMENT  
 24 AMERICA, INC.,

25 Defendant.

Case No. 10-cv-02197-RS

The Honorable Richard Seeborg

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 28 **NOTICE OF MOTION AND MOTION FOR AN ORDER (1) CONSOLIDATING CASES,  
 AND (2) APPOINTING CHIMICLES & TIKELLIS LLP AS INTERIM, CO-LEAD CLASS  
 COUNSEL; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT  
 THEREOF**

10-cv-01811-RS

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This document also relates to:  
TODD DENSMORE and ANTAL HERZ, on behalf of themselves and all others similarly situated,  
Plaintiffs,  
v.  
SONY COMPUTER ENTERTAINMENT AMERICA, INC., a Delaware corporation,  
Defendant.

Case No. 10-cv-01945-RS  
The Honorable Richard Seeborg

This document also relates to:  
JASON BAKER, SEAN BOSQUETT, FRANK BACHMAN, PAUL GRAHAM, and PAUL VANNATA, individually and on behalf of all others similarly situated,  
Plaintiffs,  
v.  
SONY COMPUTER ENTERTAINMENT AMERICA, LLC successor to SONY COMPUTER ENTERTAINMENT AMERICA, INC.,  
Defendant.

Case No. 10-cv-01897-RS  
The Honorable Richard Seeborg

This document also relates to:  
KEITH WRIGHT, on behalf of himself and all others similarly situated,  
Plaintiff,  
v.  
SONY COMPUTER ENTERTAINMENT AMERICA, INC.; and SONY COMPUTER ENTERTAINMENT AMERICA, LLC,  
Defendants.

Case No. 10-cv-01975-RS.  
The Honorable Richard Seeborg

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This document also relates to:  
  
JONATHAN HUBER, on Behalf of Himself  
and All Others Similarly Situated,  
  
Plaintiff,  
  
v.  
  
SONY COMPUTER ENTERTAINMENT  
AMERICA, LLC, formerly SONY  
COMPUTER ENTERTAINMENT  
AMERICA, INC., a Delaware corporation,  
  
Defendant.

Case No. 10-cv-02213-RS  
  
The Honorable Richard Seeborg

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1 **NOTICE OF MOTION & MOTION**

2 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD** in the matters of  
3 *Ventura v. Sony Computer Entertainment America, Inc.*, 3:10-cv-01811-RS; *Densmore, et al. v.*  
4 *Sony Computer Entertainment America, Inc.*, 3:10-cv-01945-RS; *Baker, et al. v. Sony Computer*  
5 *Entertainment America, LLC.*, 3:10-cv-01897-RS; *Wright v. Sony Computer Entertainment*  
6 *America, Inc., et al.*, 3:10-cv-01975-RS; and *Huber v. Sony Computer Entertainment America,*  
7 *LLC.*, 4:10-cv-02213-RS.

9 **PLEASE TAKE NOTICE** that on July 15, 2010, at 1:30 p.m. before the Honorable  
10 Richard Seeborg of the Northern District of California, Plaintiffs Jeffrey Harper and Zachary  
11 Kummer (together, "Plaintiffs"), will and hereby do move for an order (1) consolidating the above-  
12 captioned cases, and (2) appointing Chimicles & Tikellis LLP ("C&T") as Interim Co-Lead Class  
13 Counsel pursuant to FED. R. CIV. P. 42 and 23. This motion is based on this Notice of Motion,  
14 Motion, and Memorandum of Points of Authorities, the declaration of Joseph G. Sauder, the papers  
15 on file in these matters, and arguments of counsel. As demonstrated below, C&T is well-qualified,  
16 and its appointment is in the best interests of the Class. *See* FED. R. CIV. P. 23(g). Accordingly,  
17 Plaintiffs, by and through their attorneys, respectfully request that the Court enter the  
18 accompanying Interim Co-Lead Class Counsel Order ("Order").  
19  
20

21 **MEMORANDUM OF POINTS AND AUTHORITIES**

22 **I. INTRODUCTION**

23 This is a putative class action lawsuit brought by Plaintiffs Jeffrey Harper and Zachary  
24 Kummer on behalf of themselves and a proposed nationwide class of current and former Sony  
25 Playstation®3 ("PS3" or "Console") owners against Sony Computer Entertainment America, Inc.,  
26

1 (“Sony”). This action arises from Sony’s intentional disablement of the “Install other OS” feature  
2 (“OS Feature”) in the PS3 on or about April 1, 2010.

