IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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CURTIS P. JAHN and CAPITOL WAREHOUSING CORPORATION,

Plaintiffs,

v.

1-800-FLOWERS.COM, INC., FRESH INTELLECTUAL PROPERTIES, INC. and 800-FLOWERS, INC.,

Defendants.

OPINION AND ORDER

00-C-446-C

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This is a civil action for monetary and declaratory relief in which plaintiffs Curtis P. Jahn and Capitol Warehousing Corporation allege that defendants 1-800-FLOWERS.COM, Inc., Fresh Intellectual Properties, Inc. and 800-FLOWERS, Inc. breached a contract with plaintiffs by failing to pay the full amount of royalties guaranteed by the contract, provide audits of sales records and allow plaintiffs full access to relevant sales records. Defendants moved for summary judgment on several grounds, contending that (1) the royalty provision is unenforceable under federal law; (2) defendants paid plaintiffs royalties and provided audit reports and access to records in compliance with the contract; and (3) plaintiffs' claims

are barred by the doctrine of laches. In an opinion and order entered on July 23, 2001, I concluded that the royalty clause of the contract was unenforceable because it requires payment for an act prohibited by 47 C.F.R. § 52.107 and I granted defendants' motion for summary judgment. Because resolution of this issue in favor of defendant was dispositive of the case, I did not consider defendants' other grounds for summary judgment.

Plaintiffs appealed and the Court of Appeals for the Seventh Circuit reversed. See Jahn v. 1-800-FLOWERS.COM, Inc., 284 F.3d 807 (7th Cir. 2002). The court concluded that the parties' contract was not subject to § 52.107(a)'s prohibition on the sale of numbers because the parties entered into their contract before 1997, the date the regulation became effective. The court also held that there was no rule against perpetual royalties and remanded the case for consideration of defendants' other arguments.

Having now considered defendants' remaining grounds for summary judgment, I will grant defendants' motion in part and deny it in part. Because plaintiffs have failed to show that defendants 1-800-FLOWERS.COM and Fresh Intellectual Properties can be held liable under the amended agreement, these defendants will be dismissed from the action. However, I conclude that there are genuine issues of material fact with respect to plaintiffs' claims that defendant 800-FLOWERS breached the amended agreement by excluding service charges and wire services fees from the royalty calculation. Defendants' motion will be granted with respect to all other claims with the exception of plaintiffs' claim that defendant

800-FLOWERS violated the agreement by deducting wire service fees even when no wire service was involved in the transaction. On that claim, I will enter summary judgment in favor of plaintiffs on the court's own motion.

Finally, I conclude as a matter of law that Texas law provides the applicable statute of limitations, which is four years. Therefore, any breaches that may have occurred before July 18, 1996, are time barred. I also conclude as a matter of law that the doctrine of laches does not bar plaintiffs' claims arising within the limitations period.

In granting partial summary judgment in favor of defendants, I disagree with plaintiffs' contention that "defendants should not be allowed to move for partial summary judgment," Plt.'s Br., dkt. #85, at 18, and that defendants' motion must be "all or nothing." Plt.'s Supp. Br., dkt. #92, at 1. Nothing in Fed. R. Civ. P. 56 prohibits granting partial summary judgment. See Fed. R. Civ. P. 56 (b) (authorizing defendant to move "for summary judgment in the party's favor as to all *or any part thereof*") (emphasis added); see also Fed. R. Civ. P. 56(d) (describing procedures to be followed when the case is "not *fully* adjudicated on [the] motion") (emphasis added). It makes no difference that defendants failed to file a cross-appeal of the issues on which they now seek partial summary judgment. A party does not have to file a cross-appeal when he or she is not aggrieved by the judgment; in fact, the court of appeals disapproves of such filings. Jones Motor Co. v. Holtkamp, Liese, Beckemeier & Childress, P.C., 197 F.3d 1190, 1191 (7th Cir. 1999).

All of the arguments defendants have raised were presented in their original motion for summary judgment. Failing to address those issues now would require a trial on issues for which no reasonable jury could find in plaintiffs' favor and with respect to which defendants would undoubtedly move for judgment as a matter of law at trial.

Before setting forth the undisputed facts, a word is required regarding their source. When defendants first moved for summary judgment, each side submitted proposed findings of fact and responses to the other side's proposed findings. After the case was decided, appealed and remanded, I issued an order permitting the parties to submit short, supplemental briefs. In addition to their supplemental brief, plaintiffs submitted "additional proposed findings of fact." In response, defendants have filed a motion to strike plaintiffs' additional proposed findings.

Defendants' motion will be granted. The time for proposing facts has long since passed. The parties were not given leave by the court to submit additional findings. Plaintiffs have provided no explanation for the submission and they have not indicated why they did not proposed these facts during the initial summary judgment proceedings. Plaintiffs' additional proposed findings of fact will be stricken.

From the parties' proposed findings of fact and the record, I find that the following facts are material and undisputed. (I note that many of the facts are taken from the July 23, 2001 opinion and order. The court of appeals did not indicate that it disagreed with any of

the facts in that opinion and the parties have not suggested they have any dispute about the facts treated as undisputed in the July 23 opinion and order.)

UNDISPUTED FACTS

A. Parties

Plaintiff Capitol Warehousing Corporation is a warehousing and trucking business based in Windsor, Wisconsin. Plaintiff Curtis Jahn founded Capitol Warehousing in 1978 and is Capitol Warehousing's president, chief executive officer and sole shareholder.

Defendants 800-FLOWERS, Inc. and Fresh Intellectual Properties, Inc. are separately incorporated subsidiaries of defendant 1-800-FLOWERS.COM, Inc. Defendant 800-FLOWERS, Inc. is a floral and gift delivery service that is incorporated in New York. Defendant Fresh Intellectual Properties holds the intellectual properties of the other companies, including the trademark "1-800-FLOWERS."

B. Assignment of the FLOWERS Number to Jahn

In 1976, AT&T assigned the telephone number 1-800-356-9377 randomly to Madison Truck Brokers, a trucking brokerage company owned and operated by plaintiff Jahn. The telephone keypad letters associated with the last seven digits of that number spell out "FLOWERS." Madison Truck Brokers was not engaged in any floral-related business

and plaintiff Jahn did not request that particular number. After Jahn formed plaintiff Capitol Warehousing, he transferred the FLOWERS number to that company. Capitol Warehousing continued to use the FLOWERS number in the operation of its warehousing and trucking business.

