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IN THE CIRCUIT COURT OF THE 11TH
JUDICIAL CIRCUIT IN AND FOR MIAMI-
DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION
CASE NO. 02-4382 CA 10

MHW, LTD., and BACARDI U.S.A., INC.
f/k/a BACARDI-MARTINI U.S.A., INC.,

Plaintiffs,

v.

GALLO WINE DISTRIBUTORS, LLC
d/b/a PREMIER WINES & SPIRITS, INC.,

Defendant.

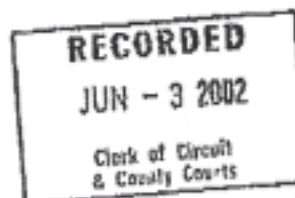
GALLO WINE DISTRIBUTORS, LLC
d/b/a PREMIER WINES & SPIRITS, INC.,

Counter-Plaintiff,

v.

BACARDI U.S.A., INC., MHW, LTD.
and BACARDI LIMITED,

Counter-Defendants.



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**ORDER GRANTING GALLO WINE DISTRIBUTORS, LLC d/b/a PREMIER
WINES & SPIRITS, INC. MOTION FOR TEMPORARY INJUNCTION**

This cause having been heard on Defendant Gallo Wine Distributors, LLC d/b/a Premier Wine & Spirits' Motion for Temporary Injunction, with due notice having been given to all parties, and the Court having heard and considered the testimony given and evidence presented in hearings spanning three days, April 26, April 29 and May 3, 2002, as well as argument of counsel, and being otherwise fully advised in this matter finds as follows:

FINDINGS OF FACT

1. GALLO WINE DISTRIBUTORS, L.L.C., d/b/a Premier Wines & Spirits, Inc. (hereinafter referred to as "Premier"), a New York limited liability company, is a wine and spirits distributor in Metropolitan New York.

2. BACARDI LIMITED, headquartered in Bermuda, makes and sells an extensive line of spirits, and it imports, sells, and markets its products in the United States.

3. BACARDI U.S.A., INC. f/k/a BACARDI-MARTINI U.S.A., INC. (hereinafter referred to as "Bacardi"), a Delaware corporation, is a subsidiary of BACARDI LIMITED through which BACARDI LIMITED distributes its products in the United States.

4. MHW, LTD (hereinafter referred to as "MHW") is a New York corporation and currently Bacardi's "Exclusive Brand Agent" in the State of New York

5. MHW and Bacardi filed this action against Premier on February 15, 2002, seeking a declaration of their rights under the 1993 and 1995 agreements between Bacardi and Premier in Count I, and a declaration of their rights under the 1999 agreement between MHW and Premier in Count II. Premier has filed a five-count counterclaim seeking injunctive relief and damages for breach of contract, breach of implied covenant of good faith and fair dealing, in the alternative promissory estoppel, in the alternative unjust enrichment, and in the alternative breach of fiduciary duty.

6. Since 1993 and continuing through the present, Premier has distributed Bacardi products under a series of contracts with Bacardi. The March 1, 1993 Distribution Agreement expired on December 31, 1994, and the January 1, 1995 Distribution Agreement provided for an expiration date of December 31, 1995. Under both of these agreements, which contained similar terms, the distributor (Premier herein) acknowledged that it acquired no rights to continue acting as a distributor

of Bacardi products. However, Bacardi had the right to terminate each of these agreements and distributor's rights thereunder solely for cause prior to their respective expiration dates. It is undisputed that after the expiration of the last of these agreements on December 31, 1995, both parties continued to perform their agreement and to act as supplier and distributor of Bacardi products under the same terms.

7. In 1998, BACARDI LIMITED began acquiring distribution rights for five major brands of spirits previously owned or controlled by one of its competitors. The new brands included Dewar's Scotch, Bombay Original and Bombay Sapphire Gins, DiSaronno Amaretto and M & R Asti/Vermouth. To finance the purchase of these newly acquired brands, Bacardi formulated a "distributor reinvestment program" by virtue of which distributors such as Premier would invest certain sums of money for the benefit of the Bacardi entities calculated by Bacardi on the basis of a percentage of the distributor's anticipated gross margins on the sales of the acquired brands and several other Bacardi products over a period of time. This 1998 distributor reinvestment program is well documented in writing as evidenced by Bacardi's own documents introduced into evidence at the hearings. For instance, in a memo addressed to Premier's President and Chief Executive Officer, David Taub, dated May 12, 1999, the subject of which was entitled "Distributor Investment," Brian Gates, Bacardi's Divisional Vice-President, instructed Mr. Taub as follows:

I spoke with several people in Miami about your request for a letter. They would like to proceed as follows:

Please have your auditors or financial department contact our VP of Finance (Mr. Oscar Suarez) or our Sales and Marketing Controller (Hector Ortiz) (1-800-327-7320). They are fully versed in the Distributor Investment Strategy in place for Premier Wine and Spirits. They will verbally answer all questions your people have with regards to the monies committed, timing, etc.

I will be available via voice mail on Thursday (1-800-841-4786 x1539). Leave me a number where you can be reached to discuss further. (Emphasis supplied)

8. At the heart of Premier's position is a letter written on Bacardi USA's stationery signed again by Brian Gates, Bacardi's Divisional Vice President, dated August 8, 2000, and addressed to Marc Taub, one of Premier's principals. Attached to Mr. Gates' letter is a chart detailing specific dollar figures previously spent and projected to be spent by Premier over a period of years. That letter reads in pertinent part:

(1) Distributor Reinvestment Dollars

Attached is our form to track dollars spent to date as well as your Year III commitment. We know you committed to approx. \$5.1 MM over five years, ~~we need to determine beyond Year Five, your on-going \$ commitment to these brands.~~

The General Rule that most Distributors around the country are agreeing to is the Year III amount of 25% of Gross Profit. In your case, approx. 1.0 MM would be the on-going yearly amount.

You also could use a dollar amount per case to determine the amount (Dewar's, Bombay Original/Sapphire, DiSaronno, M & R Asti/Vermouth). This total amount should also reach close to the 1.0 MM. Please review this information and let me know your thoughts. I have to inform Miami of our decision on August 16th.

(2) MIS Capabilities

The second issue involves Premier's MIS capabilities and information gathering. The one project I'm on now is to determine by size case sales by discount levels for last year. Fred gave me a report that he admit is difficult to decipher. Can you think of any other way to produce this info on an on-going basis? (Emphasis supplied)

9. It is therefore undisputed that in 1998 Premier made a commitment to Bacardi to invest approximately \$5.1 million dollars over a six-year period to promote the Bacardi products in question. The actual investment was based upon reinvestment of 75% of the profits the first year,

50% reinvestment the second year and 25% the third year from the sales of five of the newly acquired brands listed in the letter. Through the reinvestment dollars, Premier would increase sales of the new brands and expedite return of the purchase price paid by Bacardi to obtain the new brands. Moreover, according to Premier's position at the hearings, Bacardi agreed to continue Premier as a distributor for a period of ten years in exchange for Premier's reinvestment pledge which would allow Premier to recoup its investment and realize a "fair return."

10. Both Bacardi and Premier began performing under the reinvestment program in 1998, and continued performing beyond that time. In fact, it is undisputed that to date, Premier has paid \$4.3 million of the \$5.1 million it committed on behalf of the Bacardi entities. As evidenced by the form designed "to track dollars" attached by Bacardi's Vice President to his August 8, 2000, letter, Premier did reinvest 75% of the gross profits derived from the new brands the first year in an amount in excess of \$2 million, 50% of gross profits derived from these brands the second year for a sum totaling over \$1 million, and 25% of gross profits derived from these brands the third year for over another \$1 million. Both parties' performance was demonstrated at the hearings by testimony; correspondence from both Premier and Bacardi, and submission of financial records from which gross profits were calculated in accordance with the reinvestment formula. Further, it is undisputed that Premier has never breached its 1998 commitment to the Bacardi brands. Premier also adduced testimony that it is ready, willing, and able to continue to perform its commitment into the future.

