IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNIVERSAL COMPUTER CONSULTING, INC. and UNIVERSAL COMPUTER MAINTENANCE, INC., Plaintiffs,	:	CIVIL ACTION
v.	:	
PITCAIRN ENTERPRISES, INC., et al., Defendants.	:	No. 03-2398

MEMORANDUM AND ORDER

J. M. KELLY, J. **FEBRUARY , 2004**

Following litigation in multiple fora, presently before this Court are several motions filed by the parties in this matter. Defendants Kean Company, Kean Pitcairn, Kris Pitcairn and Pitcairn Enterprises, Inc. d/b/a Pitcairn Motorcars (collectively, the "Defendants")[1] have filed a Motion to Dismiss, to which a Memorandum in Opposition has been filed by Plaintiffs Universal Computer Consulting, Inc. and Universal Computer Maintenance, Inc. (collectively, the "Plaintiffs" or "UCC"). Plaintiffs then filed a Motion for Preliminary Injunction and a Motion for Hearing Date and Expedited Discovery, to which Defendants have filed responses. Finally, Plaintiffs filed a

[1] Plaintiffs voluntarily dismissed The Pitcairn Trust Company, as Trustee to Kean Pitcairn, as a defendant from this matter on July 10, 2003. Defendant 1862 Lincoln Highway Associates, L.P. ("1862 Associates") was dismissed without prejudice from this suit following this Court's September 9, 2003 Order for Plaintiffs' failure to effectuate service of process upon 1862 Associates.

Motion to Confirm Service, to which no response was filed.

These motions arise from a dispute concerning an asset sale by one of the Defendants, Pitcairn Enterprises, Inc. ("PE"), wherein certain creditors were paid in full, certain creditors were partially paid and certain other creditors were not paid at all. In this matter, some of the Defendants were partially paid while one Defendant and Plaintiffs were among those creditors not paid by proceeds of the asset sale.

In their Complaint, Plaintiffs allege that the purpose of PE's asset sale was to evade and frustrate Plaintiffs' attempt to collect on a final judgment which was entered against Pitcairn Motorcars in the United States District Court for the Southern District of Texas in April, 2002 (the "federal judgment"), in confirmation of an arbitration award by a panel of the American Arbitration Association in Houston, Texas in August, 2001 (the "Texas arbitration"). The federal judgment was transferred to the Court of Common Pleas for Bucks County for enforcement against Defendants. Plaintiffs, in the instant suit, contend that Defendants' conduct surrounding PE's sale of assets give rise to liability for claims of equitable fraud, unjust enrichment, tortious interference, and under the Pennsylvania Uniform Fraudulent Transfers Act ("UFTA"), 12 Pa. Cons. Stat. §§ 5101-5110.

The parties' various motions are addressed below.

I. BACKGROUND

A. The Parties

Universal Computer Consulting, Inc. and Universal Computer Maintenance, Inc., are Texas corporations headquartered in Houston, that, among other things, design and install inventory and spare parts control systems, including hardware and software, for car dealers.

PE is a Pennsylvania corporation which, until August 5, 2002, owned and operated a business known as "Pitcairn Motorcars" located at 1862 Lincoln Highway in Langhorne, Pennsylvania. PE was a franchisee of Volvo of America and Volkswagen of America. Kean Pitcairn, a Pennsylvania resident, is the president and sole shareholder of PE. Kris Pitcairn, also a resident of Pennsylvania, is Kean Pitcairn's wife. Mrs. Pitcairn is averred to have owned 80% of PE prior to 2002.

In 1989, UCC and PE entered into a series of contracts wherein UCC would render computer services to PE. The contracts provide for, among other things, arbitration of disputes before the American Arbitration Association ("AAA") and recovery of attorneys fees and costs for the prevailing party in connection with the collection of the award.

B. The Prior Litigation

In 2000, UCC commenced an AAA arbitration in Houston, Texas, alleging certain breaches of the computer service contract by PE. Following motion practice before the AAA panel and this Court to dismiss the arbitration, which motions were denied, the arbitration was held in July 2001.[2] In August 2001, the arbitration panel issued its opinion setting forth an award in Plaintiffs' favor and providing for 10% annual interest and attorneys' fees and costs in connection with collecting the award.

