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UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT

In re:)	Case No: 95-1313
)	(Bankr. DE)
SLM International, Inc., <u>etal.</u> ,)	Chapter 11 (Substantively
)	Consolidated)
)	
)	
Debtor.)	
-----)	
Bradford Press, Inc., formerly)	Adv. Proc. No. 98-1042
known as UVP/VT, Inc., formerly)	(Bankr. VT)
known as Upper Valley Press, Inc.,)	
)	
)	Doc #78-1
Plaintiff,)	
)	
v.)	
)	MEMORANDUM OF DECISION
Maska U.S., Inc.,)	
)	
Defendant.)	
-----)	

APPEARANCES:

G. Horowitz, Esq., of Kramer Levin Naftalis & Frankel, LLP, New York, New York and P. Hall, Esq., of Reiber, Kenlan, Schwiebert, Hall & Facey, P.C., Rutland, Vermont, for Official Committee of Unsecured Creditors and for Defendant Maska U.S., Inc. ("Maska").

S. E. Grill, Esq., of Devine, Millimet, and Branch, Manchester, New Hampshire and M. L. Pearl, Esq., of Langrock, Sperry and Wool, Middlebury, Vermont, for Plaintiff UVP/VT, Inc. ("UVP").

INTRODUCTION

In this adversary proceeding, plaintiff Bradford Press, Inc., formerly known as UVP/VT, Inc., formerly known and more commonly referred to in these proceedings as Upper Valley Press, Inc. ("UVP"), seeks damages allegedly sustained as a result of contamination emanating from property owned by defendant/debtor "Maska" and coming onto UVP's neighboring property in Bradford, Vermont. ⁽¹⁾ UVP contends that as a result of this contamination it was forced to delay a planned expansion and ultimately to relocate its operations entirely from a property now claimed by it to be worthless. UVP claims damages in the form of lost profits and relocation costs totaling \$6,050,278.85. Additionally, UVP requests punitive damages and certain expert and attorneys' fees, which it claims constitute "response costs" that aided remediation and response to the contamination.

Maska acknowledges that it is responsible for the PCE contamination of UVP's property, but contends that UVP is seeking a windfall by vastly exaggerating the damages it has suffered. More specifically, Maska argues that as a matter of law and fact UVP is not entitled to lost profits, relocation expenses, punitive damages, or attorneys' fees. Maska admits that UVP has likely suffered some damage in the form of lost property value resulting from the contamination, but contends that UVP has failed to carry its burden of proving such damage.

We hold that UVP is not entitled to recover lost profits or relocation expenses. We are not persuaded that UVP delayed expansion because of the threat or reality of PCE contamination on its property, neither do we believe that UVP's primary motivation to relocate from Bradford to a site in New Hampshire was caused by the contamination. Even if we did not reach the aforementioned factual findings, we find that UVP's efforts to quantify its alleged lost profits are inadequate as a matter of law.

We further hold that UVP is entitled to a claim in the amount of \$290,400 based on the diminution in value of its Bradford property resulting from the PCE contamination. We also hold that UVP is entitled to a claim for its environmental testing and monitoring costs ("response costs") of \$110,702.57. Finally, we hold that UVP is not entitled to recover attorneys' fees or punitive damages.

FINDINGS OF FACT ⁽²⁾

A. The Parties

Plaintiff Bradford Press, Inc. is the successor-in-interest to Upper Valley Press, Inc., a Vermont corporation which operated a printing business in Bradford, Vermont (the "UVP Bradford property") from October 1975 through early 1997, when it moved to a new facility in North Haverhill, New Hampshire. The printing business is now being carried out by a New Hampshire corporation established for that purpose, also known as Upper Valley Press, Inc. The Vermont corporation, however, is the holder of the claim being litigated before us. For ease of reference, except as otherwise indicated, the UVP entities are collectively referred to herein as "UVP." UVP is a privately-held corporation, owned entirely by Charles Harris ("Harris") and his wife Carol. Mr. Harris is UVP's President and Chief Executive Officer.

Defendant Maska is a Delaware corporation and a wholly-owned subsidiary of SLM International, Inc. ("SLM"), which is also a Delaware corporation. From 1982 through January, 1995, Maska operated a hockey apparel manufacturing facility on property located directly across a public highway from the UVP Bradford property. On October 24, 1995, SLM, Maska, and five other wholly-owned subsidiaries of SLM filed voluntary petitions for Chapter 11 relief in the United States Bankruptcy Court for the District of Delaware. We are presiding over this adversary proceeding by virtue of a transfer of the adversary proceeding effected by Order dated April 2, 1998. (See Order, doc. no. 9-1).

B. Maska's Environmental Problems in Bradford

In connection with its hockey apparel manufacturing operations in Bradford, Maska used a chemical known as tetrachloroethylene, more commonly known as "PCE" or "perc" (both short forms for perchloroethylene, an older name for the chemical). PCE is listed as a hazardous substance under both state and federal law. From 1982 to December 1993, Maska released significant amounts of PCE directly into its industrial waste water system, which discharged into a leach field and, ultimately, into the groundwater underneath the Maska property. Additional amounts were released by Maska into the ground in various ways, including spillages, leading to further groundwater contamination. UVP Ex. 44 at 45-48 (Heindel and Noyes Site Investigation Report, 6/10/97).⁽³⁾

In 1991, Maska was notified by the Vermont Department of Environmental Conservation ("VTDEC") that as a result of the PCE contamination, the Maska property in Bradford had been included on the United States Environmental Protection Agency's Comprehensive

Environmental Response, Compensation and Liability Information System and the Vermont Hazardous Sites List ("CERCLIS" and "VHSL", respectively).