11. By letter dated February 4, 1998, Bacardi appointed MHW to act as its "wholesaler and consultant" and as its "Exclusive Brand Agent" for the sale of its brands in the State of New York.¹

¹In December 1995, Bacardi had notified Premier that it had appointed Proprietary Brands, Inc., to act as its price posting agent in New York. At that time, Premier had elected to cease its corporate presence in New York but was required by state liquor regulations to have an

MHW signed said letter accepting the appointment on February 18, 1998. Pursuant to this letter of appointment, if required by Bacardi, "MHW agree[d] to enter into wholesale distributor agreements with licensed wholesalers selected by [Bacardi] in a format approved by [Bacardi]." The letter also provided that:

No commitments may be made by MHW on behalf of B-M USA unless they have been authorized in writing by B-M USA [Bacardi]. In all respects, MHW shall be an independent contractor and not the agent of B-M USA [Bacardi] with respect to its duties and responsibilities under this Agreement. MHW may not in manner bind B-M USA [Bacardi] unless it is expressly authorized to do so in writing by B-M USA [Bacardi]. (Emphasis supplied)

Neither Bacardi nor MHW offered in evidence any such written authorization, and according to the evidence, no such written authorization for MHW to enter into distribution agreements or to bind Bacardi existed.

12. In 1999, Premier entered into a written agreement with MHW entitled "Distribution Agreement." Neither Bacardi and MHW, on the one hand, nor Premier, on the other hand, dispute that said Agreement contains an error in its signature page which incorrectly identifies the entity entering into the Agreement with Premier as "BACARDI-MARTINI U.S.A., INC." Both sides agree that the Agreement should have read "MHW" over Scott Saul's signature on the signature page.² That Agreement between Premier and MHW contains a merger clause which Bacardi and MHW

alternate New York presence. Proprietary Brands, Inc. performed similar services for other out-of-state alcoholic beverage suppliers.

²One of the last provisions of this Agreement reads: "The provisions of this Agreement are for the exclusive benefit of the parties to this Agreement, and no other person (including without limitation any creditor of any party to this Agreement) shall have any right or claim against any party to this Agreement by reason of those provisions or be entitled to enforce any of these provisions against any party to this Agreement."

contend prevent modifications thereof, whether oral or in writing.³ This agreement also contains a termination clause which may be triggered upon 90 days written notice by either party without cause, and provides that upon termination, "neither party shall have any rights against the other for recovery of voluntary cooperative advertising, sales promotional expenses, or any other marketing or sales investments of any kind arising out of this Agreement, including, but not limited to, any promotional and/or marketing efforts and expenditures made in accordance with Article 4.q." (Emphasis supplied)

13. In mid-2001, Bacardi advised Premier of its decision to make another liquor distributor, Charmer, its exclusive distributor in the State of New York. Bacardi has admitted that its decision to terminate Bacardi was not related to Premier's performance as a distributor of Bacardi products. Thereafter, by letter dated December 21, 2001, Scott Saul, as Vice President of MHW, notified David Taub, Premier's President, that "pursuant to Article 5(a) of the Distribution Agreement between MHW, LTD. ("MHW") and PREMIER WINES & SPIRITS, INC. ("Premier") dated July 1, 1999 (the "Distribution Agreement"), MHW is hereby terminating the Distribution Agreement effective May 1, 2002 (the "Termination Date")."

14. The sale of Bacardi products represents one-third (1/3) of Premier's business. Premier presented testimony that without the revenues derived from Bacardi products, Premier projects that

³ That merger clause reads: "This agreement supersedes any and all oral and written arrangements or agreements and represents the entire understanding and agreement between the parties hereto with respect to the subject matter hereof and there are no promises, agreements, conditions, undertakings, warranties, or representations, whether written or oral, express or implied, between the parties other than as set forth herein. This agreement cannot be amended, supplemented, or modified except by an instrument in writing signed by the parties and no subsequent course of dealing or conduct of the parties shall result in a modification or extension of this Agreement; except that under Article 1.c, MHW may offer additional products or withdraw existing products from sale in the Territory without an instrument in writing signed by both parties."

it will lose between \$3 and \$4 million per year and that it will go out of business. Current suppliers of Premier are concerned about the impact that the termination of the Bacardi distributorship will have on Premier's viability as a distributor. This impact already has been reflected by less favorable credit terms being extended to Premier. Although Premier has secured some new suppliers, the new suppliers are not substantial enough to offset the loss of Bacardi revenues.