C. The Creation of 800-FLOWERS

In the early 1980s, William Alexander developed the concept of using the FLOWERS number for a floral-delivery business. Granville Semmes and David Snow approached plaintiffs with the idea of using the FLOWERS number to take floral orders over the phone in approximately 1981. Plaintiff Jahn, Semmes and Snow did a trial experiment in 1982 and then Jahn asked Alexander to join them. Jahn formed 800-FLOWERS, Inc. (Wis.) with the intention of issuing stock to investors. (800-FLOWERS, Inc. (Wis.) is not the same corporation as defendant 800-FLOWERS, Inc., a New York corporation.)

D. The 1982 Initial Agreement and Transfer of the FLOWERS Number

On May 20, 1982, on behalf of plaintiff Capitol Warehousing, plaintiff Jahn executed an "Agreement to Release Telephone Number," transferring the FLOWERS number to 800-FLOWERS, Inc. (Wis.) and "releasing any claim to the use of this telephone number now or at any future date." Jahn controlled 800-FLOWERS (Wis.) until late September or early

October 1982, when stock was issued.

On October 2, 1982, plaintiffs entered into an agreement with 800-FLOWERS, Inc. (Wis.) providing for, among other things, the payment of royalties to plaintiffs. Under the agreement, Jahn received a defined, quarterly royalty on 800-FLOWERS, Inc. (Wis.)'s future income in exchange for the transfer and use of the FLOWERS number. Texas-based investors James Poage and John Davis became involved at this point. They agreed to finance litigation that the company was involved in at the time in exchange for an option to enter into a joint venture with 800-FLOWERS, Inc. and receive a percentage of the profits.

E. The 1986 Amended Agreement

In 1984, 800-FLOWERS, Inc. (Wis.) was dissolved and its assets were transferred to 800-FLOWERS, Inc. (Texas). 800-FLOWERS, Inc. (Texas) continued to struggle financially after Poage and Davis took over the company and moved it to Texas. In a 1985 letter to plaintiff Jahn, 800-FLOWERS' new president wrote that "cash is an extremely tight commodity . . . [and a]s a result we have reduced the organization by 30%." By 1986, the company was in "desperate straits" financially.

In an effort to save the company, James McCann, a successful florist based in New York, proposed that Poage and he acquire a controlling interest in 800-FLOWERS, Inc. (Texas), with McCann managing the company's operations. McCann understood that the

broad nature of plaintiff Jahn's royalty under the initial agreement had been an impediment to previous efforts to sell the company. In return for an additional investment in the company, McCann and Poage wanted Jahn's royalty narrowed and more clearly defined and McCann's existing businesses excluded from the royalty.

In order to facilitate McCann's acquisition of the company, Poage was charged with negotiating a new royalty agreement with plaintiff Jahn. On October 10, 1986, Jahn and his attorney, A. J. Griffin, III, met with Poage in Madison, Wisconsin, at which time Poage presented them with a draft of the amended agreement. Jahn and Griffin read the amended agreement and Jahn signed it in Griffin's presence. The amended agreement narrowed the sources of revenue to which Jahn's royalty would apply. The amended agreement states:

> WHEREAS, [plaintiffs] have heretofore transferred and assigned to MADISON VENTURE, a joint venture comprised of 800 Flowers, Inc., a Wisconsin corporation, and DAVIS POAGE VENTURE, INC., a Texas corporation, which subsequently assigned their entire right, title and interest in and to a certain telephone number described as U.S. WATS Line Number 1-800-356-9377, the final seven digits of which correspond with letters of the alphabet depicted on telephone dials and push-buttons to spell the word "Flowers" (said U.S. WATS Line number being hereinafter referred to as the "Phone Number");
>
> WHEREAS, all of the right, title and interest of said MADISON VENTURE in and to the Phone Number was subsequently and eventually acquired by the Corporation [earlier defined as "800-FLOWERS, Inc. (Texas)]; and
>
> WHEREAS, the parties hereto desire to amend and restate in its entirety that certain Agreement dated October 2, 1982, executed by and among Jahn, Capitol and the Corporation (hereinafter referred to as the "Prior Agreement");

NOW, THEREFORE, in consideration of the foregoing premises and the mutual covenants and agreements of the parties hereto, and other goods and valuable consideration, the receipts and sufficiency of which are hereby acknowledged, Jahn, Capitol and the Corporation hereby amend and restate the Prior Agreement in its entirety as follows:

1. Royalty. The Corporation shall pay to Jahn, his heirs, executors, personal representatives and assigns a perpetual royalty equal to one percent (1%) of Net Sales (as hereinafter defined). As used herein, the term "Net Sales" shall mean the sum of (i) gross receipts during a calendar quarter derived exclusively from sales of floral products, accessories and related items through orders placed by the purchasers thereof over the Phone Number, less (ii) payments made to florists providing point of destination and delivery services with respect to such sales of floral products, accessories and related items.

2. Payments, Reports and Inspections.

. . . .

The Corporation, at its expense, shall engage the services of a certified public accounting firm to perform an annual audit of its sales records and shall provide a copy of said audit report to Jahn promptly after its receipt by the Corporation. Jahn or a representative appointed by Jahn and designated in writing to the Corporation shall be permitted full access to the books and sales records of the Corporation, pertaining to sales derived exclusively through the use of the Phone Number, at a reasonable time during normal business hours for the purpose of inspection and verification of the accuracy of royalty payments due to Jahn hereunder.

. . . .

4. Miscellaneous

. . . .

(f) Governing Law. This Agreement shall be governed by and interpreted, construed and enforced in accordance with the laws of the State of Texas."

On June 21, 1996, defendant 1-800-FLOWERS.COM, Inc. (then known as 1-800-

FLOWERS, Inc.) assumed all the obligations of 800-FLOWERS, Inc. (Texas). On July 1, 1996, defendant 800-FLOWERS, Inc. (New York) assumed all the obligations of 800-FLOWERS, Inc. (Texas).

F. Processing an Order and Allocating Fees by Defendant 800-FLOWERS

Generally, after a customer places an order over the FLOWERS number, defendant 800-FLOWERS selects a florist in the area in which the product will be delivered to fulfill the order. 800-FLOWERS contacts the florist to place the order and the florist then contacts a wire service, such as AFS, FTD or Teleflora, informing the service that it has received an order from 800-FLOWERS.

Defendant 800-FLOWERS charges the full amount of the sale to the customer's credit card, including sales tax and a service charge of $8.99. The service charge is for taking, placing and guaranteeing the order. It shows up as a separate entry on the receipt.

At the end of each reporting period, defendant 800-FLOWERS pays the wire service 80% of the purchase price for each order, excluding any sales tax or service charge. The wire service then forwards 93% of the payment it receives to the fulfilling florist and retains 7% for clearing the order.