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[2] On or about November 1, 2000, PE commenced an action in this Court, docketed at Civil Action No. 00-5560, to enjoin the AAA arbitration. By Order dated January 4, 2001, this Court denied PE's motion, and established a schedule to decide cross-motions for summary judgment. On June 20, 2001, the Court entered summary judgment against PE.

On July 18, 2001, PE filed a Notice of Appeal to the United States Court of Appeals for the Third Circuit. In November 2001, a mediation ordered by the Third Circuit failed to settle this matter.

Oral argument was scheduled before the Third Circuit in April 2002. PE sought a stay of the Texas federal court litigation pending the Third Circuit's ruling on its appeal. The Texas court denied PE's application, and entered judgment on April 12, 2002 in favor of Plaintiffs.

PE then filed an emergency motion with the merits panel fo the Third Circuit, seeking a stay of any attempt by Plaintiffs to collect judgment. The Third Circuit denied its emergency motion.

In July 2002, in an unpublished opinion, the Third Circuit affirmed this Court's grant of summary judgment to Plaintiffs. PE did not petition for rehearing or file a petition for certiorari with the United States Supreme Court.

In December 2001, Plaintiffs filed a petition to confirm the AAA award and, on April 16, 2002, the United States District Court for the Southern District of Texas reduced that award to judgment, confirming the award, interest and recovery of attorneys' fees and costs.

On August 31, 2002, Plaintiffs transferred the federal judgment from the Texas district court to the Court of Common Pleas for Bucks County, docketed at No. 020570, pursuant to the Uniform Enforcement of Foreign Judgments Act, 42 Pa. Cons. Stat. § 4306. That same day, Plaintiffs began execution proceedings by filing for a writ of execution.

On November 27, 2002, Plaintiffs filed a Petition for Supplemental Relief in Aid of Execution. A hearing was held on December 13, 2002, and Plaintiffs' request for relief was subsequently denied on December 23, 2002.

On January 21, 2003, Plaintiffs filed a motion alleging insufficiency of interrogatory responses by Kean Pitcairn, a conclusion with which, according to Defendants, Judge Robert J. Mellon appeared to disagree at the conclusion of the motion hearing on February 7, 2003.

On March 4, 2003, Plaintiffs filed a Motion to Correct Judgment, a Petition for Hearing on All Pending Motions and a Motion to Modify the December 23, 2003 Order, all of which were denied on March 19, 2003.

On April 7, 2003, Plaintiffs filed a Motion for Contempt against Kean Pitcairn, and following a hearing on that motion, Judge Mellon denied relief on July 7, 2003.[3]

C. The Asset Purchase

Plaintiffs allege that, in or around April 2002, a bid package for the assets of PE was circulated and, on May 25, 2002, PE and non-party R&S Imports, Ltd. ("Buyer"), a Pennsylvania corporation, entered into an Asset Purchase Agreement to buy substantially all of the assets of PE. Plaintiffs aver that the sale of assets closed on or about August 5, 2002, and that, after closing, PE's assets were approximately $711,000.00 in cash, a company car and its accounts receivable. Plaintiffs further aver that the total purchase price for the assets of PE was $8.322 million.

Plaintiffs allege that since the closing, Kean Pitcairn has caused an amount of $700,000.00 to be transferred to his personal trust and to his wife, Kris Pitcairn. Plaintiffs allege that neither is a secured creditor of PE and that both were relieved of contingent liability on personal guarantees for the corporate debts of PE in the total amount of at least $5.8 million.

Plaintiffs also allege that, at closing, Kean Pitcairn's

[3] Previously, on October 4, 2002, Plaintiffs filed their first Petition for Contempt against Kean Pitcairn, which they withdrew on October 18, 2002.

brother, Torrance, received $900,000.00, and 1862 Associates, in which Kean Pitcairn has a one-sixth limited partnership interest, received $1.284 million.