15. Premier is a 50 year old family business, run by grandfather, father and son. Premier has 350 employees, many of whom have worked for the company for 15 to 35 years. Premier adduced testimony tending to establish that it would have to lay off many employees if it is terminated as a Bacardi distributor, and that ultimately all employees would lose their jobs should Premier go out of business following termination of the Bacardi distributorship.

16. Premier currently accounts for about 85 % of Bacardi's rum sales and 75 % of Bacardi's overall sales in Metropolitan New York. Currently there are only two distributors of Bacardi products in Metropolitan New York: Charmer and Premier. If Premier ceases to distribute Bacardi products, the remaining distributor will have no competition.

17. In turn, Bacardi presented testimony tending to establish that it is losing sales on approximately 350,000 cases per year by using Premier as a distributor and that Bacardi realizes \$9.00 of profit per case which totals a \$3,150,000.00 per year loss.

CONCLUSIONS OF LAW

A party seeking a temporary injunction must prove all of the following: (1) the likelihood of irreparable harm and unavailability of an adequate remedy at law, (2) the substantial likelihood of success on the merits, (3) that the threatened injury to the movant outweighs any possible harm to the respondent, and (4) that the granting of the preliminary injunction will not disserve the public

interest. U.S. 1 Office Corp. v. Falls Home Furnishings, Inc., 655 So. 2d 209, 210 (Fla. 3d DCA 1995). See also East v. Aqua Gaming, Inc., 805 So. 2d 932, 934 (Fla. 2d DCA 2001); Richard v. Behavioral Healthcare Options, Inc., 647 So. 2d 976, 978 (Fla. 2d DCA 1994). Injunctive relief is an extraordinary remedy designed to preserve the status quo, pending a final hearing, and therefore such relief should not be granted absent a showing of all of the elements enumerated above. Millenium Communications & Fulfillment, Inc. v. Office of the Attorney General, Department of Legal Affairs, State of Florida, 761 So. 2d 1256, 1260 (Fla. 3d DCA 2000). See Naegele Outdoor Advertising Co., Inc. v. City of Jacksonville, 659 So. 2d 1046, 1047 (Fla. 1995). See also Tiffany Sands, Inc. v. Mezhibovsky, 463 So. 2d 349, 350-351 (Fla. 3d DCA 1985); Burnstein v. 5838 Condominium, Inc., 430 So. 2d 572 (Fla. 3d DCA 1983); Ladner v. Plaza del Prado Condominium Association, Inc., 423 So. 2d 927, 929 (Fla. 3d DCA 1982). Analysis of these elements in light of the evidence presented follows:

**THE LIKELIHOOD OF IRREPARABLE HARM AND
UNAVAILABILITY OF AN ADEQUATE REMEDY AT LAW**

Loss of one-third of the distributor's business, hence threatening the viability of that business, has been held to constitute irreparable harm sufficient to justify the issuance of a permanent injunction. Automotive Electric Service Corp. v. Association of Automotive Aftermarket Distributors, 747 F.Supp. 1483 (U.S.D.C. N.Y. 1990). Further, the potential destruction of a business has in several cases provided a sufficient basis to support a finding of irreparable injury, warranting the issuance of injunctive relief. See U.S. 1 Office Corp. v. Falls Home Furnishings, Inc., 655 So. 2d 209, at 210; Richard v. Behavioral Healthcare Options, Inc., 647 So. 2d 976, 978 (Fla. 2d DCA 1994). See also Spear Newman, Inc. v. E.I. DuPont de Nemours & Company, 1991 WL

318725 (D. Conn. 1991); Lathers, Local 251-L v. Jones, 1989 WL 224950 (M.D. Fla.); Mid-Fla. Coin Exchange, Inc. v. Griffin, 529 F.Supp.1006, 1030-1031 (S.D. Fla. 1981); East v. East Aqua Gaming, Inc., 805 So. 2d 932, 934 (Fla. 2d DCA 2001); St. Lucie County Radiation Oncology, Ltd. v. Woody, 766 So.2d 301, 302 (Fla. 4th DCA 2000). And the harm resulting from the termination of a long-standing, family owned business is not entirely measurable in monetary terms. See Senneca Motors, Inc. v. Ford Motor Company, 429 F.2d 1197, 1205 (2d Cir. 1970); See also Spear Newman, Inc. v. E. I. DuPont de Nemours & Company, 1991 WL 318725 (finding irreparable harm in the loss or destruction of an ongoing family business founded in 1949); Baldree v. Cargill, Inc., 758 F.Supp. 704, 706-707 (M.D. Fla. 1990) (holding plaintiffs made a sufficient showing of irreparable harm where, *inter alia*, "Gaskins' long-standing 21-year poultry business which he and his family built through personal sacrifice will be destroyed.")