3 The PS3 is a video game console that was first introduced in or around November 2006.  
4 The OS Feature allowed users to install other computer operating systems and enable the PS3 to  
5 function as a personal computer. Sony eliminated this heavily marketed feature through the release  
6 of firmware update 3.21 (“Update 3.21”) on April 1, 2010. Plaintiffs Harper and Kummer now  
7 seek an order that (1) consolidates the six actions, and (2) appoints their counsel, C&T, as Interim,  
8 Co-Lead Class Counsel under Rule 23(g) of the Federal Rules of Civil Procedure.  
9

10 On May 21, 2010, Plaintiffs Harper and Kummer filed suit on behalf of all persons in the  
11 United States that are current or former owners of the PS3 to redress Defendants’ violations of  
12 California consumer laws, breach of contract, breach of the duty of good faith and fair dealing, and  
13 unjust enrichment. Five (5) other related actions are also pending before this Court.<sup>1</sup>  
14

15 All six (6) cases (jointly referred to as “the Actions”) arise out of the same factual  
16 foundation that Sony advertised and sold the PS3 as including the OS Feature – feature consumers  
17 relied upon in purchasing the PS3. The OS Feature allowed PS3 users to operate word processing  
18 software, spreadsheet software, and email software through other operating systems, in addition to  
19 being able to navigate multiple web browsers simultaneously. Compl. ¶ 31. This feature also  
20 allowed users to expand the capabilities of those offered in previous PlayStation® models to that of  
21 a personal computer. *Id.*  
22

23  
24  
25 <sup>1</sup> On May 20, 2010, the Honorable Richard Seeborg ordered that the *Ventura, Densmore,*  
26 *Baker and Wright* actions all be related pursuant to Local Civil Rule 3-12. *See Ventura v. Sony*  
27 *Computer Entertainment America, Inc.*, 3:10-cv-01811-RS, Dkt # 37. On May 28, 2010, the *Huber*  
*action* and the instant action, *Harper*, were also deemed related. *See Huber v. Sony Computer*  
*Entertainment America, LLC*, 3:10-cv-02213-RS, Dkt # 5; *Harper v. Sony Computer Entertainment*  
*America, Inc.*, 3:10-cv-02197-RS, Dkt # 4.

1 Sony released Update 3.21 to address unexplained “security concerns.” Compl. ¶ 41. Those  
2 users that installed Update 3.21 lost the OS Feature in addition to being locked-out from 10 GB of  
3 memory on the Consoles hard drive. *Id.* ¶ 4. PS3 users that failed to download Update 3.21 lost  
4 certain standard features such as the ability to sign into the PlayStation® Network, access to online  
5 features, and playback of PS3 software and Blu-Ray discs that required Update 3.21 or later. *Id.* at  
6 ¶ 41. Sony’s release of Update 3.21 immediately presented consumers with a Catch-22 decision  
7 between losing the ability to use their PS3 as a personal computer – a selling feature highly touted  
8 by Sony – or losing the ability to access Blu-Ray and gaming features online. Compl. ¶ 42.  
9  
10 Regardless of the decision, consumers are ultimately left with less than they originally bargained  
11 for in their purchase of the PS3. All six cases have brought claims under California’s consumer  
12 protection statutes and seek certification of nearly identical classes of consumers. As discussed  
13 below, the six cases should be consolidated on a single docket and maintained on a single track.  
14

