UNPUBLISHED OPINION

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IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH

In re .	
BEEHIVE INTERNATIONAL, aka BEEHIVE, fka B-H-I, Inc., a Utah Corporation,	Bankruptcy Case No. 84C-02702
Debtor.	District Court No. 85-C-657A
	MEMORANDUM OPINION

Appearances: Noel S. Hyde, Nielsen & Senior, Salt Lake City, Utah, for the debtor; B. Ray Zoll, Zoll & Branch, Salt Lake City, Utah, and Gary A. DeFilippo, Fenwick, Davis & West, Palo Alto, California, for Micro Focus Ltd.

This matter comes now before the Court on the debtor's motion for a determination of questions certified to this Court by the United States District Court for the District of Utah. This motion came before the Court for oral argument on July 29, 1986. Having fully considered the pleadings, memoranda and documents on file herein, and having heard and considered the arguments of counsel, the Court now issues the following opinion relative to the questions certified to it.

BACKGROUND

Micro Focus Ltd. ("Micro Focus") is an international corporation, formed under the laws of Great Britain, which licenses computer software throughout the world. Beehive International ("Beehive") is a Utah corporation, engaged in the design, manufacture and supply of computer products and systems.

On November 24, 1982, Micro Focus and Beehive entered into a License Agreement, by the terms of which Micro Focus granted to Beehive and its subsidiaries a non-exclusive, worldwide right to use, produce and distribute certain computer software under the terms and conditions of the License. The License Agreement provides that Micro Focus would furnish Beehive with software products for two different computer hardware systems: (1) Beehive's "Topper" hardware computer product series (known as "CTM-1"); and (2) its UNIX series computer system (known as "CTM-2").

The Agreement provided for the payment by Beehive of $410,000.00, over a seven month period of time,[1] in consideration of the licenses granted, the services to be rendered, and the software and its "documentation" to be delivered. A per unit license fee was established in the Agreement.

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1 This time schedule was later extended pursuant to a subsequent agreement between the parties.

The Agreement also contained a mandatory arbitration provision which is the subject of the present dispute. Article 11.3 of the Agreement provides:

> If an attempt to reach a settlement has failed, any and all disputes and disagreements arising between the parties in connection with the interpretation or the performance of this agreement shall be referred to arbitration before three (3) arbitrators having knowledge of and experience in dealing with the software industry in San Francisco, California, pursuant to the rules of the American Arbitration Association.

Beehive made payments to Micro Focus in the amounts of $210,000.00. It used the CTM-1 software and incurred per unit charges amounting to $3,604.00. However, Micro Focus never furnished software for the CTM-2 product because the product was never "developed or customized" by the debtor. The introduction of the I.B.M. PC precluded the successful marketing of Beehive's CTM-2.

On August 22, 1984, Beehive notified Micro Focus by letter that it had "cancelled its CTM-2 product because of significant changes which had occurred in the marketplace"; that "Beehive will never ship the product upon which the per unit license fees were based"; that, accordingly, a refund should be made; and that the payment of further license fees should be waived.

On October 4, 1984, Beehive filed its chapter 11 bankruptcy petition in this Court. Micro Focus was not listed as a creditor in the debtor's schedules, nor was the refund claim listed as an

asset of the estate. Micro Focus was given no official notice of the bankruptcy filing and was not included on the mailing matrix, although it was informed by letter, dated October 9, 1984, that Beehive had filed its petition in this Court. The License Agreement was listed on the debtor's Statement of Executory Contracts, filed October 11, 1984.

On May 29, 1985, the debtor commenced an action in the United States District Court for the District of Utah seeking a refund of amounts paid under the License Agreement. In its complaint, the debtor contends that "technological and market changes in the computer industry" caused Beehive to cancel one of the two computer hardware systems for which software was licensed. Beehive alleges that under these circumstances "[t]he terms and conditions of the contract do not provide that [Micro Focus] may retain any excess unearned license fees, but rather contemplates and implies that [Micro Focus] will necessarily earn any fees it is entitled to retain." Complaint, ¶ 16. Beehive further alleges that the changes in the computer market triggered the Force Majeure provisions of Article 12[2] of the license:

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2 Article 12 of the License Agreement provides:

> 12. FORCE MAJEURE
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> Neither party shall be liable to the other for any failure or delay in complying with the provisions, terms and conditions of this Agreement, nor shall any such failure or delay constitute an event of default, if such failure or delay shall be due to labour disputes, strikes or other differences with

> Defendants' refusal to return unearned, prepaid, per unit license fee [sic] imposes a liability upon plaintiff in favor of defendants . . . , which liability is forbidden by the terms [of Article 12] of the Agreement . . .