Finally, Plaintiffs allege that, at closing, Buyer entered into a sub-lease (the "Sub-Lease") with PE for five parcels of real estate upon which PE had conducted its business. The largest of these five parcels is owned by 1862 Associates, and another parcel is owned by Kean Pitcairn and a third party. The Sub-Lease provides for step-ups in rents, which would result in a "net net" to PE of approximately $7,200.00 per month.

On August 29, 2002, PE assigned its right under the Sub-Lease to receive a $43,000.00 payment to a newly-formed corporation, Defendant Kean Company, to which Kean and Kris Pitcairn own all the stock. Plaintiffs contend that PE received no consideration from Kean Company for this assignment, and that, as a result of this assignment, Plaintiffs could not succeed in garnishing this asset of PE.[4]

D. The Instant Litigation

On or about April 17, 2003, Plaintiffs filed in this Court their Complaint in Equity alleging Count I Equitable Fraud, Count

[4] On December 23, 2002, the Bucks County Court of Common Pleas ordered that the "net net" of the Sub-Lease, approximately $7,200.00 per month, be placed in escrow. PE appealed this sequestration order to the Superior Court of Pennsylvania, where it is still pending.

II Unjust Enrichment, Count III Tortious Interference and Count IV Uniform Fraudulent Transfers Act. Plaintiffs seek a decree from this Court imposing a constructive trust upon the unsecured proceeds of the sale of the assets of PE, as well as punitive damages. Defendants move to dismiss Plaintiffs claim for failure to state a claim, while Plaintiffs move for a preliminary injunction, seeking contribution in the amount of $549,812.98 from all the Defendants, although the only Defendant against whom Plaintiffs hold judgment is PE, pending adjudication of the underlying Complaint.

II. STANDARD OF REVIEW

As a federal court sitting in diversity, we must adjudicate the case in accordance with applicable state law. Erie Railroad v. Tompkins, 304 U.S. 64, 78 (1938); Nationwide Mut. Ins. Co. v. Cosenza, 258 F.3d 197, 202 (3d Cir. 2001). Both parties agree that Pennsylvania law governs the substance of this dispute. Procedurally, however, this case is governed by federal law. Hanna v. Plumer, 380 U.S. 460, 473-74 (1965).

The purpose of a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) is to test the legal sufficiency of a complaint. Kost v. Kozakiewicz, 1 F.3d 176, 183 (3d Cir. 1993). We therefore accept all factual allegations in the complaint as true and give the pleader the benefit of all reasonable

inferences that can be fairly drawn therefrom. Wisniewski v. Johns-Manville Corp., 759 F.2d 271, 273 (3d Cir. 1985). We are not, however, required to accept legal conclusions either alleged or inferred from the pleaded facts. Kost, 1 F.3d at 183. In considering whether to dismiss a complaint, courts may consider those facts alleged in the complaint as well as matters of public record, orders, facts in the record and exhibits attached to a complaint. Shiver v. Levin, Fishbone, Sedan & Berman, 38 F.3d 1380, 1384 n.2 (3d Cir. 1994). A court may dismiss a complaint only if the plaintiff can prove no set of facts that would entitle him to relief. Coney v. Gibson, 355 U.S. 41, 45-46 (1957).

III. DISCUSSION

Plaintiffs allege that the sole or primary purpose of the asset sale was to evade and escape PE's liability on the federal judgment, which liability pre-dates both the signing of the Asset Purchase Agreement and the closing of the sale, and that all of the assets of the judgment debtor, including but not limited to the net cash proceeds from the sale, have been deliberately placed beyond the reach of the Bucks County Sheriff's execution process. Plaintiffs aver that Defendants have continued to transfer assets of PE to place them into the hands of third parties, in contempt of the writ of execution and for the sole

purpose of evading the federal judgment.

Defendants, however, contend that Plaintiffs, who are unsecured creditors, are attempting to manipulate the facts of a failed commercial transaction into allegations of tortious conduct. Defendants further state PE distributed the proceeds of the asset sale consistent with Pennsylvania law, thus negating any cause of action by Plaintiffs. Specifically, Defendants contend that, under Pennsylvania law, all creditors need not be treated equally and that debtors are free to prefer one creditor over another.