C. The Nature and Behavior of PCE

PCE is a member of the broad chemical family variously referred to as "chlorinated aromatic hydrocarbons" or "organic solvents", that are commonly used in industry. PCE is often referred to as "dry cleaning solution;" indeed, Maska primarily used PCE in large dry cleaning machines in connection with the manufacture of hockey uniforms.

PCE is a suspected carcinogen. Chronic exposure has also been linked to damage to the central nervous system, and, to a lesser extent, the lungs, liver, and kidneys. Maska Ex. 8 at 4 (expert report of Jeffery Noyes, 11/17/97, citing EPA Office of Compliance Sector Notebook Project, Profile of the Dry Cleaning Industry, at 33 (1995)).

Human exposure to PCE generally occurs in one of three ways: inhalation, skin contact, and ingestion. PCE is highly volatile, evaporates quickly, and vapors are often present where PCE is used. Vapor can also rise from the ground where there are significant concentrations of PCE in the soil. Groundwater contaminated with PCE can sometimes find its way to the drinking water supply, leading to ingestion. Skin contact is relatively uncommon except where workers come in direct contact with the chemical. Maska Ex. 8 at 4-5.

Once PCE is released into the environment, it travels or "migrates" in various forms, including its pure ("DNAPL") form, in dissolved phase, and in vapor phase. See, e.g., UVP Ex. 44 at 104-113. In addition, PCE will collect in underground pools. Id. at 49. These underground pools tend to "roll" in rather unpredictable ways. Maska Ex. 8 at 5.

D. The Nature and Extent of the Contamination on UVP's Property

During the trial, we heard testimony from three environmental experts: Matthew Eichler, formerly of the firm Caswell, Eichler & Hill ("CEH"), testified on behalf of UVP; Steven LaRosa of Hindel and Noyes ("H&N") was called as a fact witness by UVP, but offered expert testimony as well; and Jeffrey E. Noyes of H&N testified for Maska. While these experts disagree on some particulars about the nature and extent of contamination on UVP's property, they seem to be in agreement on at least five salient points.

First, readings indicative of DNAPL PCE have been replicated on

numerous occasions, both on the UVP property and at locations proximate to the UVP property. Second, DNAPL, or pure, PCE was released by Maska and continues to exist, at least in "residual" amounts, throughout the area. Third, the paths and flow of DNAPL are very difficult to predict because DNAPL can flow counter to the groundwater. Fourth, there are no current proven technologies to fully clean up a DNAPL site. Fifth, that in 1993 and beyond, UVP's employees were in no immediate danger from the PCE contamination inside the facility itself.

E. UVP Contends That It Delayed Expansion and Was Ultimately Forced to Relocate Because of Contamination

Harris testified that UVP's business was operating at or near full capacity in the late 1980's or 1990, but during that time he deferred expansion because the economy was in a recession. Transcript of trial testimony of Harris, dated January 6, 1999, at 23-26. (4) By the summer of 1993, however, according to Harris, UVP was definitely at full capacity and "[w]e had made a decision to expand." Harris, 1/6/99 Tr. at 74; Harris, 2/25/99 Tr. at 20. Nevertheless, Harris claims that almost immediately thereafter, UVP "made the decision in the Summer of 1993 on the pollution issue to hold off expanding, to wait to see how this issue would be resolved." Harris, 1/6/99 Tr. at 41.

Harris further testified that after waiting for two years, in June of 1995, UVP finally decided that it could no longer afford to delay expansion. While taking steps to prepare for expansion at, in late August 1995 UVP retained CEH to perform testing on its property (before it would begin expansion). On February 8, 1996, CEH reported the results of those tests. Harris testified that when

he read the CEH report "[w]e basically knew we were going to be moving [because of the results of the testing]." Harris, 1/6/99 Tr. at 72-83. Harris later clarified that in his mind the significant CEH finding that led him to this conclusion was not merely that there was PCE on the property, but that there were signs of DNAPL: "[i]t was DNAPL that told me we were moving." Harris, 2/24/99 Tr. at 125.

F. The Evidence Does Not Support UVP's Contentions

1. We Are Not Persuaded that UVP Postponed a Planned Expansion in the Summer of 1993 Because of the PCE Contamination

The evidence persuades us that UVP delayed its expansion primarily

for business reasons, rather than the PCE contamination. Indeed, on May 19, 1993, Harris made an oral report on UVP's financial condition to UVP's institutional lender, State Street Bank ("State Street"). Richard Coville ("Coville"), the State Street representative who received Harris's report, documented the conversation as follows: "Fiscal '93 is preceeding [sic] satisfactorily with anticipated full year revenues being slightly ahead of last year's \$8.6MM level. Profits are down for the first quarter due to some price concessions that were forced upon him by competition on the Shaw's printing . . . *There are no specific plans for capital expenditures this year . . .*" UVP Ex. 1 (Coville's notes from telephone conversation with Harris dated 5/19/93 (emphasis added)). Thus, in the spring of 1993, when UVP claims it was at full capacity and would have expanded but for the contamination, revenues were only slightly ahead of the previous year, during which UVP admitted it was only at 66% capacity. Harris, 2/25/99 Tr. at 128-129; Maska Ex. 49 (UVP income statements for years ended 12/31/92 and 12/31/93). Coville's notes of an August 18, 1993 meeting with Harris reflect that, at that time, well into the "summer of 1993," Harris repeated to Coville that he "is not inclined to increase his capacity through additional equipment until there are at least better prospects for other new customers." UVP Ex. 7 (Coville's notes of an August 18, 1993 meeting with Harris). Therefore, it does not appear that PCE contamination delayed the expansion.