Defendant 800-FLOWERS has agreements with at least some of the wire services, in which the wire service will give rebates to 800-FLOWERS based on the volume of orders

that 800-FLOWERS processes for an individual florist This amount is calculated after 800-FLOWERS pays a wire service 80% of the purchase price. The wire service then pays the rebate back to 800-FLOWERS. The agreement with AFS provides that 800-FLOWERS will receive a rebate of $5.00 an order for the first 50 orders, $4.00 an order for the second 50 orders and $3.10 for all orders over 100. The agreement with Telefolora provides a $3.00 rebate for each order regardless of volume. Defendant 800-FLOWERS also has an agreement with FTD, which pays a rebate of 7% of the merchandise value up to $5.00 an order and $10,000 a month. The rebates are allocated to defendant 1-800-FLOWERS.COM.

For some orders, no wire service is used. Rather, some florists receive payment directly from 800-FLOWERS rather than through a wire service. In these cases, 800-FLOWERS sends the florist an amount less than 80% and 800-FLOWERS keeps the rest. (The evidence is conflicting regarding exactly what percentage 800-FLOWERS pays to the florist directly, with figures ranging from 71%-75%.) When florists use 800-FLOWERS' software system to receive orders, they must pay back to defendant 800-FLOWERS 2% of the face value of the order after they receive payment from defendant 800-FLOWERS.

G. Royalty Calculation under the Amended Agreement

The basic method that defendant 800-FLOWERS has used in calculating plaintiffs'

royalties has remained relatively consistent since 1986, although 800-FLOWERS now relies less on estimates and more on actual numbers. In determining the "gross receipts" under the amended agreement, defendant 800-FLOWERS does not include the $8.99 service charge or sales tax. Defendant 800-FLOWERS also does not include, chargebacks, voids, credits or replacements. Defendant 800-FLOWERS includes gift certificates when they are purchased but not when they are redeemed.

Chargebacks are instances in which a customer purchases merchandise from defendant 800-FLOWERS using a credit card but later instructs the credit card company not to pay for the purchase. Voids occur when an 800-FLOWERS operator processes an order but later terminates or reprocesses it because of an error or a customer's change of mind. A credit, or refund, occurs when defendant 800-FLOWERS reimburses the customer after the purchase, usually because the customer cancels the order or is dissatisfied with the purchase. Replacements occur when defendant 800-FLOWERS replaces at no additional charge a product with which a customer is dissatisfied.

In determining which orders have been placed "over the phone number," defendant 800-FLOWERS includes only those orders placed by calling the FLOWERS number. In addition to the FLOWERS number (800-356-9377), defendants have been assigned the number 800-350-9377 in order to retrieve misdials that are intended for 800-FLOWERS. Also, defendants use the numbers 800-FLORIST, 800-BASKETS, 800-GOODIES and 800-

CANDIES for corporate sales. They also use the numbers, 1-800-FLOWER2, 1-888-FLOWERS, 1-800-LASFLORES and 1-800-LASFLORITA. Defendants include none of the orders placed over these other phone numbers in the royalty calculation. Also, defendants do not include orders placed over the internet at the 1-800-FLOWERS.COM website.

In making deductions for "payments made to florists," defendant 800-FLOWERS subtracts 80% of the price of the product.

Plaintiff Jahn did not know until August 1999 about many of the deductions taken by defendant 800-FLOWERS in making the royalty calculation.

H. Events After 1986

After plaintiffs entered into the amended agreement in 1986, plaintiff Jahn did not investigate the correctness of defendant 800-FLOWERS' royalty calculation because he trusted McCann and Poage. A flood in defendant 800-FLOWERS' offices in the late 1980s destroyed any notes and prior drafts made during negotiations of the amended agreement, as well as any records of 800-FLOWERS' royalty calculations and communications with plaintiff Jahn during the years immediately following the execution of that agreement.

In 1990, plaintiff Jahn began having suspicions that the royalty was not being calculated properly. In 1991 and 1992, plaintiff Jahn discussed the royalty calculation with Glenn Reed. Reed was the comptroller for defendant 800-FLOWERS from September 1991

until 1996 and the person responsible for calculating plaintiffs' royalties. Plaintiff Jahn asked Reed how the royalty was being calculated and requested verification, but Reed did not provide any. Beginning in 1992, Jahn told his accountant, Bret Willoughby, that it did not appear that the royalty calculation was accurate. Reed's records from the early 1990s regarding the calculation of plaintiffs' royalties were later destroyed pursuant to defendant 800-FLOWERS' document retention policy.

In September 1993, plaintiff Jahn sent a letter to McCann requesting a report on the derivation of the royalty calculation. Soon after, Jahn had a meeting with McCann but neither Jahn nor McCann can remember whether they discussed the royalty calculation. An October 1993 letter from McCann to Jahn does not address Jahn's concerns. Jahn never received a report from McCann.

Beginning in 1993, plaintiffs received annual reports from defendant 800-FLOWERS' parent company that described the results of audits of the financial statements of 800-FLOWERS. Plaintiff Jahn became more concerned about the royalty calculation after he read an annual report in February 1996, because he believed the royalty payments "did not come close" to what the amended agreement provided. Jahn again asked Reed for supporting documentation of the royalty in September 1996 and again Reed did not provide the documents.

Plaintiff Jahn also complained to William Shea that he was not receiving supporting

documentation for the royalty calculation. Shea is the chief financial officer, senior vice president and treasurer of 1-800-FLOWERS.COM, Inc. and treasurer of defendants 800-FLOWERS and Fresh Intellectual Properties. Plaintiff Jahn sent another letter to McCann in August 1997, again asking for a report on the royalty calculation. He explained that he had already asked Reed and Shea for the information but they had not provided it.

Shea sent a letter to plaintiff Jahn in September 1997 with a quarterly computation of the royalty and apologizing for the delay in providing Jahn with this information. Thereafter, Jahn received a report quarterly. The report notes that discounts, gift certificates, credits and chargebacks were not included in the gross receipts, but it did not indicate that the service charges or rebates were deducted. Both Shea and Jahn believe they had a conversation about the report, but they do not specifically remember the content of that conversation.

Defendants have made financial decisions based on the amount of royalties it pays to plaintiffs. When defendant FLOWERS.COM made its initial public offering of stock disclosing the company's financial history to potential investors, it relied in part on what it believed were plaintiffs' royalties.