Complaint, ¶ 32. Beehive's final cause of action alleges an "unjust enrichment" theory of recovery.

Micro Focus made its first appearance in the district court action by filing a motion to stay proceedings pending arbitration, pursuant to the arbitration clause of the License Agreement. While that motion was pending before the district court, Beehive proceeded with the confirmation of its plan, which was ultimately confirmed by this Court on August 1, 1985.

The debtor's plan provides for the assumption and rejection of certain leases and executory contracts. The License Agreement between Micro Focus and the debtor was not expressly assumed or rejected. Article 6.5 of the plan, however, provides:

> Except as otherwise expressly provided in this Plan or in the Confirmation Order, the Debtor assumes all other executory contracts and leases.

> employees, lockouts, shortage of or inability to obtain labour, fuel, raw materials or supplies, war, riots, insurrection, civil commotion, epidemics, fire, flood accident, storm or any act of God, governmental, judicial or administrative restrictions, nationalisation or economic sanctions, unavoidable casualty or other causes similar or dissimilar beyond either of the party's control.

The plan also states that the bankruptcy court should retain jurisdiction over matters relating to the debtor's case.

The hearing to consider the Motion for Stay Pending Arbitration was conducted by the district court on October 30, 1985. Judge Anderson ruled that the pleadings before him raised certain bankruptcy questions which appropriately should be addressed in the first instance by this Court. He entered an order staying all proceedings in that action and certified the following questions for this Court's determination:

> (1) Is the software license at issue in this action an executory contract assumed by [Beehive International] as a reorganized debtor?
>
> (2) Would any bankruptcy policy or interest be impaired if this action were referred to arbitration, and if so, what bankruptcy policy or interest should be considered in deciding whether this action should be stayed pending arbitration and transferred as requested by defendants?[3]

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There are many issues raised by the parties in their respective memoranda which we believe are not properly before this Court. These include the following:

(1) Whether Beehive reserved in the plan the right to reject the License Agreement as an executory contract should the district court ultimately determine it to be such;

(2) Whether the arbitration clause in the License Agreement was enforceable postconfirmation even if Beehive did not assume it as an executory contract;

(3) Whether the License Agreement required arbitration to take place in San Francisco or whether it simply required the chosen arbitrators to be experts in the software industry in San Francisco;

(4) Whether Beehive is entitled to a refund of the fees which it paid to Micro Focus pursuant to the License

CLAIMS OF THE PARTIES

Beehive takes the position relative to the issues properly before this Court that the provisions of the License Agreement which deal with CTM-2 constitute nothing more than a conditional offer made by the debtor which it timely revoked. It argues that its offer to Micro Focus to provide appropriate software was an offer only if and when the CTM-2 package were ever developed. Since the CTM-2 could never be developed, Beehive claims to have properly revoked its offer by the August 22 letter.

Beehive also takes the position that the district court may refuse in its sound discretion to stay these proceedings pending arbitration since bankruptcy law and policy preempts the requirements set forth in the provisions of the Arbitration Act. The plaintiff argues that the Court should exercise its discretion in that regard to avoid undue hardship and significant

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Agreement;

(5) Whether Beehive has a valid claim against Micro Focus under an unjust enrichment theory;

(6) Whether under the doctrine of Impossibility of Performance Beehive is entitled to relief from its obligations under the License Agreement;

(7) Whether Micro Focus was bound by the terms of Beehive's plan of reorganization under the holding of the Tenth Circuit in Reliable Electric Co., Inc. v. Olson Construction Co., 726 F.2d 620 (10th Cir. 1984), because it allegedly did not receive proper notice of the confirmation hearing; and

(8) Whether venue is appropriate in this district or whether the case should be transferred to the Northern District of California.

The only issues properly before this Court are those inherent in the questions certified by Judge Anderson.

delays which would attend any decision requiring the reorganized debtor to arbitrate these matters. It further contends that the arbitrator would not have the necessary bankruptcy expertise to adjudicate these issues.