On May 24, 1994, it appears that Harris for the first time discussed with Coville the possibility of financing "approximately \$2MM of capital expenditures which are primarily focused at increasing subject's capacity." UVP Ex. 12. (Coville's written summary of a meeting with Harris, dated 5/24/94). The memorialization of this conversation contains no mention of any need to resolve environmental issues before this expansion work would occur. Id.

During this time period another substantial obstacle to UVP expansion plans arose: UVP found itself in a difficult situation with Shaw's Supermarkets ("Shaw's"), its largest customer. Maska Ex. 27 (UVP income statements for the years 1987-1996); Maska Ex. 28 (UVP summary of sales to Shaw's for the years 1987-1996). Harris admitted that at that time there was a "very real danger" of losing the business. Harris, 2/25/99 Tr. at 146-48. The crisis eased after UVP agreed to give Shaw's a \$500,000 rebate to compensate for Shaw's assertion that it had been overcharged in the past. Id. Importantly, however, in an October 11, 1994 letter from UVP Vice President Dennis Devaux to Shaw's Vice President Michael Poore, Devaux stated that UVP's concessions to Shaw's had forced UVP to put major equipment upgrades and other plans on hold. Maska Ex. 29 (10/11/94 letter from UVP's V.P. Devaux to Shaw's V.P. Poore).

But the Shaw's crisis did not come to an end with the rebate agreement. UVP was aware that Shaw's was continuing to put its work out to bid with UVP's competitors. Harris concluded that it would not

be prudent to engage in major expansion plans unless UVP could get a firm commitment for Shaw's business. Harris, 2/25/99 Tr. at 150. In that regard, on November 7, 1995, Harris wrote to a press manufacturer: "We are finalizing a long term commitment with a large customer and expect that process to be concluded within three weeks. At that point, we can quickly finalize an agreement and proceed forward." UVP Ex. 20 (11/7/95 letter from Harris to Scott Derouin of Heidelberg Harris, Inc.). Similarly, on October 10, 1995, UVP's banker at State Street, Richard Coville, reported on a conversation with Harris:

Subject is attempting to negotiate a 3 year contract with Shaw's Supermarkets to print their weekly circulars -- Shaw's has been a long time customer. Shaw's currently represents 50-60% of Upper Valley press's total revenue. In association with this potential new business, additional capacity in the form of a new press continues to be contemplated.

UVP Ex. 19 (Coville's written summary of 10/10/95 meeting with Harris).

Based on the foregoing facts, we find that UVP did not delay expansion plans as a result of PCE contamination from Maska. Rather, Harris continuously made reasoned and conservative business judgments not to expand until UVP had sufficient business commitments. The signing of a long-term contract with Shaw's, not the resolution of any uncertainties about contamination, appears to have been the most influential factor in the timing of UVP's expansion.

2. The Evidence does Not Support UVP's Contention that it Relocated to New Hampshire Because of PCE Contamination

The evidence developed at trial suggests that UVP had a number of reasons entirely unrelated to the Maska contamination for deciding to relocate from its Bradford location, and specifically for moving to New Hampshire. First, the Bradford property may not have been a particularly suitable candidate for further expansion. During the more than twenty years that UVP and its predecessor printing company had operated from that site, the building had been expanded six times, in somewhat haphazard fashion to meet the needs of a rapidly growing business. Deposition transcript of Peter Palmer, UVP employee, dated 7/24/97 at 52-56; ⁽⁵⁾ Harris, 1/6/99 Tr. at 11-19; Maska Ex. 2 (map of UVP's Bradford property depicting each of UVP's expansions). UVP Plant Engineer Peter Palmer testified that an expansion at Bradford would have yielded an undesirable floor plan layout: "It would have broken up the flow, the proper flow of stuff.

You have a press here and one there." Palmer, 7/24/97 Dp. at 229. By relocating to New Hampshire UVP could design a far more efficient press room layout. Palmer, 7/24/97 Dp. at 229-30.

On cross examination, Maska's real estate appraisal expert, George F. Silver, supported and expanded on Palmer's observations:

Well, contamination or non-contamination, on the Upper Valley Press [] property, the site of the building and the configuration of the lot restricts any real significant expansion on that site. That's from a physical standpoint. The building has been added onto on several different stages and it does -- and adding more onto it is certainly probably not a best investment decision because of the limited expansion because of the property itself.

If you expand on that property, you diminish the parking and the ability to move vehicles in and out, particularly, trucks. And any more expansion on a building like that has been expanded on may not be the best economic decision. You start getting a cut up building. You got a cut up building there anyways.

Silver, 6/19/99 Tr. at 54-55.

It is equally clear that UVP perceived that there were substantial benefits to be achieved by relocating to New Hampshire. In a March 1996 internal State Street telephone call report, Coville observed that "mov[ing] the entire UVP operation to N.H. [had been] a goal of his [Harris's] for sometime now." UVP Ex. 28 (Coville's notes from telephone conversation with Harris dated 3/7/96). Harris admitted at trial that he had frequently pointed to the benefits of operating a business in New Hampshire. Harris, 2/25/99 Tr. at 90-98. One such factor was his belief that New Hampshire had comparatively less onerous regulation and bureaucracy. *Id.* at 90. Indeed, Harris told a New Hampshire newspaper that Vermont's "Act 250" requirements were "instrumental" in his decision to move UVP to New Hampshire. Maska Ex. 22 (The Caladonia Record, 8/16/96, p. 3A); Harris, 2/25/99 Tr. at 98-99.