I. Audits

Before entering into the amended agreement, McCann agreed to perform a sales audit

so that plaintiff would be comfortable. Beginning in 1993, defendant 1-800-FLOWERS.COM hired an outside accounting firm, Ernst & Young, to perform a consolidated financial audit of itself and its subsidiaries, including defendant 800-FLOWERS. Sales records are among the items that are included in the audits. Plaintiff Jahn has been provided with a copy of the audit report every year since 1993, but the report did not provide the information necessary to determine whether the royalty calculation was performed accurately.

J. 1999 Examination of Records

In June 1999, Willoughby sent a letter to Shea, informing him that he would be coming to New York to inspect documents that substantiated the calculation of the royalty. Willoughby also included a list of the types of documents that he wanted to review. The request encompassed hundreds of thousands of pages of documents. Defendant 800-FLOWERS and plaintiff Jahn's attorney agreed to narrow the request to documents covering the years 1997 through 1999.

In August 1999, plaintiff Jahn and Willoughby went to defendant 800-FLOWERS' offices in New York to inspect its financial records regarding the royalty calculation. Defendants provided copies of royalty calculations going back three years, monthly sales summaries and documents regarding chargebacks. The royalty calculations were prepared

by defendant 800-FLOWERS "as if [it] was auditing them for royalty." Employees of defendant 800-FLOWERS "attempted to tie out each of the royalty calculations back to the financial statements."

Although plaintiff Jahn and Willoughby requested them, defendant 800-FLOWERS did not provide the company's telephone bills and logs or the contracts that defendants have with wire services regarding rebates. Defendants did not permit plaintiff Jahn and Willoughby to take any documents home with them, but they later sent plaintiffs copies of those documents.

Plaintiffs filed this action on July 18, 2000.

OPINION

A. Summary Judgment Standard

Summary judgment is appropriate when the evidence in the record shows that there is "no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). This standard is satisfied when the evidence demonstrates that no reasonable jury could render a verdict in favor of the non-moving party. Sanchez v. Henderson, 188 F.3d 740, 743 (7th Cir. 1999). When the non-moving party has the burden of proving an issue at trial, she has the burden of demonstrating the existence of a genuine issue of material fact so as to preclude summary judgment. Celotex

Corp. v. Catrett, 477 U.S. 317, 322 (1986). When considering whether summary judgment should be granted, the court views the evidence in the light most favorable to the non-moving party. Sample v. Aldi, Inc., 61 F.3d 544, 546 (7th Cir. 1995).

B. Choice of Law

When diversity of citizenship is the basis for subject matter jurisdiction, the district court looks to the law of the forum state to determine which state's substantive law should be applied. Klaxon Co. v. Stentor Electric Manufacturing Co., 313 U.S. 487 (1941); Fredrick v. Simmons Airlines, Inc., 144 F.3d 500 (7th Cir. 1998). In disputes concerning the interpretation of contracts, Wisconsin generally uses the "grouping of contacts" test to determine choice of law. State Farm Mutual Auto Insurance Co. v. Gillette, 2002 WI 31, ¶ 26, 251 Wis. 2d 561, 641 N.W.2d 662. Under this test, a court applies the law of the state with which the contract has the most significant relationship. Id.

However, in this case, the contract contains its own choice of law provision: "This Agreement shall be governed by, interpreted, construed and enforced in accordance with the laws of the State of Texas." Plaintiffs suggest that before applying Texas law, the court must determine whether there is a conflict between Texas law and Wisconsin law. They also suggest that because Texas has only a "tenuous interest" in this case, Wisconsin law "would be better suited to interpret this contract." Plt.'s Br., dkt. #55, at 19 n.4.

Plaintiffs are incorrect on both counts. Wisconsin does not require either that the state's law in the choice of law provision be different from Wisconsin law or that the other state have a significant relationship with the contract. Wisconsin courts respect the choice of law in the contract provided that "to do so [will not be] at the expense of important public policies of a state whose law would be applicable if the parties choice of law provision were disregarded." Bush v. National School Studios, Inc., 139 Wis. 2d 635, 407 N.W.2d 883, 886 (1987). The case on which plaintiffs rely, Diesel Service Co. v. Ambac International Corp., 961 F.2d 635 (7th Cir. 1992), was later overruled by Generac Corp. v. Caterpillar Inc., 172 F.3d 971 (7th Cir. 1999). Further, in Diesel Service, the court acknowledged the rule announced in Bush and did not create a new exception to applying a choice of law provision. Diesel Service, 961 F.2d at 637. Therefore, unless plaintiffs can show that applying Texas law will threaten important public policies of the state's law that would otherwise be applicable, I will respect the parties' choice of law as provided in the contract.

C. Statute of Limitations

Defendants raise affirmative defenses based on both the statute of limitations and the doctrine of laches. With regard to the statute of limitations, the parties disagree about the law that should be used to determine the limitations period. Plaintiffs believe that either Wisconsin's or New York's statute of limitations, which are both six years, should apply,

while defendants argue for the four-year statute of limitations under Texas law. Compare Stewart v. Stine, 80 S.W.3d 586, 592 (Tex. 2002) with Stalis v. Sugar Creek Stores, Inc., 744 N.Y.S. 2d 586, 587 (App. Div. 2002), and Yorcherer v. Farmers Insurance Exchange, 2002 WI 41, ¶ 16, 252 Wis. 2d 114, 643 N.W.2d 457. Although the dispute has many layers, the threshhold question is whether the choice of law provision in the contract should determine the controlling statute of limitations. Plaintiffs argue that it does not; defendants argue that it does.

In support of their position, plaintiffs cite several cases holding that the statute of limitations is generally not determined by a choice of law provision in a contract, at least when the provision does not state expressly that it covers that issue. Trustees of Operative Plasterers' and Cement Masons' Local Union Officers and Employees Pension Fund v. Journeymen Plasterers' Protective, 794 F.2d 1217, 1221 n.8 (7th Cir. 1986) (dicta); Federal Deposit Insurance Corp. v. Petersen, 770 F.2d 141, 142-43 (10th Cir. 1985); Des Brisay v. Goldfield Corp., 637 F.2d 680, 682 (9th Cir. 1981); Cessna Finance Corp. v. Brown, No. 88-C-3369, 1995 WL 307026, *1 (N.D. Ill May 17, 1995); Colonial Penn Life Insurance Co. v. Assured Enterprises, Ltd., 151 F.R.D. 91, 95 (N.D. Ill. 1993). The reasoning behind these decisions appears to be that the statute of limitations is an issue of "procedural" rather than "substantive" law and that choice of law provisions should not be interpreted to cover procedural law unless they do so expressly.