In Automotive Electric Service Corp., the plaintiff asserted that the loss of its membership in the defendant national trade organization (AAAD) would necessarily mean that it would no longer be permitted to sell to the Goodyear GASC stores under its contract with AAAD. The plaintiff presented testimony that the business flowing from the combination of Goodyear company-owned stores and trust sales amounted to 33% of its gross sales. In addition, the plaintiff adduced evidence that it made changes in its financial structure, entered into different arrangements to factor its receivables in order to accommodate the Goodyear business, and placed a two million dollar mortgage on its warehouse. The plaintiff further presented testimony that as a result of this loss of business, it would not be able to pay its bills, its mortgage payments or its factor, and that without the Goodyear and Trust business, it could not continue to operate as a warehouse distributor. In finding irreparable injury and the absence of an adequate remedy at law, the court wrote:

The Court finds that absent membership in AAAD and the opportunity to service the Goodyear stores, which account for almost one-third of the plaintiff's gross sales, it may have to terminate its business. This is not a case of mere lost profits, but rather the basic existence of a seventy year old business may be threatened. The evidence reveals that in order to prepare to service the substantial Goodyear account, the plaintiff added a night shift, placed a two million dollar mortgage on their warehouse and became involved with a factor with a running balance owed of approximately \$700,000. Like the plaintiffs in Semmes, the [plaintiffs] have a virtually unmeasurable interest in continuing to operate their business and a damage award would, in this Court's view, be inadequate to afford complete relief.

Automotive Electric Service Corp., 747 F.Supp. at 1514.

And in Semmes Motors, Inc., the court reasoned:

Ford's contention that Semmes failed to show irreparable injury from termination is wholly unpersuasive. Of course, Semmes' past profits would afford a basis for calculating damages for wrongful termination, and no one doubts Ford's ability to respond. But the right to continue a business in which Williams Semmes had engaged for twenty years and into which his son had recently entered is not measurable entirely in monetary terms; the Semmes want to sell automobiles, not to live on the income from a damages award. (Citation omitted)

Semmes Motors, Inc. v. Ford Motor Company, 429 F.2d at 1205.

As in Automotive Electric and Semmes, Premier presented testimony at the hearings that the sale of Bacardi products amounts to one-third of its business and that without the revenues generated from Bacardi sales, it would lose between \$3 and \$4 million per year and would probably have to go out of business, with devastating results. Premier is a 50 year old family business, run by grandfather, father and son, with a work force of 350 employees many of whom have worked for the company for 15 to 35 years.

In addition, Premier adduced testimony that its current suppliers have voiced concerns

about the impact that the termination of the Bacardi distributorship will have on Premier's viability as a distributor, claiming that this impact is already felt through less favorable credit terms being extended to Premier. Premier has secured some new suppliers, but they are not substantial enough to offset the loss of Bacardi revenues.

In sum, in the court's view, Premier has sufficiently established the first element enumerated above in determining whether preliminary injunctive relief is warranted. Premier has sufficiently demonstrated that it is likely to suffer irreparable harm due to the loss of the Bacardi distributorship and that it does not have an adequate remedy at law measurable in monetary terms to compensate it for such loss.

THE SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS

Premier argues that it has a substantial likelihood to prevail on the merits of its breach contract claim. It is undisputed that in 1998 Bacardi formulated a "distributor reinvestment program" and specifically adopted a "Distributor Investment Strategy in place for Premier Wine and Spirits," as Bacardi's own Divisional Vice President described it in writing in May of 1999. It is further undisputed that in August of 2000, the same Divisional Vice President acknowledged in writing Premier's \$5.1 million commitment to Bacardi pursuant to that reinvestment strategy, and tracked specific dollar figures spent and to be spent by Premier over a period of years. In fact, Premier established at the hearings that to date it has actually spent \$4.3 million towards the \$5.1 million it committed to Bacardi, and further, that it has not recouped its investment only a few years into that period.