Micro Focus, on the other hand, argues that there is nothing in the License Agreement which would suggest that the provisions relating to the CTM-2 constituted a conditional offer. It takes the position that the License Agreement was an executory contract which was assumed by the express language in Beehive's plan of reorganization.

Micro Focus believes that there is no conflict between the Bankruptcy Code and the Federal Arbitration Act in this case since the plan of reorganization has already been confirmed and this Court only retained jurisdiction to litigate the rejection of contracts discovered after confirmation. It further contends that Beehive has made no showing of "prejudicial conflict" and that such a showing would be required to justify preemption of the arbitration clause in the License Agreement.

DISCUSSION

In light of the questions certified by the district court, there are three issues to be considered by this Court:

(1) Is the License Agreement a conditional offer or an executory contract;[4]

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[4] Counsel for Beehive conceded in oral argument that if the

(2) If the License Agreement is an executory contract, was it assumed by Beehive upon confirmation of its plan of reorganization; and

(3) What, if any, bankruptcy policy would be impaired if this action were referred to arbitration and what policies and interests should be considered in deciding whether to stay the action pending arbitration.

CONTRACTUAL RELATIONSHIP BETWEEN PARTIES

On its face, the License Agreement between Beehive and Micro Focus appears to be a binding and unconditional contractual agreement. However, Beehive argues that since Micro Focus had no obligation to provide software for the CTM-2 until the CTM-2 hardware was developed by Beehive, and since Beehive did not ever develop the CTM-2, therefore the provisions which relate to the CTM-2 must be construed as a conditional offer by Beehive which Beehive effectively revoked when it determined that it would be unable to market the CTM-2.

After having carefully reviewed the License Agreement and the circumstances surrounding its execution and performance, this Court is unable to find sufficient basis for Beehive's contentions and believes that the Agreement was a binding

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License Agreement constituted a binding agreement, it would be "executory," although he argued that Beehive reserved under the plan its right to determine whether it should be rejected if the Court found that an executory contract existed.

contractual agreement. There is nothing in the Agreement itself which would support a conclusion that the obligations were intended to be conditional. The language of the document is not in the form of an offer; rather it sets forth clear obligations by both parties. The Agreement sets forth the rights and obligations of each party and specifies their remedies upon default. It even contains a provision, by the terms of which, each party might terminate the Agreement. Such language and provisions are consistent with Micro Focus' position that the Agreement was a binding contract. On the other hand there is no offer language contained in the Agreement. There are no provisions governing the timing and method by which Micro Focus might accept Beehive's putative offer.

It may well be the case that Beehive has a valid claim for the refund of prepaid fees which it made pursuant to the terms of the Agreement, or, upon proper showing, Beehive may be relieved of its obligations thereunder pursuant to the doctrine of Impossibility of Performance. However, those substantive issues are not presently before this Court, and such potential claims cannot have the effect of mysteriously transforming an enforceable contractual agreement, unambiguous on its face, into a conditional offer which has been revoked upon failure of the condition.

Moreover, this Court is unpersuaded that the August 22 letter even purported to revoke an offer. Rather, in our opinion, Beehive therein sought relief from contractual obligations based on equitable considerations. No where in that letter does Beehive refer to an "offer" or purport to give "notice" to Micro Focus that it was revoking such an offer. Rather, the letter refers to an "agreement"; suggests that "the payment of further license fees should be waived"; and argues that "[i]t is certainly not equitable" for Micro Focus to retain the fees which have been paid--all of which is inconsistent with Beehive's revoked offer theory. Had this been an offer which Beehive was revoking, it could have affirmatively revoked that offer and simply asserted its legal rights. It would not have been necessary to negotiate for an equitable treatment. This Court therefore finds the License Agreement to be an enforceable executory contract and believes that Beehive's remedies must be found under the Agreement, unless its contractual rights and obligations were altered by the plan of reorganization.

ASSUMPTION OF THE LICENSE AGREEMENT

Having concluded that the License Agreement was an executory contract, the Court now turns to the question whether it was effectively assumed by the plan of reorganization.

Article VI of Beehive's plan provides for the treatment of leases and executory contracts. Certain leases and contracts were expressly rejected by the debtor; others were expressly assumed. Article 6.5 of the plan then provides:

> Except as is otherwise expressly provided in this Plan or in the Confirmation Order, the Debtor assumes all other executory contracts and leases.