Apparently, another motivating factor in Harris's decision was New Hampshire's lower state income tax rate (at the time of UVP's move, New Hampshire did not have a state income tax). Harris, 2/25/99 Tr. at 91-94. Even though the Harrises have been long-time residents of North Haverhill, New Hampshire, they were required to pay Vermont income tax on all income earned from UVP. Harris, 1/6/99 Tr. at 91;

Harris, 2/25/99 Tr. at 92-93. Coville testified that "Chip over some lengthy period of time had always perhaps talked about doing something in New Hampshire, that it was maybe a more favorable tax situation in New Hampshire versus Vermont." Coville, 12/4/97 Dp. at 34. Coville also noted that Harris had an additional motive to move the Company. Another company owned by the Harrises, Upper Valley Transport Systems ("UVTS"), a trucking company that supplies and delivers paper to UVP, was already located in North Haverhill, and there would be advantages to consolidating UVP's and UVTS's operations in a single location. Id.; Harris, 1/6/99 Tr. at 85.

Peter Palmer summarized the common wisdom that had long been circulating at UVP about the likelihood that someday Harris would move the business:

There's always been talk years ago that New Hampshire is an easy state to work in for a business. Some day we'll probably end up in New Hampshire. We talked about that who knows when.

Q. What were the benefits of New Hampshire?

A. Chip himself always kind of liked New Hampshire. He lives in New Hampshire. Statewide taxes, employees' taxes, the tax situation here is better. Everybody feels it's a better state. We moved over this way, so there's got to be reasons. But that's was sort of old talk, we talked about it for years.

Palmer, 7/24/97 Dp. at 224-25.

UVP quite simply has not shown by a preponderance of the evidence that its relocation decision was caused or required by Maska's contamination of the Bradford property.

3. Expansion Financing

While we have found as a matter of fact that UVP did not delay its expansion because of the PCE contamination, UVP argues that the PCE contamination prevented it from expanding at the Bradford property. Ultimately, this contention hinges upon two premises: first, that third party financing was necessary for an expansion; and, second, that such financing could not be obtained given the PCE contamination. We are not satisfied, for the reasons set forth below, that UVP has established these premises.

According to Harris, UVP could have expanded the physical plant at Bradford sufficiently to meet its foreseeable needs for no more than \$330,000. Harris, 2/25/99 Tr. at 64-65, 69. Harris admitted that UVP was capable of self-financing such an expenditure, and had self-financed similar capital expenditures in the past. Harris, 2/25/99 Tr. at 73-74.

UVP also had ready access to third-party credit. Indeed, UVP had a \$500,000 unrestricted line of credit with State Street, secured only by accounts receivable and inventory. Harris, 2/25/99 Tr. at 74-75. UVP had sufficient availability under the line of credit during the period when it was supposedly delaying expansion. Harris, 2/25/99 Tr. at 75-76; UVP Ex. 14 at 2 (6/2/95 credit line report from State Street). State Street renewed UVP's line of credit repeatedly after the likelihood of contamination was clear, and then after contamination was actually discovered. Harris, 2/25/99 Tr. at 53; UVP Ex. 11 (5/19/94 credit line renewal letter from State Street).

Moreover, because the line of credit was secured only by receivables and inventory, and because UVP had little long term debt, UVP's machinery and equipment, valued at more than \$1.6 million, was virtually unencumbered and available to secure further credit. Harris, 2/25/99 Tr. at 76-78; UVP Ex. 14. Also, state and local authorities offered UVP help in securing financing as an incentive for the company to remain in Vermont. Vermont Governor Howard Dean placed a personal telephone call to Harris offering his assistance. Harris, 2/25/99 Tr. at 78-79. UVP never asked their environmental expert whether it could continue operations or expand at Bradford. Eichler, 1/4/99 Tr. at 88-90. If it had, Eichler would have advised that in his experience companies often continue operations and even expand on PCE contamination sites, including sites with DNAPL-type contamination. *Id.* Maska's expert, Jeffrey Noyes, similarly observed that numerous businesses continue to operate, and even expand and obtain financing in the face of similar environmental issues. Noyes, 6/14/99 Tr. at 153-59.

With the exception of State Street, UVP did not contact a single financial institution to determine whether it would finance an expansion at Bradford. Harris, 2/25/99 Tr. at 80. State Street, however, *did* express interest in extending such financing. In a January 26, 1996 letter to Harris, Coville presented a preliminary proposal to finance "the proposed acquisition of new equipment approximating \$3.0 million during 1996." UVP Ex. 26 (1/26/96 letter from Coville to Harris). This proposal was made with knowledge of the likely contamination problems, and in the expectation that UVP's expansion would take place on the Bradford property. Coville, 12/4/97 Dp. at 45. Indeed, Mr. Coville wrote that,

[o]ne significant area of concern for us relates to the contamination of the Company's property in Bradford; it is our understanding that Maska, on an adjacent parcel of land, is the cause of this problem. Though we do not foresee retaining a security interest in any real estate of the Company, it is necessary that we be provided from the appropriate sources the following information: (a) summary of the extent and potential resolution of the problem, (b) summary of action to be or being taken by the State of Vermont and any other agencies of the state or federal government, and (c) an opinion relating to Upper Valley's potential liability in this matter. Please be aware that any commitment for financing by the Bank will be contingent upon our satisfactory review of this environmental issue.

UVP Ex. 26 at 2.

Harris never pursued the State Street proposal, however, and his explanation for not doing so is that he felt certain that the conditions in the letter could not be satisfied. Harris, 1/6/99 Tr. at 80-81. A review of the record, however, suggests that UVP could have responded, at least partially, to Coville's requests.