Premier asserts that an inevitable counterpart of its commitment is a reciprocal obligation on

Bacardi's part to maintain Premier as a distributor, at least for the duration of the commitment or recoupment period. Otherwise, Bacardi would obtain and retain the benefit of Premier's investment and give nothing in return.

Bacardi, on the other hand, asserts that its "distributor reinvestment program" was not tied to any distribution rights, and that it could terminate Premier as a distributor at any time before the admitted commitment period expired, regardless of whether or not Premier had recouped its investment at termination.

The existence of the August 8, 2000, letter is undisputed. That writing represents an admission by Bacardi that it viewed Premier's investment as a commitment and that it was aware of dollars pledged, dollars spent, and dollars to be spent by Premier during a specific period pursuant to that commitment. See § 90.803 (13), Fla. Stat. (2001); Scholz v. RDV Sports, Inc., 710 So. 2d 618 (Fla. 5th DCA 1998). The letter further acknowledges Premier's multi-million dollar commitment "over five years" and the need to determine Premier's "on-going" dollar commitment to Bacardi "beyond Year Five." What the letter does not specifically say, however, is that this long-term substantial investment by Premier was tied to Premier's right to distribute Bacardi products for the pertinent period of time. It is this latter point that Bacardi seizes upon to argue that it could terminate Premier as it did. Premier, on the other hand, reasons that it would defy logic to conclude that such a one-sided, hollow promise could exist. Otherwise, Premier complains, its multi-million dollar investments to serve Bacardi would have to be carried without the Bacardi revenues they were designed to support.

Premier argues that the 1998 distributor investment agreement between Premier and Bacardi constitutes either a free standing agreement or a modification of their distribution agreement.

Bacardi responds that the merger clause contained in the 1999 distribution agreement between Premier and MHW precludes any modification thereof, whether written or oral, express or implied, including modification by course of dealing or conduct of the parties.

In Florida, however, "the law has been clearly established that a written contract may be modified by a subsequent oral agreement or subsequent conduct of the parties, even though the written contract purports to prohibit such modification." Beach Higher Power Corp. v. Granados, 717 So. 2d 563 (Fla. 3d DCA 1998). See also White v. Ocean Bay Marina, Inc., 778 So. 2d 412 (Fla. 3d DCA 2001); Pam Am. Eng'g Co., Inc. v. Poncho's Constr. Co., 387 So. 2d 1052, 1053 (Fla. 5th DCA 1980); Barile Excavating & Pipeline Co., Inc. v. Vacuum Under Drain, Inc., 362 So. 2d 117, 119 (Fla. 1st DCA 1978). Further, under Florida law, a written contract may be modified by an oral agreement if the latter has been accepted and acted upon by the parties in a manner that would work a fraud on either party to refuse to enforce it. W.W. Contracting, Inc. v. Harrison, 779 So. 2d 528, 529 (Fla. 2d DCA 2000); Jupiter Square S.C. Assocs., Inc. v. Tomary, Inc., 571 So. 2d 538 (Fla. 4th DCA 1990). See Professional Insurance Corporation v. Cahill, 90 So. 2d 916, 918 (Fla. 1956). Such a modification is permissible even where the written contract contains a provision prohibiting its alteration except in writing. Professional Insurance Corporation v. Cahill, 90 So. 2d at 918.

While it is true that Premier signed the distribution agreement with MHW on July 1, 1999, it is also undisputed that both Bacardi and Premier acted upon and accepted the terms of the 1998 distributor investment plan, both before and after the execution by Premier of the 1999 distribution agreement with MHW, as evidenced in writing by Bacardi's August 8, 2000, letter to Premier. In fact, to date Premier has invested a total of \$4.3 million pursuant to that plan, and Bacardi has

acquiesced in that investment. Premier has made most of those payments after the execution of the 1999 MITW agreement, as evidenced by Bacardi's own August 2000 letter to Premier enclosing the schedule of past and future payments by Premier on behalf of the Bacardi brands pursuant to the Distributor Reinvestment Program.