Notwithstanding the fact that the License Agreement had been listed as an executory contract on the debtor's Statement of Executory Contracts, filed with this Court on October 11, 1984, that Agreement was neither expressly assumed, or expressly rejected by Beehive. Micro Focus argues that by virtue of the operation of Article 6.5 of the plan the License Agreement was necessarily assumed. Beehive explains the failure to expressly assume or reject the Agreement by arguing that it was taking the position that there was no contract and a rejection would have had two undesirable effects. First, the rejection would have operated as an admission that the License Agreement was, in fact, an executory contract and not an offer. Secondly, the rejection would create a claim for breach of contract. Furthermore, Beehive argues that since Article X of the plan provides that the Court shall retain jurisdiction over the rejection of executory

contracts and other disputes,[5] it may still reject the License Agreement should the courts determine it to be an executory contract.

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5 Article X of the plan provides in pertinent part:

> 10.1 The Court, following Confirmation, shall retain jurisdiction over the Debtor's case and proceedings or other matters arising in or related to the Debtor's case, or arising under title 11, U.S.C., including but not limited to the following matters:
>
> (a) Resolution of any and all objections to or other proceedings or motions regarding Claims or administrative expenses;
>
> (b) Rejection of executory contracts or leases that are not discovered prior to Confirmation and allowance of Claims for damages as to rejection of any such executory contracts or leases within such time as the Court may direct;
>
> (c) Determination of all questions and disputes regarding title to the assets of the estate, and determination of all causes of action, controversies, disputes, or conflicts whether or not subject to pending actions as of the Confirmation Date between the Debtor or the Reorganized Debtor and any other party, including, but not limited to, any right of the Debtor or the Reorganized Debtor or any party in interest to recover money or

This Court believes that by virtue of Article 6.5 of the plan the License Agreement was assumed by the debtor subject to the requirements for assumption set forth in § 365 of the Code. The License Agreement was listed as an executory contract by the debtor. There is no indication whether it was disputed as to amount or liability. The plan and disclosure statement do not

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property or avoid liens or other interests pursuant to provisions of the Bankruptcy Code.

(d) The correction of any defect and the curing of any omission or inconsistency in the Plan or the Confirmation Order as may be necessary to carry out the purposes and intent of the Plan;

(e) Modification of the Plan after Confirmation pursuant to the Bankruptcy Code and applicable rules;

(f) Resolution of any and all disputes arising under or related to the Plan, the Confirmation Order or any other order issued with respect to the Plan, including, without limitation, any disputes in interpreting or implementing the provisions of this Plan or any disputes arising out of the failure of the Debtor, the Reorganized Debtor, and any party in interest to perform the acts and meet the obligations required under the Plan;

(g) Resolution of requests for orders closing or reopening the Debtor's Chapter 11 case;

(h) Resolution of requests for orders directing any and all entities to execute documents or to perform other acts necessary to effect the terms of the Plan and any other requests pursuant to Section 1142 of the Bankruptcy Code;

(i) Resolution of any disputes with respect to the Debtor's agreements existing as of the Confirmation Date; and

(j) Allowance of fees and expenses of the Committee.

set forth the nature of the License Agreement nor the position Beehive was espousing relative thereto, as they might have.[6] Furthermore, the plan might have rejected the License Agreement as an option or clearly revoked the offer or provided for an alternative treatment of its rights and obligations under the Agreement. It did not. The plan could have provided an exception to Article 6.5 if the debtor believed that either assuming or rejecting the Agreement was not in its best interest. It did not do that either. The Court believes that under these circumstances it must conclude that the License Agreement was assumed by confirmation of the plan. Creditors knew that Beehive had listed the License Agreement as a disputed executory contract. Since no other resolution was made of the Agreement one could only conclude that the Agreement was governed by Article 6.5. Parties in interest must be able to rely on the express provisions of the plan.

This Court is likewise not persuaded by Beehive's argument relating to the Court's retention of jurisdiction in order to hear certain matters. The fact that this Court retained jurisdiction does not create any new substantive rights in the debtor. It simply means that the Court may hear certain matters

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At oral argument counsel for Beehive argues that this oversight was caused by the fact that bankruptcy counsel was not involved in this litigation and therefore did not know of the debtor's position. However, this Court does not believe that a bankruptcy debtor may avoid the necessity of providing adequate information by utilizing various professionals who are unaware of what other professionals are doing.

should they come before it. It would be highly inappropriate to conclude that a general provision retaining jurisdiction had the effect of altering substantive provisions clearly set forth in the plan. Moreover, the License Agreement is not the type of executory contract which was "not discovered prior to confirmation," as contemplated by Article 10.1(b). Beehive knew about the License Agreement. It was listed on the Statement of Executory Contracts. It could have expressly been dealt with under the plan and was not.