In response, defendants cite Wang Laboratories, Inc. v. Kagan, 990 F.2d 1126 (9th Cir. 1993), and Halmbrecht & Quist Venture Partners v. American Medical International, Inc., 46 Cal. Rptr. 2d 33 (Ct. App. 1995). In Wang, the court did not disagree with the "substantive" and "procedural" dichotomy identified in other cases, but it concluded that unless a choice of law provision contains *an exception* for the statute of limitations, it should be interpreted to include that issue. In Halmbrecht, the court concluded that an agreement providing that it "shall be governed by and construed in accordance with the laws of the State of Delaware" encompassed Delaware's statute of limitations because "the broad meaning of law" included both substance and procedure. None of the decisions cited by plaintiffs or defendants discuss Guaranty Trust Co. v. York, 326 U.S. 99 (1945), in which the Supreme Court held that statutes of limitations are "substantive," at least for the purpose of determining whether to apply state or federal law in a diversity suit. Although the Supreme Court has recognized that an issue that is "substantive" in one context may be "procedural" in another, Sun Oil Co. v. Wortman, 486 U.S. 717 (1988), the absence of any discussion of Guaranty Trust in these cases suggests that their reasoning may be incomplete.

I do not find any of these cases entirely persuasive. In my view, the issue is not whether a statute of limitations is "substantive" or "procedural," but more directly whether the terms of the choice of law provision encompass the statute of limitations. The parties have cited no Texas case law on this issue and I have discovered none in my own research.

(Texas law would control here because the issue is the scope of the choice of law provision and therefore it is a matter of contract interpretation.) The cases plaintiffs cite presume that a choice of law provision in a contract does not include the statute of limitations unless it is stated expressly. In Wang, the court came to the opposite conclusion; it presumed that the statute of limitations was included unless there was an express exception. (In Halmbrecht, the difficulty was of a different nature; in that case, the court resolved the issue by defining "law" without considering its context in the contract.) Whether or not the choice of law provision contains express language regarding the statute of limitations (or "procedural" law), if the only reasonable interpretation of the contract's plain language is that the statute of limitations is (or is not) included, then that is the interpretation the court must adopt. See National Union Fire Insurance Co. v. CBI Industries, Inc., 907 S.W.2d 517, 520 (Tex. 1995).

It is significant that the parties' contract provides that the agreement "shall be . . . *enforced* in accordance with the laws of the State of Texas." Terms in contracts are given their ordinary meaning unless the contract provides otherwise. Puckett v. United States Fire Insurance Co., 678 S.W.2d 936, 939-40 (Tex. 1984). "Enforce" means "to cause to take effect" or "to give effect." Webster's New International Dictionary 847 (2d ed. 1957). Thus, the provision may be read as stating that the agreement shall be given effect according to Texas law. Obviously, a statute of limitations is concerned with whether the contract will

be given effect or enforced; a court cannot enforce a claim for breach of contract if the statute of limitations has expired. I conclude therefore that the choice of law provision umambiguously includes the statute of limitations and that Texas's four-year limitations period applies.

The parties do not dispute that plaintiffs' cause of action for breach of contract accrued with each payment of royalties. Harrison v. Bass Enterprises Production Co., 888 S.W.2d 532, 537 (Tex. Ct. App. 1994). Plaintiffs filed this action on July 18, 2000. Therefore, under Texas law, plaintiffs are barred from asserting a breach of contract claim for any royalty payment made before July 18, 1996.

D. Laches

Defendants argue that plaintiffs' claims are barred by the doctrine of laches because plaintiffs waited 14 years to file a lawsuit. In their original summary judgment briefs, the parties assumed without argument that Texas law concerning the doctrine of laches should apply. However, in plaintiffs' supplemental brief, they cite only Wisconsin law on the laches issue. Defendants cite both Texas and Wisconsin law. Neither side explains why the choice of law provision in the contract would not mandate application of Texas laches law. I see no reason why the reasoning regarding the statute of limitations would not apply to the

doctrine of laches as well. Like the statute of limitations, the doctrine of laches affects the determination whether a contract will be enforced. Accordingly, I conclude that Texas law applies.

Because I have concluded that the Texas statute of limitations for breach of contract bars plaintiffs from recovering damages with respect to payments made more than four years before they commenced this action, I need decide only whether the doctrine of laches should bar plaintiffs from asserting claims accruing on or after July 19, 1996. Under Texas law, a claim is barred by laches if (1) there was an unreasonable delay by the other party in asserting legal or equitable rights; and (2) the party asserting laches made a good faith change in position to his detriment because of the delay. Brewer v. Nationsbank of Texas, N.A., 28 S.W.3d 801, 804 (Tex. Ct. App. 2000). In addition, when the statute of limitations has not yet expired on a claim, the doctrine of laches applies only if "allowing the action would work a grave injustice." Caldwell v. Barnes, 975 S.W.2d 535 (Tex. 1998). Either "extraordinary circumstances" or facts supporting a claim for estoppel must be present as well. Bluebonnet Savings Bank, F.S.B. v. Grayridge Apartment Homes, Inc., 907 S.W.2d 904, 912 (Tex. Ct. App. 1995).

Although defendants contend that they have been prejudiced, they do not argue that permitting plaintiffs to proceed will work a grave injustice, that there are extraordinary circumstances or that they have a claim for estoppel. Further, even assuming that there was

an unreasonable delay in commencing this action, I am not persuaded that to the extent that defendants have been prejudiced by plaintiffs' delay, they have satisfied the test for laches under Texas law.

The flood from the 1980s that destroyed many of defendants' documents was not a consequence of plaintiffs' delay in bringing the action. Even if plaintiffs had filed the action as soon as they became suspicious in 1990, those documents would have been unavailable. As to the loss of Reed's notes, defendants do not explain why these notes are necessary to defend against plaintiffs' claims, other than to allege that the notes would have shown that plaintiffs had sufficient knowledge to bring the action sooner and therefore would demonstrate plaintiffs' unreasonable delay. In essence, defendants are arguing that plaintiffs should be barred by laches because defendants have been prejudiced in proving that plaintiffs should be barred by laches. I cannot conclude that that is the type of "grave injustice" that satisfies the test for laches under Texas law. Similarly, defendants do not explain how they are prejudiced by the inability of Reed, Poage and McCann to remember certain conversations they had with plaintiff Jahn, except they allege that those conversations would show that plaintiff Jahn knew enough to bring his claim sooner.

The only other circumstance referred to by defendants is that they have made financial decisions based on their established method of calculating plaintiffs' royalties. However, to bar plaintiffs from asserting their claims because of reliance, defendants would

have to satisfy the elements of estoppel. Bluebonnet Savings Bank, 907 S.W.2d at 912. Defendants have made no such showing. I note also that to the extent defendants have been prejudiced, they are at least partially to blame. It is undisputed that plaintiff Jahn made several requests for verification of the royalty calculation, but defendants did not comply with these requests. It is therefore disingenuous for defendants to argue that they are being sandbagged by plaintiffs. I conclude as a matter of law that plaintiffs are not barred by the doctrine of laches for any claims arising within the statute of limitations period.