15 Pursuant to Rule 23(g) of the Federal Rules of Civil Procedure, the Court is empowered to  
16 designate Interim Class Counsel pending the Court’s determination of whether to certify the  
17 proposed class. C&T is well qualified to represent the Class here in a co-leadership position,  
18 having substantial experience representing consumers in consumer fraud related class actions,  
19 having litigated complex class actions, including consumer product class actions, and having  
20 extensive knowledge of the applicable law. C&T is ready, willing and able to devote the  
21 manpower and resources required to zealously represent the Class. C&T, as proposed Interim Co-  
22 Lead Class Counsel is committed to cooperatively prosecuting this litigation and ultimately  
23 obtaining a complete resolution of all claims at issue for the Class members nationwide.  
24

25 Here, Plaintiffs propose a leadership structure that would consist of no more than two co-  
26 leads with the authority to select other firms to form an executive committee, subject to the Court’s  
27



1 approval. The Manual for Complex Litigation (4th ed. 2004) expressly encourages such  
2 cooperative efforts by and between counsel. See *id.* at §10.22 (“In some cases the attorneys  
3 coordinate their activities without the court’s assistance, and such efforts should be encouraged.”).  
4 As shown below, the capabilities of C&T and this proposed structure would more than meet the  
5 requirements of Fed. R. Civ. P. 23. Plaintiffs Harper and Kummer therefore ask the Court to  
6 designate their counsel, Chimicles & Tikellis LLP, as Interim Co-Lead Class Counsel in order to  
7 protect the interests of the Class and promote an efficient adjudication of these and any related  
8 cases.  
9

10 **II. ARGUMENT**

11 **A. This Court Should Consolidate Harper, Ventura, Densmore, Baker, Wright and**  
12 **Huber**

13 Rule 42(a)(2) of the Federal Rules of Civil Procedure provides that a district court may  
14 consolidate multiple actions where they involve a common question of law or fact. FED. R. CIV. P.  
15 42. In this action, consolidation is appropriate with respect to the Actions filed in this Court  
16 because they involve common questions of law and fact. See, e.g. *Owen v. Labor Ready, Inc.*, 146  
17 Fed. Appx. 139, 141 (9th Cir. 2005) (citing *Huene v. United States*, 743 F.2d 703, 704 (9th Cir.  
18 1984) (noting that a district court, in exercising its broad discretion to order consolidation, “weighs  
19 the saving of time and effort consolidation would produce against any inconvenience, delay, or  
20 expense that it would cause”)); *Harmston v. City & County of San Francisco*, No. 07-01186 SI,  
21 2008 U.S. Dist. LEXIS 9622, at \*5 (D. Cal. Jan. 29, 2008) (quoting *Investors Research Co. v. U.S.*  
22 *Dist. Court for Cent. Dist. of Cal.*, 877 F.2d 777, 777 (9th Cir. 1989) (“The district court has broad  
23 discretion under this rule to consolidate cases pending in the same district.”)).  
24

25 In addition, the Actions will likely involve similar issues regarding class certification, and  
26 will involve identical discovery of the parties and of non-parties. For the same reasons,  
27

1 consolidation of any related actions against Sony related to the PS3 and the OS Feature that are  
2 subsequently filed in, removed to, or transferred to this District is appropriate. *See, e.g.,*  
3 *Richardson v. TVIA, Inc.*, No. 06-06304 RMW, 2007 U.S. Dist. LEXIS 28406 (D. Cal. Apr. 16,  
4 2007).

5  
6 **B. This Court Should Appoint C&T As Interim Co-Lead Counsel**

7 Rule 23(g)(2)(A) of the Federal Rules of Civil Procedure encourages courts to “designate  
8 interim counsel to act on behalf of the putative class before determining whether to certify the  
9 action as a class action.” The commentary to Rule 23 explains that the rule “authorizes [a] court to  
10 designate interim counsel during the pre-certification period if necessary to protect the interests of  
11 the putative class.” *Parkinson v. Hyundai Motor Am.*, 2006 U.S. Dist. LEXIS 59055, \*5 (D. Cal.  
12 2006) (*citing* Fed. R. Civ. P. 23, Advisory Committee Notes).