Several Florida cases have explained that "[a] temporary injunction does not decide the merits of a case; no full hearing has been conducted. To rule on a temporary injunction, the court must, early in the case, estimate the likelihood of the plaintiff prevailing on the merits and securing a permanent injunction." Knox v. District School Board of Brevard, 27 Fla. L. Weekly D 1017 (Fla. 5th DCA 2002); Rollins, Inc. v. Parker, 755 So. 2d 839, 841 (Fla. 5th DCA 2000); Gold Coast Chemical Corporation v. Goldberg, 668 So.2d 326 (Fla. 4th DCA 1996). The purpose of a temporary injunction is not to resolve a dispute on the merits, but rather to preserve the status quo until the final hearing when full relief may be granted. Tiffany Sands v. Mezhibovsky, 463 So. 2d 349, 350-351; (Fla. 3d DCA 1985); Burnstein v. 5838 Condominium, Inc., 430 So. 2d 572 (Fla. 3d DCA 1983); Ladner v. Plaza del Prado Condominium, 423 So.2d 927, 929 (Fla. 3d DCA 1982) ("a party is not required to prove his case in full at a preliminary injunction hearing").⁴

In the court's view, Premier has presented adequate evidence, including Bacardi's own letters, charts and other writings, to sufficiently document the existence of an investment agreement with Bacardi which could be viewed either as an independent agreement or as a

⁴ In Tiffany Sands, the court phrased the inquiry as follows: "The narrow question before this court is whether the [movant] has made a showing, reasonably free from doubt, that a temporary injunction is necessary to prevent great and irreparable harm." Tiffany Sands v. Mezhibovsky, 463 So. 2d at 351. See also Ladner v. Plaza del Prado Condominium Association, Inc., 423 So. 2d at 929.

modification of the 1999 distribution agreement with MHW,⁵ based on the authorities cited herein. To date, Premier has never breached its 1998 commitment to the Bacardi brands, and there is no contention by Bacardi to the contrary. Cf. Cordis Corporation v. Prooglin, 482 So. 2d 486, 490-491 (Fla. 3d DCA 1986). For purposes of its request for temporary injunctive relief, Premier has made a sufficient showing that it has a substantial likelihood of prevailing on the merits of its breach of contract claim.

BALANCING THE HARDSHIPS: WHETHER THE THREATENED INJURY TO THE MOVANT OUTWEIGHS ANY POSSIBLE HARM TO RESPONDENT

This court has determined that Premier is likely to suffer irreparable harm from its termination as a Bacardi distributor primarily because Premier will likely be forced out of business following that termination. On the other hand, Bacardi offered testimony tending to establish that it is losing approximately 350,000 sales on cases per year by using Premier as a distributor, which amounts to a yearly loss of \$3,150,000 based on a realized profit of \$9.00 per case. Bacardi also presented

⁵ On this score Premier takes the position that Bacardi is not a party to the 1999 distribution agreement between Premier and MHW, which contains a merger clause whose effect is to supersede any and all oral and written agreements "between the parties hereto." According to Premier, because the parties to that agreement are Premier and MHW and because Bacardi is not a party to that agreement, that agreement could not supersede the 1998 investment agreement between Premier and Bacardi. On the other hand, Bacardi claims that MHW executed the 1999 distribution agreement with Premier as Bacardi's agent with full authority to do so from Bacardi and with Premier's knowledge of such agency. As such, Bacardi claims that the merger clause contained in said agreement supersedes any prior agreements between Premier and Bacardi, including the 1998 investment plan. Premier relies on the agreement's provision which makes MHW "an independent contractor and not the agent of B-M USA [Bacardi] with respect to its duties and responsibilities under this Agreement" and on the language that "MHW may not in manner bind B-M USA [Bacardi] unless it is expressly authorized to do so in writing by B-M USA [Bacardi]." In the court's view, an answer to this issue becomes unnecessary in light of the fact that the principles of law governing modification of contracts by subsequent conduct cited in the text of this Order apply equally to modifications of contracts between the same parties. (See cases cited in text).

testimony tending to show that certain Bacardi accounts are "hemorrhaging" money and that Premier's on premises sales are inadequate. Bacardi has admitted, however, that its decision to terminate Premier is not for cause. Therefore, Bacardi should not have legitimate occasion to complain that should injunctive relief be granted, it will be forced to continue a business relationship with a distributor unworthy of trust. *Cf. Semmes Motors, Inc. v. Ford Motor Company*, 429 F.2d at 1205.