Each of the claims in Plaintiffs' Complaint will be addressed in turn.

A. Equitable Fraud Claim

Defendants argue that Plaintiffs fail to plead fraud with particularity as required by Federal Rule of Civil Procedure 9(b) and, further, that their allegations do not substantiate a claim for equitable fraud. Specifically, Defendants contend that it is difficult to determine which of the eighty-five paragraphs of allegations Plaintiffs rely upon to substantiate their allegation of fraud and that Plaintiffs fail to allege how they relied upon any of the representations made by the Defendants. UCC responds that they have sufficiently plead equitable fraud, and that this claim is, in essence, a "creditor's bill" in equity to reach the

debtor's equitable assets, a long-recognized common law cause of action in Pennsylvania.

The purpose of a creditor's bill is to subject the debtor's property, which has been conveyed away in fraud of creditors, to the claims of the creditors by setting aside and voiding the fraudulent conveyance. See White Co. v. Finance Corporation of America, 63 F.2d 168, 169 (3d Cir. 1933); Houseman v. Grossman, 35 A. 736 (Pa. 1896). This action at common law permits a judgment creditor to bring an action in equity to reach the debtor's equitable assets. United States v. Kensington Shipyard & Drydock Corp., 187 F.2d 709, 712 (3d Cir. 1951). Plaintiffs concede that, to state a claim for equitable fraud, there must be an allegation of specific fraudulent intent by the debtor.

Rule 9(b) requires that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally." Fed. R. Civ. P. 9(b). "Rule 9(b) requires plaintiffs to plead with particularity the 'circumstances' of the alleged fraud in order to place the defendants on notice of the precise misconduct with which they are charged, and to safeguard defendants against spurious charges of immoral and fraudulent behavior." Seville Industrial Machinery Corp. v. Southmost Machinery Corp., 742 F.2d 786, 791 (3d Cir. 1984). Allegations of "date, place or time"

fulfill these functions, but Rule 9(b) does not require them. Id. Thus, plaintiffs are free to use alternative means of injecting precision and some measure of substantiation into their allegations of fraud. Id. In this case, Plaintiffs have satisfied Rule 9(b)'s requirements by setting forth a detailed account of Defendants' alleged course of conduct since having had judgment entered against them by the Texas district court. Specifically, Plaintiffs aver that a judgment was entered against PE and transferred to the Court of Common Pleas for enforcement, and that, on the eve of an alleged execution of the judgment, PE sold its assets to the non-party Buyer. The purpose of Rule 9(b) is to provide notice, not to test the factual allegations of the claim. Morganroth & Morganroth v. Norris, McLaughlin & Marcus, P.C., 331 F.3d 406, 414 n.2 (3d Cir. 2003). Plaintiffs have provided sufficient facts regarding dates and specific transactions that, when viewed as true, Plaintiffs' claim for a creditor's bill survives dismissal.

B. Unjust Enrichment and Tortious Interference Claims

Defendants argue that neither unjust enrichment nor tortious interference applies to Plaintiffs allegations. Plaintiffs respond, without any legal support, that their claims for unjust enrichment and tortious interference are best understood as insurance for Plaintiffs should they be unable to prove specific

intent for their equitable fraud claim.

As a preliminary matter, under Pennsylvania law, the quasi-contractual doctrine of unjust enrichment, an equitable doctrine, is inapplicable when the relationship between the parties is founded on a written agreement or express contract. Hershey Foods Corp. v. Ralph Chapek, Inc., 828 F.2d 989, 999 (3d Cir. 1987). Where there is an express contract that governs the relationship of the parties, a party's recovery is limited to the measure provided in the express contract fixing the value of the services involved. Id. In this case, it is undisputed that an express contract governed the relationship of the parties prior to the Texas arbitration, and that, during that time, Plaintiffs could not have recovered on a claim for unjust enrichment for any benefits conferred upon Defendants under the terms of their contract. The Court is aware, however, that Plaintiffs claims in this action arise from alleged conduct by the Defendants following the Texas arbitration.