Indeed, merely 3 months after the Coville letter, the "potential resolution of the problem" became clear: Maska assumed the legal obligation to undertake all remediation work the State of Vermont would require. The Consent Decree, entered into by Maska and the State, similarly satisfies the second item requested by the Bank, "a summary of action to be or being taken by the State of Vermont and any other agencies of the state or federal government." UVP Ex. 34 (Consent Decree, entered into by Maska and the State dated 5/14/96). As to the Bank's final request, "an opinion relating to UVP's potential liability in this matter," the record reflects that UVP did in fact give such an opinion in its audited financial statements for 1996, 1997, and 1998. Harris, 2/25/99 Tr. at 84-85.

Further evidence that UVP might have satisfied State Street's requirements is the fact that UVP *did* satisfy similar requirements imposed by Keybank National Association in order to obtain a greater amount of financing -- \$6.5 million -- for its relocation and expansion in New Hampshire. Maska Ex. 21 at 11 and Schedule 3.7 (reimbursement agreement between Keybank and UVP dated 2/10/97); Harris, 2/25/99 Tr. at 87-88. UVP's ability to obtain \$6.5 million in financing from Keybank even while under the "cloud" of environmental liability, persuades us that UVP might have obtained financing for a substantially less expensive expansion at the Bradford property.

At trial, Harris also suggested that an additional reason for UVP's decision not to expand at Bradford was the notion that doing so would be a poor investment: "I felt, as a businessman, that investing in property without a remediation plan, without knowing where you were going with this thing was absolutely throwing good money after bad money." Harris, 2/26/99 Tr. at 42. While this reasoning makes sense, the question before us is whether UVP *had to relocate* as a result of the contamination in order to expand. We do not believe that to be the case.

As noted above, expanding at Bradford would have required an investment of no more than \$330,000 in the building itself. The vast bulk of the cost of expansion was the cost of the new presses, movable equipment, the value of which would not appear to be diminished by installation at the UVP Bradford property. Accordingly, we find that UVP has not shown that expansion financing was unavailable or that it could not be internally generated.

G. UVP's Damages Claims

1. UVP's Lost Profits Claim

Because we find that (a) the PCE contamination did not play a substantial role in the delay of UVP's expansion plans and (b) PCE contamination did not require UVP to relocate from the Bradford property to New Hampshire, we do not need to address the UVP's calculation of its lost profits. We do note, however, that UVP's lost profits calculations do not sway us.

UVP's expert James Carey sought to quantify UVP's lost profits through a number of discreet elements of alleged damage. Carey's analysis focused primarily on two distinct types of business that UVP allegedly would have obtained and been able to perform had it expanded: "heatset" printing work for Shaw's, and "Target Processing" work, both of which were not in UVP's then-current lines. UVP has historically been a "cold offset web printer," meaning that it does newspaper-type printing onto continuous roles of newsprint. While it also prints local weekly newspapers, the vast majority of UVP's business -- including the Shaw's account -- is printing advertising circulars for insertion into newspapers. Seven or eight times a year, however, primarily on holidays, Shaw's uses heatset printing to produce glossy circulars on shiny paper. Harris, 2/25/99 Tr. at 202. UVP contends that by virtue of its close relationship with Shaw's, it could have obtained the Shaw's heatset work whenever it wished. Id. at 23.

More than 42% of the lost profits calculated by Carey are attributed to heatset printing work. UVP Ex. 80, Schedule 3 (Carey's report on the damages suffered by UVP dated 7/30/98). While in Bradford, UVP had never performed heatset printing and did not have the capability to perform such work. Harris, 1/6/99 Tr. at 25-28.

An additional 28% of Carey's lost profit calculation is attributable to "Target Processing" and "Target Direct." Both were new businesses for UVP, unrelated to its historical operation as a cold offset printer. Harris, 1/6/99 Tr. at 45-46; Harris, 2/25/99, Tr. at 178-79. In fact, Harris admitted that Target Direct is not a UVP line of business and never has been. Harris, 2/25/99 Tr. at 179-181. It has always been operated as part of Harris's other company, UVTS. Harris, 2/25/99 Tr. at 178-184. Harris seeks to justify its inclusion in UVP's damage claim by asserting that he "would have" placed Target Direct within UVP but for the Maska contamination. Harris, 2/25/99 Tr. at 46-47.

As to every element of damage he calculates, Carey simply relied on assumptions provided by Harris and carried out basic multiplication and present value calculations. Thus, Carey accepted without inquiry the following fundamental assumptions, among others:

- That UVP had reached full capacity prior to 1994. Harris, 2/25/99 Tr. at 32
- That UVP would have been able to win the Shaw's heatset work as soon as it had the capacity to perform it. Carey, 2/26/99 Tr. at 95.
- That if UVP had expanded, it would have been able to use up this entire additional capacity within three years. is, Carey, 2/26/99 Tr. at 123.
- That if UVP had started doing the saturation mailing work of Target, it would have immediately realized no costs beyond a 52% labor cost. Harris, 2/25/99 Tr. at 37-38.
- That UVP would have achieved unspecified efficiencies exactly equal to the capital cost of expansion. Harris, 2/25/99 Tr. at 48-49.
- That if UVP had subsumed and operated Target Direct, that business would immediately have realized 25% annual growth. Carey, 2/26/99 Tr. at 122-23.

Carey was unable to offer a justification for the inclusion of UVP's lost profits due to its inability to operate Target Direct, nor was Carey able to explain how the Maska contamination could possibly have hindered the operation of Target Direct. Harris did not offer an explanation, and seemed to concede that UVTS had in fact been able to operate Target Direct from New Hampshire. Harris, 2/25/99 Tr. at 42-43; Harris, 2/26/99 Tr. at 120-22.

In short, we are not persuaded by UVP's lost profit analysis.

2. UVP's Relocation Costs

As we noted when discussing UVP's lost profits calculations, because we find that UVP was not required to move from Vermont to New Hampshire, a discussion of UVP's calculation of its relocation costs is unnecessary. Nevertheless, we briefly examine those costs here because we are skeptical of the amount sought from Maska.