13 Courts interpreting Rule 23(g) have relied primarily on the Advisory Committee notes,  
14 holding that “the primary responsibility of class counsel, resulting from appointment as such, is to  
15 represent the best interests of the class.” *Coleman v. General Motors Acceptance Corp.*, 220  
16 F.R.D. 64, 100 (M.D. Tenn. 2004); *see also In re Cree, Inc., Sec. Litig.*, 219 F.R.D. 369, 373  
17 (M.D.N.C. 2003). In this case, designation of C&T as Interim Co-Lead Class Counsel, as described  
18 below, is appropriate because such counsel is needed to (i) effectively coordinate the efforts of  
19 multiple Plaintiffs’ counsel, and those of plaintiffs whose cases may subsequently be filed,  
20 transferred and/or removed to this Court, and (ii) ensure appropriate, efficient and unified  
21 communications on behalf of the Plaintiffs with the Court, the Defendants, and counsel for future  
22 cases.  
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1 As discussed below, C&T, individually and collectively, is a highly qualified firm and will  
2 fairly and adequately represent the plaintiffs and members of the Class. Thus, it is in the Class's  
3 best interests that C&T be formally appointed as Interim Co-Lead Class Counsel.

4 **1. Legal Standard for Appointment of Interim Class Counsel.**

5 Rule 23(g)(1)(B) instructs district courts to consider matters pertinent to deciding whether  
6 Class Counsel can “fairly and adequately represent the interests of the class.” The Rule further  
7 requires that in appointing class counsel, the Court must consider the following criteria:  
8

- 9 · the work counsel has done in identifying and/or investigating potential claims in the  
10 action;
- 11 · counsel’s experience in handling class actions, other complex litigation, and claims  
of the type asserted in the action;
- 12 · counsel’s knowledge of the applicable law; and
- 13 · the resources counsel will commit to representing the class.

14 FED. R. CIV. P. 23(g)(1)(A)(i)-(iv). In addition to these factors, the Court “(i) may consider any  
15 other matter pertinent to counsel’s ability to fairly and adequately represent the interests of the  
16 class”; (ii) “may direct potential class counsel to provide information on any subject pertinent to the  
17 appointment and to propose terms for attorney fees and nontaxable costs”; and (iii) “may make  
18 further orders in connection with the appointment.” See FED. R. CIV. P. 23(g)(1)(B)-(E). The  
19 standards for adequacy of counsel developed by courts examining Rule 23(a)(4) “have been  
20 incorporated almost in their entirety into new Rule 23(g)... .” Steven Baicker-McKee *et al.*, *The*  
21 *Federal Civil Rules Handbook* at 534 (2005).  
22

23 Under Rule 23(a)(4), as discussed in the Advisory Committee Notes to Rule 23(g), the  
24 adequacy of the representation is a factual inquiry and the Court is given broad discretion in  
25 making the determination. “Adequate representation ‘depends on the qualifications of counsel for  
26 the representatives, an absence of antagonism, a sharing of interests between representatives and  
27

1 absentees, and the unlikelihood that the suit is collusive.” *Crawford v. Honig*, 37 F.3d 485, 487  
2 (9th Cir. 1994) (amended opinion) (quoting *Brown v. Ticor Title Ins. Co.*, 982 F.2d. 386, 390 (9th  
3 Cir. 1994)). It is also important that the Court assess “whether there has been full disclosure of all  
4 agreements and understandings among counsel” and “that clear and satisfactory guidelines have  
5 been established for compensation and reimbursement.” MANUAL FOR COMPLEX LITIGATION at §  
6 10.224.  
7

8 **2. C&T Has Significant Relevant Experience**  
9 **and Knowledge of the Applicable Law.**

10 The qualifications and experience of C&T in federal and state courts and, specifically, in  
11 complex class actions involving consumer products and consumer fraud claims are set forth in the  
12 accompanying firm résumé (Attached as Exhibit “A” to the Declaration of Joseph G. Sauder). In  
13 sum, C&T brings a wealth of litigation experience representing consumers and leading class  
14 actions, including consumer class actions in particular. Moreover, through its experience, C&T  
15 collectively possesses a strong command of the applicable law, the Federal Rules of Civil  
16 Procedure and the Local Rules of the Northern District of California.  
17

