

December 31, 2002

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**RE: Atlantis Industries, Inc. v. NewBold Corporation  
C. A. No. 01C-11-017-THG**

Dear Counsel:

This is the Court's ruling on the Defendant's application for attorneys' fees.

The history of the problems with this case is in the record as the pertinent conferences had a court reporter present. Nevertheless, a brief summary is appropriate.

The litigation involves a dispute over what contract or business arrangement was in existence at the time the Defendant notified Plaintiff that Defendant would no longer be purchasing specialty parts from Plaintiff. The damages claimed by Plaintiff are substantial.

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Plaintiff filed suit and included a specific theory of damages under the UCC. Discovery focused on that theory.

In confidential settlement correspondence, the Defendant informed Plaintiff that it believed another theory of damages was more appropriate. Plaintiff then confidentially provided some raw calculations on that theory. This was done confidentially and not part of the record. Plaintiff never updated discovery or informed the Defendant that it was switching gears as to its present theory of recovery of damages until it provided its portion of the Pre-Trial Stipulation.

I ruled that Plaintiff had not provided reasonable notice to the Defendant; and furthermore, Plaintiff's position that the Defendant had all it needed to know about the new theory (i.e., the raw data in the confidential settlement correspondence) was patently unreasonable. The Defendant was entitled to pursue full discovery of its choosing to ferret out this new position. The Defendant was not obligated to take Plaintiff's counsel's word on it and proceed to trial.

After Defendant filed Motions in Limine seeking to exclude that which had not been provided in discovery, Plaintiff was well aware that its evidentiary problems could not be repaired prior to trial and that if Plaintiff were to pursue its chosen theory of damages, it would have to seek a continuance. Plaintiff did that and filed an Emergency Motion for Continuance.

In considering the continuance motion, the Court made counsel aware that any favorable action on the continuance would be conditioned upon the payment of a portion of Defendant's attorneys' fees. Plaintiff accepted this but was concerned the fees could be substantial. The Court noted that was a possibility. With this acknowledgment by Plaintiff, the Court granted the continuance and further requested a fee application from and comment by Plaintiff as to the request.

Both parties have submitted their positions as to the attorneys' fee issue. Plaintiff attacks not only the reasonableness but the Court's authority to grant the fees at all; this in spite of Plaintiff being aware of the Court's position that the emergency application would result in fees being awarded Defendant so that the Defendant would not be at a loss due to the Plaintiff's need for a continuance.

Plaintiff's counsel argues this was just a "garden-variety discovery dispute". He seeks unfairly to blame his opponent for the need to request the emergency continuance. This is a significant case and the dollars involved are substantial. Defendant is entitled to have Plaintiff seek

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its judgment fairly and by the rules. An award of attorneys' fees is appropriate based on my determination that Plaintiff had not updated its discovery to encompass the change in its damages theory.

The fact that Defendant has several attorneys working on its defense doesn't mean I should reduce the fees. Nor do I find reasonable the position that most of the trial preparation can be used in the future when this case is tried in May, 2003. That's like saying you've studied for a mid-term exam so you don't have to study as much for the final exam. Nobody would or should go into a trial without a thorough review of the case. The vast majority of preparation will have to be reviewed and studied again.

I've reduced the amount requested by reducing travel time from regular hourly rates. I've also reduced the claim for that portion I am determining is preparation for trial that can be recycled. For example, the damages portion of the instructions will have to be re-done but the balance should be okay. Finally, I'm reducing the Defendant's request by what I'll call the reasonableness factor: i.e., did it take the amount of time requested for Defendant to reasonably defend its position?

I order that Atlantis shall pay NewBold an award of attorneys' fees in the amount of \$15,000.00 within thirty days, these fees being reasonable compensation to NewBold for its expenses arising from the granting of Plaintiff's emergency continuance.

**IT IS SO ORDERED.**

Yours very truly,

T. Henley Graves

THG:baj  
cc: Prothonotary