PREEMPTION OF THE ARBITRATION CLAUSE

The final issue before this Court is what, if any, bankruptcy policy would be impaired if this action were referred to arbitration and what policies and interests should be considered in deciding whether to stay the action.

At the heart of the resolution of this issue is an apparent conflict between the Federal Arbitration Act and the Bankruptcy Code. The former Act provides for a mandatory stay of all proceedings governed by a written arbitration provision. Section 3 of Title 9 provides:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of

> the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

Generally, a written arbitration clause will be enforced by the courts upon a proper showing that (1) the issue involved is one that is referable to arbitration under an agreement in writing for such arbitration, and (2) the party applying for the stay is not in default in proceeding with such arbitration. C. Itoh & Co. (America) v. Jordan International Co., 552 F.2d 1228, 1231 (7th Cir. 1977). See also, Miller v. Aacon Auto Transport, Inc., 545 F.2d 1019, 1020-1021 (5th Cir. 1977), on remand 434 F.Supp. 40, affirmed 614 F.2d 292, cert. denied 449 U.S. 918 (1980); Maxum Foundations, Inc. v. Salus Corp., 779 F.2d 974 (4th Cir. 1985). Cf. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404, 87 S.Ct. 1801, 1806, 18 L.Ed.2d 1270 (1967) ("a federal court may consider only issues relating to the making and performance of the agreement to arbitrate.").

The competing and apparently conflicting federal policy is embodied in the Bankruptcy Code. "This Act significantly expands the jurisdiction of bankruptcy courts and is based on the notion that to protect the positions of both the [bankruptcy debtor] and its creditors, bankruptcy actions should not be subject to unnecessary delay and all claims and issues relevant to such claims and actions should be resolved in one expeditious proceeding. A conflict arises when . . . the debtor in a bankruptcy action sues on a contract and the defendant demands a

stay of the bankruptcy proceeding pending contractually agreed to arbitration." Zimmerman v. Continental Airlines, Inc., 712 F.2d 55, 56 (3d Cir. 1983), cert. denied, 464 U.S. 1038, 104 S.Ct. 699 (1984).

This Court believes that the proper approach to be employed in arbitration cases is that set forth in the Zimmerman opinion. In that case, the debtor had contracted with Continental Airlines to supply it with certain vehicles. The contract provided that if there were any delays in delivery, Continental could get per diem "liquidated damages." The contract also contained an arbitration clause similar to the one in the License Agreement at issue in this case. There was a delay in delivery and Continental withheld $200,000.00 of its payment on the contract. After the debtor filed bankruptcy, the trustee sued Continental, alleging that its claim to the liquidated damages was improper. Continental applied for a stay pending arbitration, pursuant to 9 U.S.C. § 3. The bankruptcy court refused the application:

> In view of the enactment of the Bankruptcy Reform Act of 1978 and the urgent need for the prompt administration of adversary proceedings, we conclude that, in the case before us, the arbitration clause is not binding on the parties and that we may determine this case by trial rather than by arbitration.

22 B.R. 436 at 438. In affirming the decision of the bankruptcy court, the Court of Appeals held that "because the underlying purposes of the Bankruptcy Reform Act impliedly modify the Arbitration Act, the granting of a stay pending arbitration, even

when the arbitration clause is contractual, is a matter left to the sound discretion of the bankruptcy judge." 712 F.2d at 56 (emphasis supplied). In arriving at that conclusion, the Court recognized that "unless the bankruptcy court is exempt from the commands of the Arbitration Act" its duty to stay any proceeding would be clear under the mandatory language of 9 U.S.C. § 3. Id. at 57. After reviewing the legislative history of the Bankruptcy Code, however, the Court observed that

> A major impetus underlying this reform legislation has been the need to enlarge the jurisdiction of the bankruptcy court in order to eliminate the serious delays, expense and duplications associated with the current dichotomy between summary and plenary jurisdiction. . . ." S.Rep. No. 95-989, 95 Cong., 2d Sess., reprinted in 1978 U.S. Code Cong. & Ad. News 5787, 5803. While the reduction of unnecessary delays, expenses, and duplications of effort are important in all judicial proceedings, they are especially important in bankruptcy cases. The economic fragility of the bankrupt's estate, the excess of creditors' demands over debtor's assets, and the goal of rehabilitating the debtor all argue for expeditious resolution of the bankruptcy proceeding.