E. Proper Parties

Defendants contend that defendants 1-800-FLOWERS.COM and Fresh Intellectual Properties are not proper parties to this action and should be dismissed. They point out that the only parties to the amended agreement are plaintiffs and 800-FLOWERS, Inc. (Texas). Although it is undisputed that defendant 1-800-FLOWERS.COM (then known as 1-800-FLOWERS, Inc.) assumed all the obligations of 800-FLOWERS, Inc. (Texas), on June 21, 1996, it is also undisputed that on July 1, 1996, all the obligations of 800-FLOWERS, Inc. (Texas) were assumed by defendant 800-FLOWERS, Inc. (New York).

Plaintiffs contend that after July 1, 1996, *both* 1-800-FLOWERS.COM and 800-FLOWERS, Inc. (New York) shared responsibility for the obligations of 800-FLOWERS, Inc. (Texas), but the evidence they cite does not support this assertion. The July 1

document in which 800-FLOWERS, Inc. (New York) assumed the obligations of 800-FLOWERS, Inc. (Texas) states: "RESOLVED, that the Corporation [defined earlier as "800-FLOWERS, Inc., a New York corporation] assume all of the obligations originally of 800-FLOWERS, Inc., a Texas corporation and, thereafter, by 1-800-FLOWERS, Inc. as a result of the aforesaid merger." Dep. of James McCann, dkt. #46, Ex. 104, at F59. Under that provision, whatever obligations 1-800-FLOWERS, Inc. (now 1-800-FLOWERS.COM) assumed on June 21 were taken over by defendant 800-FLOWERS, Inc. (New York) on July 1. Therefore, defendant 1-800-FLOWERS.COM cannot be held liable on the basis of the July 1 document.

The only remaining basis on which to hold defendant 1-800-FLOWERS.COM liable would be as the parent company of defendant 800-FLOWERS. Citing Consumers Co-op of Walworth County v. Olsen, 142 Wis. 2d 465, 419 N.W.2d 211 (1988), plaintiffs argue that courts will not recognize a corporation as a separate entity when the reality of the corporation is not faithful to its technical form. However, plaintiffs do not develop this argument beyond a conclusory assertion and they cite to no evidence that would support it. "Arguments not developed in any meaningful way are waived." Central States, Southeast and Southwest Areas Pension Fund v. Midwest Motor Express, Inc., 181 F.3d 799, 808 (7th Cir. 1999).

With respect to defendant Fresh Intellectual Properties, plaintiffs have failed to

respond to defendants' argument that this company cannot be held liable under the amended agreement. Plaintiffs have failed to show that either defendant 1-800-FLOWERS.COM or defendant Fresh Intellectual Properties can be held liable under the amended agreement. Therefore, both of those defendants will be dismissed. (Because I am dismissing defendants 1-800-FLOWERS.COM and Fresh Intellectual Properties, I will refer to defendant 800-FLOWERS simply as "defendant" for the remainder of the opinion).

F. Breach of Contract

The parties do not appear to dispute the basic principles of contract interpretation that govern this action. The goal of contract construction is to ascertain and give effect to the parties' intent as expressed in the contract. Gulf Insurance Co. v. Burns Motors, Inc., 22 S.W.3d 417, 423 (Tex. 2000). When the language of a contract has "a definite or certain legal meaning" in the context of the contract as a whole and in light of the circumstances at the time the contract was executed, it is unambiguous and can be construed as a matter of law. National Union, 907 S.W.2d at 520. When a contract is unambiguous, extrinsic evidence may not be used to create an ambiguity. Id. The failure to include express language of the parties' intent does not create an ambiguity when there is only one reasonable interpretation. Columbia Gas Transmission Corp. v. New Ulm Gas, Ltd., 940 S.W.2d 587, 589 (Tex. 1996). However, if the language of the contract is subject to two or

more reasonable interpretations, it is ambiguous and a question of fact is created regarding the parties' intent. Id. If a contract is ambiguous, the fact finder may consider the parties' interpretation and consider extrinsic evidence to determine the meaning of the contract. Id. Whether a provision in a contract is ambiguous is question of law to be determined by the court. MCI Telecommunications Corp. v. Texas Utilities Electric Co., 995 S.W.2d 647, 650 (Tex. 1999).

The agreement provides that Jahn is to receive 1% of the "net sales" of 800-FLOWERS, Inc. The definition of "net sales" has two components. First, it must be determined what the sum is of the "gross receipts during a calendar quarter derived exclusively from sales of floral products, accessories and related items through orders placed by the purchasers thereof over the Phone Number." From the gross receipts are subtracted "payments made to florists providing point of destination and delivery services with respect to such sales of floral products, accessories and related items." The parties dispute both what should be included in the gross receipts as well as what should be deducted as part of the payments made to florists.

1. "Gross receipts"

a. Service charges

With every order placed, defendant charges the customer a service fee of $8.99 for

taking, placing and guaranteeing the order. The issue is whether the service fee is part of the "gross receipts." Defendant focuses on the part of the provision that refers to "sales of floral products, accessories and related items," pointing out that the service charge is none of these things. This is true, but the agreement does not limit royalty payments to sales of flowers and the like but to the gross receipts *derived* from those sales. Defendant contends that the service charge is "derived from the sale of services" rather than from floral products. Although that is one reasonable interpretation, another would be that the service charge is derived from the sale of floral products because it originates with and is dependent upon flower sales. It would be reasonable to argue that customers are placing orders for flowers, not services, and that there would be no "service" to provide if it were not for the sale of floral products. In that sense, the service fee is "derived" from the sale of flowers.

Defendant places great emphasis on the word "exclusively," arguing that it limits royalties to sales of floral products only. Again, this is not the only reasonable interpretation. The limitations of payment to gross receipts derived exclusively from floral products may mean only that royalties are limited to sales derived from floral products and not from a different type of product. It does not necessarily mean that royalties will be calculated only for sales derived *directly* from floral products rather than from all sales that originate with the sale of the floral product.