18 **3. C&T Is Exceptionally Well Qualified,**  
19 **Experienced and Able to Litigate the Actions.**

20 As courts evaluating the adequacy of representation requirement at the class certification  
21 stage have repeatedly held, a class is fairly and adequately represented where counsel are qualified,  
22 experienced and generally able to conduct the litigation on its behalf. *See, e.g., In re Agent Orange*  
23 *Product Liab. Litig.*, 996 F.2d 1425, 1435 (2d. Cir. 1993); *In re NASDAQ Market-Makers Antitrust*  
24 *Litig.*, 169 F.R.D. 493, 512 (S.D.N.Y. 1996) (class counsel satisfy adequacy requirement where  
25 they are able to prosecute the action vigorously). As discussed above and detailed in the respective  
26 résumé, C&T is exceptionally well qualified to litigate the Actions. The United States District  
27

1 Court for the Eastern District of Pennsylvania has described Joseph Sauder of C&T as “vastly  
2 experienced in class action litigation” when appointing C&T Interim Co-Lead Class Counsel.  
3 *Kurian v. The County of Lancaster*, Case No. 2:07-cv-03482-PD, Dkt. # 68 at 6 (E.D. Pa. April 9,  
4 2010); *See also McGovern v. Samsung Electronics America, Inc.*, Case No. 2:08-cv-00663-JAG,  
5 Dkt. # 13 at 2 (D.N.J. April 7, 2008) (holding that C&T fulfilled the adequacy requirement pursuant  
6 to Fed. R. Civ. P. 23(g)(2) and appointing them Interim Co-Lead Counsel for Plaintiffs and the  
7 proposed class); *In re Heartland Payment Systems, Inc. Data Security Breach Litigation*, Case No.  
8 4:09-md-02046, Dkt. # 21 at 6 (S.D. Tex. August 28, 2009) (appointing C&T as Interim Co-Lead  
9 Counsel for the Financial Institution Track in one of the largest data breaches ever recorded).

11 Moreover, C&T works cooperatively and productively with other law firms, in other  
12 complex class actions, including other consumer cases, and will form an efficient and highly skilled  
13 group to represent the Plaintiffs and Class members in the Actions. As such, the adequacy  
14 requirement clearly is satisfied.

16 **4. C&T Has Committed, and Will Continue to**  
17 **Commit, Significant Time and Resources to Litigate the Actions.**

18 The work C&T has already undertaken in identifying and investigating potential claims in  
19 the Actions also favors their appointment as Interim Co-Lead Class Counsel. It also is an  
20 indication of the extensive resources they will commit to representing the Class. C&T has been  
21 investigating the factual bases of the allegations in the Actions and was the first to identify claims  
22 relating to consumers inability to access approximately 10 GB of the hard drive after installing  
23 Update 3.21. *See* Compl. ¶ 4. C&T has also devoted substantial hours and resources to this matter  
24 through the investigation of PlayStation’s history, discussing and reviewing issues with Plaintiffs,  
25 conducting further interviews with additional PS3 users, and learning the intricacies of Update  
26 3.21. Only after such an extensive investigation did C&T file the *Harper* action against Sony.  
27

1 According to the Third Circuit Task Force Report on the Selection of Class Counsel, the  
2 filing of a well-prepared complaint after significant investigation is work relevant to the  
3 appointment of class counsel. *See id.*, 208 F.R.D. 340, 418-19 (2002). C&T has filed a well-  
4 prepared complaint on behalf of PS3 owners nationwide and, in connection with filing and  
5 prosecuting the cases, conducted substantial investigation into the facts and circumstances pertinent  
6 to the litigation.  
7

