At a Term of the Supreme Court held in and for the County of Wayne at the Hall of Justice in Lyons, New York on the 21st day of July 2010.

Present: Honorable Daniel G. Barrett
Acting Supreme Court Justice

SUPREME COURT STATE OF NEW YORK
COUNTY OF WAYNE

U.S. GROWN LLC, CLIFFORD J. DEMAY, DIANE MCKEON AND RANDY WILLIAMSON,

Plaintiffs

-vs-

HERMAN FRANCK, ESQ.,

Defendant.

DECISION
Index No. 70193
2010

HERMAN FRANCK, ESQ.,

Cross-Plaintiff,

U.S. GROWN, CLIFFORD J. DEMAY, DIANE MCKEON AND RANDY WILLIAMSON,

Cross-Defendants.

Appearances - Plaintiff - John W. Gormley, Esq.
Appearances - Defendant - pro se

The Plaintiffs have moved for summary judgment. The essence of this application is a request for a judicial determination whether a certain option agreement and its subsequent modification is void and a request for a permanent injunction prohibiting the defendant from exercising it,

pursuant to the rule against perpetuities.

The Defendant opposes the Plaintiffs requested relief and seeks partial summary judgment on his Cross-Complaint, First Cause of Action for Breach of the Written Co Management Agreement, Liability issues only.

The parties are in agreement that the Management and Operations Agreement for U.S. Grown LLC and the Modification Agreement attached to the Plaintiffs moving papers are accurate copies of the original documents and were signed by the parties to this action. It is also agreed that Defendant drafted these documents. (Paragraph 6 A i,ii)

The Agreement and its modification provided that the Plaintiff DeMay gave the Defendant an option to purchase an interest in the company to come from DeMay's membership interest.

Paragraph 5 H states that the option is granted perpetually, and has no termination date.

Paragraph 5 L provides, in part, that the option agreement is not transferable except to related heirs of Defendant.

In the Agreement the parties agree to first seek mediation prior to commencing an action. The parties acknowledged that mediation would be futile relative to the issues at bar, and the parties therefore waived the issue of mediation.

The rule against perpetuities has been the cause of many sleepless nights for students taking the bar exam. It was a creature of case law that evolved in England during the 1600s. Its function was to ensure the productive use and development of productive use and development by

simplifying ownership, facilitating the exchange thereof and freeing property from unknown impediments to alien ability. Symphony Space, Inc., v. Pergola Properties, Inc., 88 N.Y. 466 [1966].

The Rule Against Perpetuities is codified in Section 9-1.1 of the Estates Powers and Trusts Law. The law has two parts, one dealing with restraints on the ability to convey real property and the second part deals with remote vesting.

Remote Vesting

Section 9-1.1(b) provides that no estate in property is valid unless it vests no later than 21 years after one or more lives in being at the creation of the estate and any period of gestation involved (Symphony Space, Inc., supra). The prohibition of Section 9-1.1(b) is non-waivable. Metropolitan Transportation Authority v. Bruken Realty Corp., 67 N.Y. 2d02 156 [1986]. It is "rigid" and "invalidates" any interest that may vest within the statutory time period even if the consequences are capricious. Wildenstein & Co., Inc. V. Wallis, 79 N.Y. 2d 641, 647-48 [1992]. The assessment of whether an interest may vest within the statutory period must be based on the circumstances that existed at the time of its granting, not on whether the interest in fact vested within the permitted time. Metropolitan Transit Authority, supra.

Paragraph 5 H of the Agreement clearly states that the option at bar is granted perpetually and has no termination date. Courts have consistently held that an option containing no limitation as in this case demonstrates the parties' intention that it lasts indefinitely. Symphony Space, supra.

Paragraph 5 L provides that the option agreement is transferable to

related heirs of the Defendant.

The inclusion of terms such as "heirs" indicate that the parties intend the option to be indefinite. Options that contain such terms as heirs, successors and assigns violate the Rule Against Perpetuities. For example, in Buffalo Seminary v. McCarthy, 86 A.D. 435 [1982], aff'd 58 N.Y. 2d 867 [1983] the Appellate Division Fourth Department, held that the inclusion of the language making an option binding on "successors, assigns and executors" indicated the parties' intention that the option was to "extend in duration for an indefinite period of time" and thereby created an interest that could vest beyond the permissible period contained in E.P.T.L. Section 9-1.1(b). This was affirmed by the Court of Appeals.

The Defendant places great reliance on Izzo v. Brooks, 106 Misc. 2d 743 [1980]. The Fourth Department refutes this case in Buffalo Seminary, supra. At footnote 6 on page 442.

> The Court in Izzo v. Brooks, supra, while stating that an option which creates a contingent equitable interest would be within the rule against remove vesting, interpreted the preemptive option there as creating a vested interest subject to defeasance, thereby avoiding application of the statute. Options are generally regarded as creating contingent equitable interest and we find no support for the court's construction...

It is the decision of this Court that:

1. The option contained in the Management and Operations Agreement for U.S. Grown, LLC and the Modification Agreement is

void as it violates the Rule Against Perpetuities.

2. The Court grants a permanent injunction prohibiting the Defendant from exercising this option.

3. The Defendant's application for summary judgment on the issue of liability regarding the breach of written company management agreement is denied, as there do exist issues of fact regarding the same.

Counsel for Plaintiffs', Mr. Gormley, prepare the Order based on this decision.

Dated: August 10, 2010
Lyons, New York

Daniel G. Barrett
Acting Supreme Court Justice