Plaintiffs must demonstrate the following elements for a claim of unjust enrichment: (1) the plaintiff conferred benefits upon the defendant; (2) the defendant realized those benefits; (3) the defendant accepted and retained the benefits under circumstances in which it would be inequitable for it to retain them without payment of value. Bunnion v. Consol. Rail Corp., 108 F. Supp. 2d 403, 427 (E.D. Pa. 1999), aff'd, 230 F.3d 1348

(3d Cir. 2000). Plaintiffs' Complaint fails to provide any indication as to the nature of the benefits Plaintiffs conferred upon Defendants, except to the extent that the Complaint incorporates by reference all preceding paragraphs and states that "some or all of the Pitcairn Defendants have been unjustly enriched as a result of their wrongful and illegal conduct." (Compl. ¶ 95.) Assuming that Plaintiffs are referring to the payments that Defendants received as a result of PE's Asset Purchase Agreement with Buyer, the source of such payments was from the sale proceeds of PE's assets and, as such, it is unclear as to how Plaintiffs have conferred any benefit upon Defendants. Furthermore, the section of Plaintiffs' Complaint entitled "Benefits to the Pitcairn Defendants" sets forth no allegations as to how Plaintiffs have conferred benefits upon Defendants or how Defendants realized those benefits, if any. Since Plaintiffs fail to set forth sufficient allegations to state a claim for unjust enrichment, this claim must be dismissed.

Under Pennsylvania law, a claim for tortious interference with contract relations requires the existence of three parties, one of which is the tortfeasor:

> Essential to recovery on the theory of tortious interference with contract is the existence of three parties; a tort-feasor who intentionally interferes with a contract between the plaintiff and a third person . . . . As a result there must be a contractual relationship between the plaintiff and a party other than the defendant.

Maier v. Maretti, 671 A.2d 701, 707 (Pa. Super. Ct. 1995). In addition to the requirement of a third party, Plaintiffs must establish the following: (1) existence of a contractual relationship; (2) an intent on the part of the defendant to harm the plaintiff by interfering with that contractual relationship; (3) the absence of a privilege or justification for such interference; and (4) damages resulting from the defendant's conduct. Small v. Juniata College, 682 A.2d 350, 354 (Pa. Super. Ct. 1996).

While a contract governed the relationship between the parties before the Texas arbitration, that very same contract cannot also now form the basis of Plaintiffs' claim for tortious interference. In the instant action, Plaintiffs' allegations relate to conduct arising from events taking place after the Texas arbitration, not from conduct relating to performance of the computer service contract that previously governed the parties' relationship. Specifically, Plaintiffs allege that some or all of the Defendants have wrongfully interfered with Plaintiffs' lawful attempts to collect judgment. However, attempts to collect on a judgment do not a contract make, and Plaintiffs otherwise fail to allege that a contract outside of the original service contract exists between the parties. Since Plaintiffs fail to allege that a contractual relationship between the parties currently exists, Plaintiffs are unable to plead all

of the elements of their claim for tortious interference.

Accordingly, even accepting as true Plaintiffs' allegations and all reasonable inferences therefrom, as we are required to do on a motion to dismiss, Plaintiffs fail to state claims for unjust enrichment and tortious interference and, therefore, these claims are dismissed.

C. Pennsylvania Uniform Fraudulent Transfers Act[5]

Defendants again contend that Plaintiffs have failed to plead fraud sufficiently and, further, that their allegations cannot state a claim under the Pennsylvania UFTA. Plaintiffs concede that while their UFTA claim may be "surplusage" should they prevail on their common law equitable fraud claim, they argue that they nevertheless state a UFTA claim. Alternative pleading is permissible pursuant to the Federal Rule of Civil Procedure 8, which provides, in pertinent part, that "[a] party may also state as many separate claims or defenses are the party has regardless of consistency and whether based on legal, equitable, or maritime grounds." Fed. R. Civ. P. 8(e).