UVP seeks \$1,590,338 in relocation cost damages, of which more than \$1.2 million represents the amount UVP contends it had to spend to replace the Bradford facility with a reasonable equivalent; the remainder is comprised of moving and financing costs. UVP Ex. 81. (UVP report on relocation expenses). UVP derived this figure by adding up all the amounts it has spent on acquiring, renovating, and expanding the North Haverhill property, and multiplying the total by 50.98%, which represents the ratio between the approximately 26,000 square feet of floor space at Bradford and the square footage at North Haverhill after expansion. Harris explained that in performing this calculation UVP was trying to charge Maska only for the cost of replacing the existing facility -- in the words of UVP's counsel, it sought to make an "apples to apples" comparison.

Putting aside the question of whether it is fair to equate (on a square-foot to square-foot basis) the value of the Bradford building with the newly-renovated space UVP obtained in North Haverhill, there is a flaw in UVP's argument: When UVP acquired the North Haverhill property for \$495,650, it included a building that was a fair replacement for Bradford. By Harris's own account, the untouched new building had adequate floor space, comparable to that of Bradford, but the ceiling height was insufficient for UVP's needs because it was only fourteen feet. Harris, 2/25/99 Tr. at 174-75. That is precisely the same ceiling height -- and precisely the same problem -- that UVP had in Bradford. Harris, 1/6/99 Tr. at 93; Harris, 2/25/99 Tr. at 174-75. The only reason UVP had to renovate the new building, Harris admits, was to obtain the same higher press room space UVP would have had to construct at Bradford as well; indeed, Harris described inadequate ceiling height as the single most important

reason UVP would have had to expand the Bradford building. Harris, 2/25/99, Tr. at 173. Put simply, by asking for the cost of replacing a fourteen-foot high building with a twenty-foot high building with the same floor space, UVP is in effect seeking to have Maska pay for UVP's expansion.

For this reason, based upon the evidence submitted by UVP, we conclude that *if* UVP were entitled to recover its relocation expenses, an award of the \$495,650 it paid to acquire the North Haverhill property, plus moving costs, would be sufficient to replace the Bradford property on an "apples to apples" basis.

3. UVP's Testing Expenses -- "Response Costs"

Evidence at trial showed that the Maska Corrective Action Plan which Maska submitted to the State of Vermont in or about April 1998, incorporated the results of testing which had been performed by UVP's consultants, as well as the results of testing which UVP helped design and monitor. UVP Ex. 69 (Maska Corrective Action Plan); UVP Ex. 74 (Letter dated 7/10/98 from Michael B. Smith, State of Vermont Hazardous Materials Specialist, to Harris). This extensive testing was a reasonable response to the PCE contamination by UVP and resulted in environmental consulting expenses of \$110,702.57 to investigate, characterize, and monitor the contamination on UVP's property. UVP Ex. 89A (UVP summary of invoices for environmental work). Even with the extensive testing of UVP's property it is impossible to determine if all pockets of PCE contamination have been located on UVP's property and where and how the PCE will migrate on UVP's property in the coming years. Eichler, 1/4/99 Tr. at 63, 77-78, 178-79. But for Maska's PCE contamination, UVP would not have incurred these expenses.

Based on the foregoing uncontested facts, we find that UVP's testing expenses were reasonable and directly caused by Maska's contamination of the area. Furthermore, we find that the results of the testing done by UVP assisted Maska in its reports to the State of Vermont.

H. The Effect of the PCE Contamination On the Value of UVP's Bradford Property

1. Diminution in Value.

As UVP seeks to be compensated for the cost of acquiring a new facility equivalent to the Bradford property; it did not present

appraisal testimony as to the diminution in value of the Bradford property.

Harris, however, testified as to the property's value, including the Town of Bradford's assessment of the property's value, prior to the discovery of its contamination. Harris, 1/6/99 Tr. at 67-68. With regard to the value of the Bradford property absent contamination, Harris offered the following facts:

(1) UVP's "cost basis without depreciation" for the property was \$950,000. Harris, 1/6/99 Tr. at 67.

(2) Before the contamination was discovered, the Town of Bradford had appraised the property for tax purposes at \$750,000. Harris, 1/6/99 Tr. at 67-68.

(3) Harris has heard that a "similar" building in Orford, New Hampshire, sold for \$850,000 in the summer of 1996. Harris, 2/26/99 Tr. at 31-32.

With respect to the value of UVP's Bradford property in light of the contamination, Harris testified that in his opinion, the property is worthless. Harris based his belief on the fact that he had offered to give the property to the Town of Bradford for nothing but had been refused. Harris, 2/25/99 Tr. at 49-50. Evidence was also heard that indicated that the Town of Bradford had assigned a value of \$429,200 to the property after the discovery of the pollution. The Town of Bradford has thus concluded that the PCE contamination has lessened the value of UVP's Bradford property by \$320,800.

Maska's real estate appraiser, George Silver testified that UVP's Bradford property had a pre-contamination value of \$490,000, and a post-contamination value of \$230,000. Silver thus concluded that the property had lost \$260,000 in value as a result of the PCE contamination.

We find each of these sets of estimates to be credible. We also find that the discrepancy between the figures can be explained by different methodologies and assumptions. We are not willing to scrutinize the formulae behind each of the figures because to do so with any real level of accuracy would require examining facts beyond the contents of the evidentiary record. Instead, we find that the mean of the Town of Bradford's appraisal and Silver's appraisal is a fair representation of the property's diminution in value. The mean of the two estimates is \$290,400, and we find that amount to be the best evidence presented of the diminution in value of the UVP

Bradford property through the date of presentation of evidence on the point. 2. Subdivision.