Because there are at least two reasonable interpretations of the meaning of "derived"

in this context, I conclude that this provision is ambiguous. Therefore, the issue whether service charges should be included in the "gross receipts" is a question of fact. Columbia Gas Transmission, 940 S.W.2d at 589. Both parties have presented extrinsic evidence on this issue. It will be for the jury to decide whether the parties intended to include service charges in the amended agreement.

b. Chargebacks, voids, credits, replacements, gift certificates and customer service inquiries

Plaintiffs' entire argument on this issue is contained in one sentence. They contend that chargebacks, credits, etc. are "the expense of doing business and [are] not a proper deduction from 'gross receipts.'" Plt.'s Br., dkt. #55, at 25. This argument is not useful in determining the correct interpretation of the contract.

The parties agree that the term "gross receipts" in the contract does not have a technical meaning. Using the dictionary, defendants offer a meaning of gross receipts as "the total received," which plaintiffs do not dispute. It is also undisputed that defendant does not ultimately receive any money for chargebacks, voids and credits. Therefore, the only reasonable interpretation of the contract is that chargebacks, voids and credits are not part of the gross receipts.

With respect to gift certificates, it is undisputed that plaintiffs receive royalty payments for gift certificates that are *purchased*. However, plaintiffs do not receive royalties

when a customer *redeems* a gift certificate. This is not a breach of the agreement. Defendant receives money only when a customer purchases a gift certificate, not when the certificate is redeemed. The contract does not entitle plaintiffs to receive double payment for one purchase. Similarly, replacements do not involve defendant's receipt of any money but occur when defendant replaces a product at no charge when a customer is dissatisfied. Finally, plaintiffs do not explain in their briefs or their proposed findings of fact what they mean by customer service inquiries or how they believe their royalty payments have been improperly reduced as a result of the way defendant classifies those inquiries. Thus, plaintiffs have failed to demonstrate that there is a genuine issue of material fact with respect to that issue. Defendants' motion for summary judgment will be granted with respect to chargebacks, voids, credits, replacements, gift certificates and customer service inquiries.

c. Sales tax

Plaintiffs have not developed their argument regarding sales tax. They contend only that because defendant include sales tax in its calculation of "cash receipts" in its own records, sales tax should also be included in the "gross receipts" under the contract.

Defendant's inclusion of sales tax in "cash receipts" in its own records has no bearing on the meaning of the agreement. Defendant does not profit from sales tax; the money goes to the state and is not part of the gross receipts. See City of Pearland v. Reliant Energy

Entex, 62 S.W.3d 253, 256 (Tex. Ct. App. 2001) (holding that "gross receipts" did not include sales tax because "[s]ales tax monies become state funds at the moment of collection, and [defendant] merely holds these funds in trust until they are remitted to the state"). Because plaintiffs' interpretation of gross receipts to include sales tax is not reasonable, summary judgment will be granted to defendants with respect to this issue.

2. "Over the phone number"

a. Internet sales

Defendant FLOWERS.COM maintains a website in which customers can order floral products over the internet. Plaintiffs contend that they should receive royalties for all orders placed over the FLOWERS.COM website. Plaintiffs argue in their brief that the contract "defines the number as both a name and a number" and that use of "defendants' website is almost identical to the use of telephone." Plt.'s Br., dkt. #55, at 26-27. However, plaintiffs do not identify what part of the contract equates the name 800-FLOWERS with the telephone number. My review of the agreement does not reveal any such treatment. Rather, the agreement provides for royalties for "orders placed . . . over the Phone Number." The Phone Number is described in the contract as "1-800-356-9377, the final seven digits of which correspond with the letters of the alphabet depicted on telephone dials and push-buttons to spell the word "Flowers.'" Simply saying in the contract that the telephone

number spells out the word "flowers" does not mean that the contract "defines the number as both a name and a number." The contract limits royalties to orders placed over the FLOWERS number; it does not extend royalties to any sale made in conjunction with the name 800-FLOWERS. Plaintiffs did not have an agreement with defendants regarding the right to use a name, only the right to use a telephone number. Although the public's perception may be that the name and number are closely related, the contract cannot be interpreted reasonably to grant plaintiffs royalties for internet sales.

Plaintiffs argue alternatively that even if failing to include internet sales in the royalty payments does not violate the express terms of the agreement, defendant violated its duty of good faith and fair dealing by not including those sales. According to plaintiffs, defendant is acting in bad faith by encouraging its customers to place orders over the internet rather than over the telephone and then refusing to include those sales in the royalty computation.

The parties disagree whether Texas law recognizes a duty of good faith in this situation, and if not, whether Wisconsin or New York law should apply to this issue instead of Texas law because the duty of good faith is an important public policy. This dispute need not be resolved, however, because even if the duty of good faith does apply, no reasonable jury could conclude that defendant has violated it by not including internet sales in plaintiffs' royalties.

Good faith is generally defined as "honesty in fact" in the conduct at issue. David

Auction House, Inc. v. Ontario National Bank, 609 N.Y.S. 2d 707 (App. Div. 1994); Tex. Bus. & Com. Code § 1.20(19); Wis. Stat. § 401.201(19). There is nothing dishonest or unfair about trying to promote internet sales. Perhaps in 1986, plaintiffs could not have foreseen the future rise of the internet; perhaps they would have tried to strike a different deal if they had. However, defendant is not obligated to alter the terms of the agreement as circumstances change, to insure that plaintiffs receive the maximum royalty amount. Even if the parties had entered into the agreement after the internet became prominent, it does not follow that defendant would have agreed to include internet sales in the royalty calculation. The agreement is tied specifically to the telephone number because it is the number that plaintiffs provided to defendant. The agreement does not contemplate that plaintiffs will receive royalties for every sale that defendant generates regardless of the forum in which it generates them. If defendant had decided to stop using the FLOWERS number because it believed another number would be more profitable or if it decided to stop national telephone sales altogether and focus only on local franchises, it would not be violating the express terms of the contract or the implied covenant of good faith. Similarly, the duty of good faith does not require defendant to expand the royalty agreement as the telephone number becomes less useful to it. Defendants' motion for summary judgment will be granted with respect to claims regarding internet sales.

b. Calls to other numbers

Plaintiffs contend that they are entitled to royalties for sales from several other telephone numbers that defendant uses, such as 800-FLORIST, either under the contract itself or under the implied covenant of good faith and fair dealing.

These arguments fail for reasons similar to those that doomed plaintiffs' internet sales claim. The agreement provides that plaintiffs will receive royalties for orders placed over the FLOWERS number, not for orders placed over similar numbers or to any other telephone number that defendant uses. Neither the contract nor the duty of good faith requires defendant to pay royalties for numbers other than the FLOWERS number. Defendants' motion for summary judgment will be granted on this issue as well.