8 C&T has already committed the time and efforts of numerous attorneys to the legal  
9 research, factual investigation and prosecution of the case, and will continue to do so, keeping in  
10 mind appropriate staffing levels for each project. Further, C&T has commenced significant  
11 investigations of potential class member claims, which are ongoing. C&T, as Proposed Interim Co-  
12 Lead Class Counsel is ready, willing and able to commit the manpower and resources necessary to  
13 vigorously litigate the Actions.  
14

15 **5. Given the Complexity of the Actions, the**  
16 **Proposed Case Leadership Structure is Appropriate.**

17 The Third Circuit Task Force Report on the Selection of Class Counsel further advises that  
18 “the court should be cognizant of the possibility that the class could benefit from the combined  
19 resources and expertise of a number of counsel.” *Third Circuit Task Force Report*, 208 F.R.D. at  
20 417. As made clear by the Plaintiffs’ Complaint, this is a complex case that will require extensive  
21 discovery, briefing and other cutting edge legal work. It is equally clear, then, that the breadth of  
22 Proposed Interim Co-Lead Class Counsel’s collective experience will benefit Plaintiffs and the  
23 proposed Class members, thereby making their appointment appropriate.  
24  
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27

1                   **6.     Guidelines for Compensation and Reimbursement are in Place.**

2                   C&T has kept, and will continue to keep, as the Manual recommends, contemporaneous and  
3 accurate records of the billable time spent in this matter. Finally, C&T will establish procedures to  
4 assign work to other counsel and to monitor the time spent on such work by counsel.

5                   In sum, C&T is, and continues to be, at the forefront of the Actions, including its  
6 investigation and prosecution on a nationwide basis, by working together as a cohesive unit in a  
7 cooperative and streamlined fashion to represent the interests of the Class members.  
8

9                   **III.    CONCLUSION**

10                  C&T, as proposed Interim Co-Lead Class Counsel, have extensive experience handling  
11 class actions and other complex litigation, including consumer litigation, have committed the  
12 resources necessary to effectively prosecute actions of this magnitude, and are well-equipped to  
13 serve as Interim Co-Lead Class Counsel in the Actions. For the foregoing reasons, Plaintiffs  
14 respectfully request that the Court enter the accompanying Order consolidating the related actions  
15 filed against Defendant Sony pertaining to consumers' purchase of the PS3 and subsequent removal  
16 of the OS Feature by Sony, and appointing C&T as Interim Co-Lead Class Counsel in the Actions  
17 described above.  
18

19 Dated: June 9, 2010

Respectfully submitted,

20  
21 By: \_\_\_\_\_

Rose F. Luzon (SBN 221544)  
SHEPHERD, FINKELMAN,  
MILLER & SHAH, LLP  
401 West A. Street, Suite 2350  
San Diego, CA 92101  
Telephone: (619) 235-2416  
Facsimile: (619) 234-7334  
Email: [rluzon@sfmslaw.com](mailto:rluzon@sfmslaw.com)

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Joseph G. Sauder  
Matthew D. Schelkopf  
Benjamin F. Johns  
CHIMICLES & TIKELLIS LLP  
One Haverford Centre  
361 West Lancaster Avenue  
Haverford, PA 19041  
Telephone: (610) 642-8500  
Facsimile: (610) 649-3633  
E-mail: [JGS@chimicles.com](mailto:JGS@chimicles.com)  
[MDS@chimicles.com](mailto:MDS@chimicles.com)  
[BFJ@chimicles.com](mailto:BFJ@chimicles.com)

Christopher G. Hayes  
LAW OFFICE OF  
CHRISTOPHER G. HAYES  
225 South Church Street  
West Chester, PA 19382  
Telephone: (610) 431-9505  
Facsimile: (610) 431-1269  
E-mail: [chris@chayeslaw.com](mailto:chris@chayeslaw.com)

James C. Shah  
SHEPHERD, FINKELMAN,  
MILLER & SHAH, LLP  
35 East State Street  
Media, PA 19063  
Telephone: 610-891-9880  
Facsimile: 610-891-9883  
Email: [jshah@sfmslaw.com](mailto:jshah@sfmslaw.com)

*Counsel for Plaintiffs Jeffrey Harper and  
Zachary Kummer*