Id. at 58. The Court of Appeals then concludes:

> The dictates of the Arbitration Act, requiring stays of proceedings pending arbitration, could result in delays, expenses, and duplications similar to those previously experienced in bankruptcy proceedings because of the dichotomy between plenary and summary jurisdiction. Clearly a mandatory stay of a bankruptcy proceeding delays that proceeding.
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> . . .

> Bankruptcy proceedings, . . . have long held a special place in the federal judicial system. Because of their importance to the smooth functioning of the nation's commercial activities, they are one of the few areas where Congress has expressly preempted state court jurisdiction. . . . While the sanctity of arbitration is a fundamental federal concern, it cannot be said to occupy a position of similar importance.
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> . . .
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> [W]e hold that the intentions of Congress will be better realized if the Bankruptcy Reform Act is read to impliedly modify the Arbitration Act. Thus, while a bankruptcy court would have the power to stay proceedings pending arbitration, the use of this power is left to the sound discretion of the bankruptcy court.

712 F.2d at 58-60. See also, In re F&T Contractors, Inc., 649 F.2d 1229, 1232 (6th Cir. 1981) ("The decision to compel or deny arbitration is discretionary with the bankruptcy judge." Court held that the bankruptcy judge did not abuse his discretion in refusing to compel arbitration since "the claims of other creditors would have been affected by the decision of the arbitration board but those creditors would not have been able to participate in the proceeding."); Truck Drivers Local Union No. 807 v. Bohack Corp., 541 F.2d 312, 320 (2d Cir. 1976), cert. denied, 439 U.S. 825, 99 S.Ct. 95 (1978) ("There must be judicial control over the exercise of the right to arbitrate just as there is over other rights and duties of the bankrupt."); In re Muskegon Motor Specialties Co., 313 F.2d 841 (6th Cir. 1963) (It was not abuse of judicial discretion for bankruptcy court to

refuse to compel arbitration.); In re T.D.M.A., Inc., 66 B.R. 992 (Bkrtcy. E.D. Penn. 1986) (Bankruptcy court should defer to arbitration only in "extraordinary situations" where deference to specialized forum is necessary to resolve issues with which bankruptcy courts are unfamiliar.); In re Double TRL, Inc., 65 B.R. 993, 993 (Bkrtcy. E.D.N.Y. 1986) ("[E]nforcement of contractual arbitration agreements is left to the sound discretion of the bankruptcy court." Factors to be considered include: (1) the degree to which the nature and extent of the litigation and evidence makes the judicial forum preferable to arbitration; (2) the extent to which special expertise is necessary to resolve the disputes; and (3) the identity of the persons comprising the arbitration committee and their track record in resolving disputes between the parties.); In re Allen & Hein, Inc., 59 B.R. 733 (Bkrtcy. S.D. Cal. 1986); In re Fletchner Packing Co., 63 B.R. 585 (Bkrtcy. N.D. Ohio 1986); Quinn v. CGR, 48 B.R. 367 (D. Colo. 1985) (exercises "discretion" and compels arbitration.); In re Miller & Neill Co., 41 B.R. 589 (Bkrtcy. N.D. Ohio 1984); In re Braniff Airways, Inc., 33 B.R. 33, 34 (Bkrtcy. N.D. Tex. 1983) ("[C]ongressional bankruptcy policy overrides the provisions of the Arbitration Act."); Coar v. Brown, 29 B.R. 806 (D.N.D. Ill. 1983); In re Brookhaven Textiles, Inc., 21 B.R. 204 (Bkrtcy. S.D.N.Y. 1982) (Bankruptcy court was not required to submit dispute to arbitration since issues did not require "expertise of any special tribunal."); In re Smith

Jones, Inc., 17 B.R. 126 (Bkrtcy. D. Minn. 1981) (Court recognized it had jurisdiction to construe and determine application of collective bargaining agreement, but modified the stay to allow arbitration under the contract.); In re Cross Electric Co., Inc., 9 B.R. 408 (Bkrtcy. W.D. Va. 1981) (debtor not required to submit to arbitration since bankruptcy court has jurisdiction.).