It is apparent, therefore, that although Bacardi may not be achieving optimal sales through Premier, Bacardi's existence is not threatened by the continuation of Premier's distributorship until a decision on the merits can be made herein. Further, Premier's distributorship is not exclusive, and therefore, Bacardi will not be prevented from doing additional business with other distributors.

As the court wrote in *Semmes Motors, Inc. v. Ford Motor Company*:

Consideration of the propriety of the temporary injunction must begin by recognizing that here . . . "the balance of the hardships tips decidedly toward plaintiff." (Citation omitted) . . . [A] "judgment for damages acquired years after his franchise has been taken away and his business obliterated is small consolation to one who, as here, has had a Ford franchise" for many years. (Citation omitted) As against this, the hardship to Ford in continuing the Semmes dealership *pendente lite* was relatively small. Ford makes no claim that Semmes has not adequately represented it in the lucrative Scarsdale market, and the record indicates that the submission of false claims has been greatly reduced, if not eliminated. . . .

Semmes Motors, Inc. v. Ford Motor Company, 429 F.2d 1197, at 1205.

In sum, as in *Semmes*, the balance of the hardships tips in favor of Premier inasmuch as the threatened injury to Premier outweighs any possible harm to Bacardi.

**WHETHER THE ISSUANCE OF TEMPORARY INJUNCTIVE RELIEF
WILL DISSERVE THE PUBLIC INTEREST**

It is rudimentary that the public has an interest in increased competition and the resulting lower prices which should result from the business of additional Bacardi distributorships in the New York metropolitan area. Further, Premier offered testimony tending to establish that it would have to lay off many employees if it is terminated as a Bacardi distributor, and that ultimately all employees would lose their jobs should Premier go out of business following termination of the Bacardi distributorship. Premier is a 50 year old family business employing 350 workers, many of whom have worked for the company for 15 to 35 years. Particularly, during dubious economic times such as the nation is currently experiencing, the loss of 350 jobs in Metropolitan New York is at the very least not a positive factor in economic recovery. See St. Petersburg Harbourview Hotel Corp. v. First Union Nat'l Bank of Fla., 168 B.R. 770, 773 (M.D. Fla. 1994) (the public interest would clearly be served . . . by saving an on-going economic enterprise by preserving going concern value by saving numerous jobs and also an on-going commercial relationship . . . with its several vendors"). Therefore, the granting of injunctive relief pending full resolution of this case on the merits will not disserve the public interest.

INJUNCTION BOND

Based upon all the evidence adduced at the hearings, including the testimony offered by Bacardi concerning the monetary losses it has suffered and will continue to suffer if it must keep Premier as a distributor (albeit non-exclusive) of its products in the New York metropolitan area, the court finds that an injunction bond in the sum of \$1,500,000 is a sufficient bond to be posted by Premier, conditioned for the payment of costs and damages sustained by Bacardi if Bacardi is

wrongfully enjoined.

It is hereby **ORDERED AND ADJUDGED** as follows:

1. GALLO WINE DISTRIBUTORS, LLC d/b/a PREMIER WINES & SPIRITS' (Premier)

Motion for Temporary Injunction is granted.

2. Pending completion of the trial on the merits and a decision thereon, BACARDI U.S.A., INC. (Bacardi), its agents, attorneys, successors and assigns and all those acting in concert with it, including MHW, LTD., are hereby enjoined from terminating GALLO WINE DISTRIBUTORS, LLC d/b/a PREMIER WINES & SPIRITS as a distributor of Bacardi products in the New York metropolitan area.

3. This order shall become effective upon notice to Bacardi that Premier has filed with the Clerk of this Court a bond of an approved surety in the amount of \$1,500,000.

4. A copy of this order shall be served upon Bacardi forthwith.

5. On the court's own motion, this cause is hereby expedited and advanced in this court's trial docket.

DONE AND ORDERED in Chambers at Miami Dade County, Florida, this 28th day of May, 2002, at 11:00 a.m.


MARGARITA ESQUIROZO
Circuit Judge

Copies furnished to:

Chester T. Kantin, Esq.
Robert Josefsberg, Esq.
Marty Steinberg, Esq.