Section 5104 of the Pennsylvania UFTA provides that:

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[5] The Pennsylvania UFTA, codified at 12 Pa. Cons. Stat. §§ 5101-5110, replaces the repealed Pennsylvania Uniform Fraudulent Conveyances Act, 39 Pa. Cons. Stat. §§ 351-362, and became effective sixty days after December 3, 1993. See 12 Pa. Cons. Stat. § 5101, Historical and Statutory Notes; Protocomm Corp. v. Novell, Inc., 55 F. Supp. 2d 319, 323 n.4 (E.D. Pa. 1999).

> A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
>
> (1) with actual intent to hinder, delay or defraud any creditor of the debtor; or
>
> (2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:
>
> (i) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
>
> (ii) intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due.

12 Pa. Cons. Stat. § 5104(a). In determining whether a debtor had actual intent to hinder, delay or defraud a creditor, Section 5104 permits consideration of a non-exclusive list of eleven "badges of fraud." See 12 Pa. Cons. Stat. § 5104(b).

Here, Plaintiffs set forth allegations in their Complaint in support of eight of the eleven badges of fraud: (1) transfer or obligation was to an insider; (2) debtor retained possession or control of the property transferred after the transfer; (3) the transfer was concealed; (4) before the transfer was made, the debtor had been sued; (5) the transfer was of substantially all of the debtor's assets; (6) the debtor concealed the assets; (7) the debtor was insolvent; and (8) the transfer occurred shortly after a substantial debt was incurred. See 12 Pa. Cons. Stat. § 5104(b)(1)-(11).

Defendants argue that Plaintiffs' focus on preferential

transfers to insiders is not legally sufficient to establish Defendants' intent to hinder, defraud or delay. Defendants also argue that Plaintiffs have not substantiated any allegations that the preferred creditors received any benefit above and beyond the discharge of an actual obligation owing to the creditors. Moreover, Defendants contend that Plaintiffs' focus on Defendants' vigorous defense or ongoing litigation is legally insufficient to establish an intent to hinder, delay or defraud. While Defendants' arguments, if proven true, would defeat the merits of Plaintiffs' claims, these arguments would be appropriate for summary judgment. At this procedural juncture, where Plaintiffs' factual allegations and all reasonable inferences therefrom must be accepted as true, we find that Plaintiffs state a claim pursuant to the Pennsylvania UFTA.

D. Plaintiffs' Motion for Preliminary Injunction

Plaintiffs have not met their burden of demonstrating need for extraordinary relief in the form of a preliminary injunction. Specifically, Plaintiffs request that this Court order all of the Defendants to deposit the amount of $549,812.98, the amount of the underlying judgment entered against PE alone, in an interest-bearing escrow account under the sole control of their attorney. It is well-known that this Court will grant a preliminary injunction only if: (1) the movant has shown a reasonable

probability of success on the merits; (2) the movant will be irreparably injured by denial of relief; (3) granting the preliminary relief will not result in even greater harm to the nonmoving party; and (4) granting the preliminary relief will be in the public interest. Allegheny Energy, Inc. v. DQE, Inc., 171 F.3d 153, 158 (3d Cir. 1999).

Plaintiffs rely on the United States Supreme Court decision in Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308 (1999), as specifically approving preliminary injunctive relief in this matter. In that case, the Supreme Court held that a district court lacks authority to issue a preliminary injunction preventing a debtor from disposing of their assets unless a judgment has been entered establishing such debt. Id. at 333. In this regard, the Supreme Court stated:

> The rule requiring a judgment was a product, not just of the procedural requirement that remedies at law had to be exhausted before equitable remedies could be pursued, but also of the substantive rule that a general creditor (one without a judgment) had no cognizable interest, either at law or in equity, in the property of his debtor, and therefore could not interfere with the debtor's use of that property.

Id. at 319-320 (emphasis added). Plaintiffs argue that preliminary injunctive relief is appropriate here because they plead a classic creditor's bill, having alleged that a judgment establishing that debt has been secured and that a writ of execution has been served on the judgment debtor.