Micro Focus argues that the bankruptcy court must stay the proceedings pending arbitration unless the debtor can demonstrate a "prejudicial conflict." It cites the Court to two bankruptcy cases which purportedly stand for that proposition--In the Matter of Hart Ski Mfg. Co., 18 B.R. 154 (Bkrtcy. D. Minn. 1982), opinion amended, 22 B.R. 762, aff'd, 22 B.R. 763 (D. Minn.), aff'd, 711 F.2d 845 (8th Cir. 1983); and In re Morgan, 28 B.R. 3 (Bkrtcy. 9th Cir. 1983). However, neither of those decisions deal with the issues involved in this case. In Hart Ski, the court did not reach the issue of whether it had discretion not to refer the dispute to arbitration. The only issues involved in any of the opinions rendered in that case were (1) whether the parties actually agreed to arbitrate disputes; and (2) whether the creditor waived its right to arbitration by filing a proof of claim. The parties agreed that if the contract provided for arbitration, they were bound to arbitrate.

The Morgan opinion is equally inapposite to the present case. That case involved a chapter 11 debtor who had made a contract claim against a non-creditor third party. In that context the Appellate Panel for the Ninth Circuit held that the debtor in possession was bound by the mandatory arbitration provisions in the contract. That is simply not the procedural posture herein.

This Court believes that the policies and factors, which should be considered by the Court in deciding whether to exercise its discretion and to stay bankruptcy proceedings pending arbitration, include the following:

(1) Delays, additional expenses, and the potential for duplication of effort which would attend the requested arbitration;

(2) The need for bankruptcy expertise in resolving the issue to be subjected to arbitration;

(3) The effect of arbitration on the bankruptcy court's control over the administration of the chapter 11 estate;

(4) Whether the issues to be resolved require the special expertise of an arbitrator;

(5) The effect of an arbitrator's award on parties (e.g., general unsecured creditors) who are not parties to the arbitration proceeding;

(6) The experience of the arbitrator in resolving disputes between these particular parties.

In addition to the foregoing factors, the Court also believes the timing of the motion for stay pending appeal should appropriately be considered by the Court. The potential for unreasonable delay, expense and duplication, impeding the reorganization process by allowing a controversy to go to arbitration, is fairly acute in the early stages of a chapter 11 proceeding. However, such effects are less likely to occur following the confirmation of the plan. The case is then governed by the provisions of the plan of reorganization. The automatic stay is no longer in effect. See §§ 362(c), 1141(b), (d). The debtor has negotiated with creditors regarding their treatment. At that stage, the Court believes there is less of a conflict between the Arbitration Act and basic bankruptcy policy. Although the same factors should be considered by the Court, and it undoubtedly continues to have authority to exercise its judicial discretion, we believe the context of the motion and the stage of the chapter 11 proceeding should be given appropriate consideration.

In this case, the plan has been confirmed and Beehive has had its chance to negotiate deals with its creditors. For some reason, it either failed to agree with Micro Focus or chose not to conduct serious negotiations. In either event, Beehive has already maneuvered itself through the most critical phase of the

bankruptcy maze. At this point in the reorganization, the Court finds that there is no bankruptcy policy which would be seriously compromised by allowing this dispute to be resolved by arbitration. It is difficult to imagine how arbitration of this claim would cause more delay and expense than a full-blown adversarial trial in district court. There is no great potential for duplication here, since the confirmation process has been completed.

We find no need for bankruptcy expertise in resolving these disputes. The rights of the parties are to be found in their contractual provisions. The arbitrator's award will undoubtedly have an effect on the reorganized debtor and consummation of its plan, but the arbitrator need not evaluate that. It will simply determine the merits of Beehive's claims under the contract.

Likewise, since Beehive's plan has been confirmed, the bankruptcy court's interest in maintaining control over administration of the chapter 11 estate is at most minimal. Moreover, there is no allegation that these proceedings will unfairly prejudice other creditors who will not be allowed to participate in the arbitration process.

CONCLUSION

For the reasons set forth herein, the Court finds that (1) the License Agreement between Beehive and Micro Focus is an executory contract which was assumed by the debtor; and (2) no bankruptcy policy would be impaired if this action were referred to arbitration.

DATED this 27 day of May, 1987.

BY THE COURT:

Glen E. Clark

GLEN E. CLARK
UNITED STATES BANKRUPTCY JUDGE