We now turn to Maska's subdivision hypothesis of damages mitigation, whereby the contaminated portion of the UVP Bradford property would be subdivided and sold separately from the allegedly unpolluted portion containing UVP's building. We find this suggestion unpersuasive for two reasons.

First, the scientific experts were in disagreement as to the potential nature and extent of the pollution underneath the building itself. In fact, after Mr. Eichler's testimony in January 1999, additional testing by Maska's consultants confirmed that the shallow plume is indeed migrating in a northerly direction, requiring the plume map to be re-drawn and expanded. UVP Ex. 91 (5/11/99 letter from Steven LaRosa to Harris). While Maska's experts denied finding any evidence of DNAPL pathways on UVP's property, it would seem that the increased contaminant readings on the shores of the Connecticut River directly to the East of the UVP property reflect a pathway in that vicinity. Thus, very substantial additional investigation and remediation involving the UVP property may ultimately be required by the State of New Hampshire. LaRosa, 6/14/99 Tr. at 86-87. Second, common sense dictates that the stigma associated with the serious contamination of a property will diminish the value of the large industrial structure and property immediately adjacent to it.

We therefore find that Maska's subdivision theory is unlikely to mitigate the damage to the value of the UVP Bradford property.

CONCLUSIONS OF LAW

A. UVP's Causes of Action and Burden of Proof

1. UVP asserts a variety of legal theories for recovery of damages caused by environmental damage, including the common law doctrines of, nuisance, trespass, negligence and strict liability, as well as private rights of action under various state and federal statutes, including, without limitation, the Comprehensive Environmental Response, Compensation and Liability Act and the Vermont Waste Management Act ("CERCLA" and "VWMA", respectively). We find that it makes little difference which of these doctrines is invoked to provide UVP with a remedy because Maska has acknowledged that it has contaminated the UVP Bradford property with PCE. Nevertheless, we hold that:

a. The release of perc by Maska and its subsequent migration onto UVP's property constitutes an actionable nuisance. See Coty v. Ramsey Associates, Inc., 149 Vt. 451, 464 (1988).

b. The release of perc by Maska and its subsequent migration onto UVP's property constitutes an actionable trespass. Kathan v. Bellows Falls Village, 126 Vt. 86, 89 (1966).

c. The release of perc by Maska constitutes actionable negligence, in that Maska had a duty to guard against the release of hazardous substances from its property; and in that Maska breached this duty when it failed to use reasonable care to ensure that the PCE it used in its manufacturing process was disposed of properly.

d. Maska further breached its duty when it failed to act in a timely and prudent manner to limit the extent of its PCE contamination of the Bradford Industrial Park.

2. Based on Maska's concession of liability and our legal holdings, the remaining issues that we face concern the type and amount of damages.

3. UVP's burden of proof requires that it show "by a preponderance of evidence each element of damage sustained." 22 Am. Jur. 2d § 902.

4. Recoverable damages under these common law theories include costs incurred to address the injury as well as lost profits. See, e.g., Bradley v. Buck, 131 Vt. 368 (1973); Coty v. Ramsey, 149 Vt. at 464..

5. Recoverable damages under the state and federal environmental statutes include compensatory damages, punitive damages and response costs (including attorney's fees). See Crabbe v. Veve Assoc., 150 Vt. 53, 58 (1988); Vermont Groundwater Protection Act, 10 V.S.A. §1410(c); Folino v. Hampden Color and Chem. Co., 832 F. Supp. 757, 763 (D. Vt. 1993); U.S. v. Bogas, 920 F.2d 363, 369 (6th Cir. 1990).

B. UVP's Lost Profit and Relocation Cost Claims Fail For Two Reasons

1. Causation

For the reasons set forth in Findings of Fact E1 and E2, *i.e.*, that the PCE contamination did not delay UVP's expansion or require UVP to move its operations, we hold that UVP has failed to carry its burden of proving that the PCE contamination attributable to Maska proximately caused UVP any lost profits. Accordingly, UVP is not entitled to recover lost profits from Maska.

2. UVP's Lost Profit Analysis is Overly Speculative, and Improperly Seeks

Anticipated Lost Profits for New Business Ventures

Even if we found that the PCE contamination caused UVP to delay expansion or to relocate, for the reasons set forth in Findings of Fact F1, we find that UVP has not met its burden of proof to recover the lost profits it claims. Vermont law establishes a high threshold for lost profit claims. Lost profits cannot be awarded based on "speculation and conjecture." State v. May, 166 Vt. 41, 689 A.2d 1075, 1078 (1996) (bank that suffered a computer theft could not recover lost profits based on optimistic speculation); see also Vermont Elec. Supply Co. v. Andrus, 135 Vt. 190, 373 A.2d 531 (1977) (where employee breached a noncompete agreement, employer was not entitled to profits estimated based on dreams of a 100% success rate). We find that UVP has not carried its burden of proving lost profits through reliable and non-speculative analysis.

Moreover, lost profits can never be recovered for foregone opportunities with new businesses, because "evidence of expected profits from a new business is too speculative, uncertain, and remote to be considered and does not meet the legal standard of reasonable certainty." Berlin Dev. Corp. v. Vt. Structural Steel Corp., 127 Vt. 367, 250 A.2d 189, 193 (1968) (tenant business owners could not recover against landlord because their businesses were only a few months old so that profits could not be estimated with certainty); accord Workman v. Agency of Transp., 163 Vt. 606, 657 A.2d 174 (1994) (in condemnation action, landowner could not recover lost profits from the industrial warehouses that he had once hoped to build on the condemned property); Kenford Co. v. County of Erie, 502 N.Y.S.2d 131 (1986) (plaintiff could not recover loss of prospective profits for the contemplated twenty-year operation of a stadium that was never even constructed). The rule is not different merely because UVP itself is an established business. Profit projections for a new enterprise carried out by an established company are as inherently speculative as an entirely new business. Great Lakes Aircraft Co. v. Claremont, 135 N.H. 270, 608 A.2d 840 (1992) (airplane manufacturer

could not recover against its landlord for lost profits that it had hoped to derive from acquiring and operating a new subsidiary airline business).