The parties do not dispute that Plaintiffs were awarded a

judgment by a Texas district court that was subsequently transferred to the Bucks County Court of Common Pleas for enforcement on August 30, 2002, and that, on the same day, Plaintiffs began execution proceedings by filing a praecipe for writ of execution. It remains disputed, however, whether Plaintiffs have exhausted all of the legal remedies available to them by pursuing execution of Defendants' property.

The Honorable Susan Devlin Scott of the Bucks County Court of Common Pleas issued an opinion on March 14, 2003 addressing this precise point:

> There is no indication, however, that Plaintiffs pursued execution beyond that point [beginning execution proceedings by filing a praecipe for writ of execution]. In order to effectuate a levy of Defendant's assets, Plaintiffs would have needed to have the writ of execution issued by the prothonotary delivered to the sheriff and to have paid the sheriff's [sic] his fee for levying assets. The docket entries do not reflect that either of those was done.

Universal Computer Consulting v. Pitcairn Enterprises, Inc., No. 2002-05720-27-1, slip op. at 2 (Bucks County Common Pleas Ct., Mar. 14, 2003). Judge Scott concluded:

> Although Plaintiffs requested the prothonotary to issue a writ of execution on August 30, 2002, there is no indication that Plaintiffs have taken all of the necessary steps to have the sheriff levy Defendant's receivables. Until the sheriff has levied Defendant's receivables, Defendant is free to do with them as it deems fit.

Id. at 9.

Plaintiffs argue that Defendants' former counsel consented

to accept service by mail of the writ of execution on behalf of Defendants and that service upon counsel is sufficient to levy on Defendants' property. Pennsylvania Rule of Civil Procedure 3108 is clear about the proper procedure for service of a writ of execution:

> Service of the writ shall be made by the sheriff in the case of
>
> (1) tangible personal property, by levy thereon or, if the property is in possession of a third person who prevents a levy or fails to make property of the defendant available to the sheriff for levy, by serving the third person as garnishee;
>
> (2) a lien upon real property created under a mortgage, judgment or otherwise, by serving as garnishee the mortgagor, judgment or lien debtor, and the real owner of the real property upon which the mortgage, judgment or other lien is secured . . . .

Pa. R. Civ. P. 3108(a)(emphasis added). Plaintiffs have not demonstrated compliance with this rule for service of a writ of execution, as further explained in Judge Scott's decision and, moreover, have provided no indication that proper service pursuant to Pennsylvania Rule of Civil Procedure 3108 was even attempted. Therefore, Plaintiffs have not exhausted all legal remedies available to them before seeking extraordinary relief from this Court, and Plaintiffs' request for a preliminary injunction must be denied.

E. Plaintiffs' Motion to Confirm Service

Finally, Plaintiffs move for an order from this Court

confirming that service of process was effectuated upon 1862 Associates by way of service on Defendant Kean Pitcairn, whom Plaintiffs aver is a one-sixth limited partner of 1862 Associates. By Order dated September 9, 2003, this Court dismissed 1862 Associates from the instant action for Plaintiffs' failure to effectuate service of process upon it within 120 days as required by Federal Rule of Civil Procedure 4(m). Plaintiffs contend that 1862 Associates is a defendant that wishes not to be "found." No response has been filed.

Federal Rule of Civil Procedure 4(h) sets forth the manner in which service must be effectuated upon a partnership, and provides that service may be made pursuant to the law of the state in which the district court is located for the service of a summons upon the defendant in an action brought in the courts of general jurisdiction of the state, or by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized to receive service of process. Fed. R. Civ. P. 4(h)(1).

Pennsylvania Rule of Civil Procedure 423, which sets forth the rule for service on a partnership, provides, in pertinent part:

> Service of original process upon a partnership and all partners named in the action or upon an unincorporated association shall be made upon any of the following persons provided the person served is not a plaintiff in the action:
>
> (1) any partner, officer or registered agent of

> the partnership or association . . . .