The evidence demonstrates that heatset printing and saturation mailing were both new businesses for UVP - and, in fact, Target Direct was not even a business of UVP at all, but part of UVTS. We therefore hold that UVP has not met its burden of proof with respect to these ventures and cannot recover lost profits for them.

C. UVP's Testing Expenses -- "Response Costs"

Under CERCLA section 107(a), 42 U.S.C. § 9607(a), and the VWMA, 10 V.S.A. § 6615(a), a party who owns a facility which releases a hazardous material is liable for costs incurred by other parties in responding to the release. See Folino v. Hampden Color and Chem. Co., 832 F. Supp. 757, 763 (D. Vt. 1993). CERCLA response costs include indirect costs such as site testing and studies as well as direct removal costs. See U.S. v. Bogas, 920 F.2d 363, 369 (6th Cir. 1990).

For the reasons set forth in Findings of Fact G3 above, UVP is entitled to recover its environmental testing costs of \$110,702.57 from Maska under federal and state environmental law, because Maska's conduct proximately caused UVP to incur these costs.

D. UVP May Recover Damages in the Form of Loss of Property Value

Vermont law expressly recognizes "stigma" damages in environmental contamination cases, that is, fear of contamination alone may be enough to cause damages which are recoverable against the tortfeasor. Allen v. Uni-First Corp., 151 Vt. 229, 233-34 (1988). Maska itself acknowledges that UVP undoubtedly suffered at least some property damage because of the PCE contamination. For the reasons listed in the Findings of Fact H above, we find that Maska's contamination has proximately caused UVP's Bradford property to lose \$290,400 in value.

E. Attorneys' Fees

Attorneys' fees incurred by a party that "significantly benefit[] the entire cleanup effort and serve[] a statutory purpose apart from the reallocation of costs" are recoverable. Key Tronic Corp. v. United States, 511 U.S. 809, 820 (1994); Bedford Affiliates v. Sills, 156 F.3d 416, 431 (2nd Cir. 1998). There is no evidence in the record indicating that UVP's attorneys have in any way significantly

benefitted the clean-up effort. UVP's attorneys have prepared for, and pursued litigation on behalf of UVP in this forum. Accordingly, UVP is not entitled to recover its attorney's fees.

F. Punitive Damages

As a matter of law, it is well-established that punitive damages are generally not available in bankruptcy (at least where a class of creditors will not be paid in full) because allowing "punitive damages against the Debtor's estate would punish the entire body of creditors and not the actual wrongdoer who deserves the punishment." In re W.G. Wade Shows, 218 BR. 625, 628 (Bankr. M.D.Fla. 1998) (punitive damages previously awarded against debtor in state action could not be allowed as component of judgment creditor's claim against Chapter 11 estate). See also, In re Drexel Burnham Lambert Group., Inc., 1990 WL 302177 (Bankr. S.D.N.Y. 1990) (NYSE penalty claim must be subordinate to the claims of innocent unsecured creditors); In re Colin, 44 BR. 806, 810 (S.D.N.Y. 1984) ("a claim for punitive damages should not be allowed to share in pari passu with other general unsecured creditors for to do so would result in innocent creditors paying for the debtor's alleged misconduct"); In re Klefstad, 95 BR. 622, 625 (Bankr. W.D.Wis. 1988) (punitive post-petition real estate tax penalties were disallowed because penalties were "not in harmony with overall philosophy of the Bankruptcy Code"). Accordingly, UVP will not be awarded any punitive damages. Additionally, as a matter of fact, we do not find that Maska acted with the requisite behavior to justify punitive damages, See, e.g., Powers v. Judd, 150 Vt. 290, 294, 553 A.2d 139, 141 (1988), and, therefore, hold that UVP will not be awarded punitive damages.

G. Conclusion

For the foregoing reasons, we find that UVP shall have an allowed claim against the Maska estate in the amount of \$401,102.57. We are entering a separate order dated the date hereof incorporating our findings and holdings contained herein.

Dated at Rutland, VT this 30th day of July, 1999.

/s/ Francis G. Conrad
United States Bankruptcy Judge

1. Our subject matter jurisdiction over this controversy arises under 28 U.S.C. §1334(b) and the General

Reference to this Court by the District Court for the District of Vermont. This is a core proceeding under 28 U.S.C. §§ 157(b) (2) (B) and (O). This memorandum of decision constitutes findings of fact and conclusions of law under Fed.R.Civ.P. 52, as made applicable by Fed.R.Bankr.P. 7052.

2. All findings of fact contained herein are based upon the Pretrial Statement of Stipulated Fact, dated October 28, 1998, submitted by the parties and bearing docket number 31-1 ("Fact Stip. or "Fact Stip. at ___"), and evidence submitted at trial.

3. References to trial exhibits will hereinafter be made in the following format: "UVP Ex. ___", and "Maska Ex. ___"; the first time an exhibit is cited it will be identified parenthetically.

4. References to trial testimony will hereinafter be made as follows: Name, date of testimony, transcript page number(s)(e.g., Harris, 1/6/99 Tr. at 23-26).

5. References to deposition transcripts will be made as follows: Name, date, page (e.g., Palmer, 7/24/97 Dp. at 52-56).

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