Pa. R. Civ. P. 423. Under Pennsylvania partnership law, "[e]very partner is an agent of the partnership for the purpose of its business . . . ." 15 Pa. Cons. Stat. § 8321(a).

Plaintiffs aver that Defendant Kean Pitcairn is a partner of 1862 Associates and that service of process was properly effectuated on Kean Pitcairn. It is unclear, however, whether Plaintiffs ever served original process on Kean Pitcairn in his capacity as a partner of 1862 Associates. Plaintiffs appear to argue that service on Kean Pitcairn is effectively service on the partnership of 1862 Associates, because notice to Kean Pitcairn can be imputed to the partnership. See Darby v. Philadelphia Transp. Co., 73 F. Supp. 522 (E.D. Pa. 1947). In the interest of justice, since Kean Pitcairn has already been personally served with original process, and that no prejudice will result to 1862 Associates, we require only that Plaintiffs serve original process on Kean Pitcairn, this time specifically naming him in his capacity as a partner of 1862 Associates. We will, accordingly, vacate our September 9, 2003 Order dismissing 1862 Lincoln Highway Associates, L.P. from this matter.

IV. CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss is **GRANTED IN PART** and **DENIED IN PART**, to the extent that

Plaintiffs' claims for unjust enrichment and tortious interference are dismissed from Plaintiffs' Complaint. All other claims remain before the Court.

As Plaintiffs have not demonstrated all of the elements required for extraordinary relief, Plaintiffs' Motion for Preliminary Injunction is **DENIED**. Accordingly, Plaintiffs' Motion for a Hearing Date and Expedited Discovery is **DISMISSED AS MOOT**.

Finally, Plaintiffs' Motion to Confirm Service of Process on 1862 Lincoln Highway Associates, L.P. is **GRANTED**, and this Court's September 9, 2003 dismissing 1862 Associates from this action is **VACATED**. Defendants 1862 Lincoln Highway Associates, L.P. must, therefore, answer or otherwise plead within the time required by the Federal Rules of Civil Procedure, as of the date of this Order.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNIVERSAL COMPUTER CONSULTING, INC. and UNIVERSAL COMPUTER MAINTENANCE, INC., Plaintiffs,	:	CIVIL ACTION
v.	:	
PITCAIRN ENTERPRISES, INC., et al., Defendants.	:	No. 03-2398

O R D E R

AND NOW, this day of February, 2004, in consideration of the Motion to Dismiss filed by Defendants Kean Company, Kean Pitcairn, Kris Pitcairn and Pitcairn Enterprises, Inc. (collectively, the "Defendants") (Doc. No. 2) and the Memorandum in Opposition thereto filed by Plaintiffs Universal Computer Consulting, Inc. and Universal Computer Maintenance, Inc. (collectively, the "Plaintiffs") (Doc. No. 3), **IT IS ORDERED** that the Motion to Dismiss is **GRANTED IN PART** and **DENIED IN PART**, to the extent that Count II Unjust Enrichment and Count III Tortious Interference of Plaintiffs' Complaint are **DISMISSED**. All other claims remain before the Court.

In consideration of the Motion for Preliminary Injunction filed by Plaintiffs (Doc. No. 7) and the Response thereto filed by Defendants (Doc. No. 10), **IT IS ORDERED** that the Motion for Preliminary Injunction is **DENIED**. Accordingly, Plaintiffs' Motion for Hearing Date and Expedited Discovery (Doc. No. 8), to

which Defendants filed a response (Doc. No. 9), is **DISMISSED AS MOOT**.

In consideration of the Motion to Confirm Service filed by Plaintiffs (Doc. No. 15), to which no response has been filed, **IT IS ORDERED** that the Motion to Confirm Service is **GRANTED**. **IT IS FURTHER ORDERED** that this Court's September 9, 2003 Order dismissing 1862 Lincoln Highway Associates, L.P. from this action is **VACATED**.

The Clerk of Court is instructed to re-list 1862 Lincoln Highway Associates, L.P. as a defendant to this matter.

BY THE COURT:

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JAMES McGIRR KELLY, J.