3. "Payments made to florists"

a. Wire services

In most cases, when defendant receives payment for orders made over the FLOWERS number, it sends a percentage of that payment to a wire service, such as Teleflora or FTD. In turn, the wire service keeps a percentage of the payment for processing and then gives the remaining amount to the fulfilling florist. Defendant deducts from the royalty calculation the amount that it sends to the wire service, usually 80% of the price of the product. In turn, the wire service sends the florist something less than the 80% it receives from

defendant. Plaintiffs argue that defendant's practice violates the contract because the contract permits deductions only for "payments made to florists" and the amount kept by the wire service is not a payment made to a florist. Defendant disagrees. It asserts that the entire amount sent to wire service *is* a payment to a florist and that the amount deducted by the wire service is a fee charged *to the florist*, not to 800-FLOWERS. In other words, in defendant's view, it is as if the wire service sent the entire 80% to the florist and then billed the florist a fee.

The evidence on this issue is scant. Defendant cites the rules and regulations of Teleflora, which provide that: "A clearinghouse fee of 7.0% of the gross amount of each incoming order is charged to the delivering florist." Aff. of William Shea, dkt. #40, Ex. D. However, defendant's contention is undermined by the undisputed fact that defendant receives "rebates" from at least some of the wire services for each order placed with a florist through the wire service. The ordinary meaning of rebate is a "deduction" or "payment back." Webster's New International Dictionary 2074 (2d ed. 1957). For what is 800-FLOWERS receiving a "payment back" if the wire service is not charging 800-FLOWERS a fee? Defendant has not presented any evidence that the wire services provide any other product or service to 800-FLOWERS for which they would provide a rebate. I conclude that plaintiffs have raised a genuine issue of material fact with respect to their claim that defendant breached the agreement by deducting from the royalty calculation the amount

retained by the wire service. If the wire service fees are fees charged to defendant in whole or in part, then they cannot be considered a payment that defendant makes to the florist and should not be deducted from the royalty calculation.

Alternatively, plaintiffs contend that if they are not entitled to have the wire service fees included in their royalty calculation, then at least the rebates that defendant receives from the wire services should be included. Because the need to resolve this issue is contingent on whether the wire services fees are proper reductions, I will reserve ruling on whether the rebates are part of the gross receipts.

b. Payments made to florists when no wire service is involved

In most cases defendant pays the florist through a wire service, but in some instances it bypasses the wire service and pays the florist directly. Although no wire service is involved and defendant pays the florist less than 80%, defendant nevertheless calculates plaintiffs' royalty as if it kept only 20% of the sale. Defendant now concedes that the amount it keeps is not a payment made to a florist within the meaning of the amended agreement. Dft.'s Reply to Plt.'s Resp. to Plt.'s Proposed Findings of Fact, dkt. #65, at 45-46, ¶ 140; Dft.'s Supp. Br., dkt. #90, at 8 n.6. Accordingly, I will enter summary judgment in favor of plaintiffs on this issue. See Jones v. Union Pacific Railroad Co., 302 F.3d 735 (7th Cir. 2002) (district judge may grant summary judgment in favor of non-moving party on its own

motion when there are no issues of material fact in dispute and losing party had notice and opportunity to come forward with evidence). However, there is conflicting evidence with respect to what defendant 800-FLOWERS actually pays to florists in these instances, with figures ranging from 71%-75%. Therefore, this damages issue will have to proceed to trial.

Closely related to this issue is plaintiffs' claim that they should also receive royalties on the 2% fee that some florists pay back to defendant after defendant pays them. However, plaintiffs have proposed no facts on this issue with respect to what that fee is for or why it should not be deducted as a payment made to a florist. Because plaintiffs have failed to raise a genuine issue of material fact regarding the 2% fee, defendants' motion for summary judgment will granted on this issue.

4. Audit reports

The amended agreement requires defendant to provide plaintiff Jahn with annual audit reports of the company's "sale records." Plaintiffs allege that defendant has not provided these reports. However, it is undisputed that, at least during the statute of limitations period, defendant provided plaintiffs with annual audit reports that included the sales records of defendant. Plaintiffs complain that the reports were not sufficient to determine how defendant calculated the plaintiffs' royalty and that the purpose of the provision was to make Jahn "comfortable." Regardless, the amended agreement does not

require defendant to provide a breakdown of the royalty calculation in the audit report; therefore, there was no breach of the amended agreement. Defendants' motion for summary judgment on this issue will be granted.

5. Access to records

The amended agreement requires that plaintiff Jahn or his representative will have "full access to the books and sales records of [defendant], pertaining to the sales derived exclusively through the use of the Phone Number, at reasonable times during normal business hours for the purpose of inspection and verification of the accuracy of royalty payments due to Jahn hereunder." Plaintiffs contend that defendant violated this provision when plaintiff Jahn and Willoughby went to examine defendant's records in August 1999. Although it is undisputed that 800-FLOWERS did not provide plaintiff Jahn and Willoughby all the documents they requested, plaintiffs have failed to show that the documents they did not receive pertained to sales derived from the FLOWERS number or that the missing documents prevented them from verifying the accuracy of the royalty. Therefore, plaintiffs have failed to create a genuine issue of material fact that defendant violated the amended agreement by failing to provide them access to records.

ORDER

IT IS ORDERED THAT

1. The motion of defendants 1-800-FLOWERS.COM, Inc., Fresh Intellectual Properties, Inc. and 800-FLOWERS, Inc. to strike plaintiffs Curtis P. Jahn's and Capitol Warehousing Corporation's additional proposed findings of fact is GRANTED. Plaintiffs' additional proposed findings are STRICKEN.

2. The motion for summary judgment filed by defendants 1-800-FLOWERS.COM, Inc., Fresh Intellectual Properties, Inc. and 800-FLOWERS, Inc. is GRANTED in full with respect to defendants 1-800-FLOWERS.COM and Fresh Intellectual Properties, Inc. Defendants 1-800-FLOWERS.COM and Fresh Intellectual Properties, Inc. are DISMISSED from this case.

3. Defendants' motion for summary judgment is DENIED with respect to plaintiffs' claims that defendant 800-FLOWERS, Inc. breached its contract with plaintiffs Curtis P. Jahn and Capitol Warehousing Corporation by failing to include service charges and wire service fees in the royalty calculation and by excluding wire service fees even when no wire service was involved in the transaction. Defendants' motion for summary judgment is GRANTED with respect to all other claims.

4. Summary judgment is GRANTED in favor of plaintiffs on their claim that defendant 800-FLOWERS breached its contract with plaintiffs by excluding wire services fees from the royalty calculation even when no wire service was involved in the transaction.

It is DECLARED that defendant 800-FLOWERS breached the contract when it excluded these fees from plaintiffs' royalties. This claim will proceed to trial to determine the amount that defendant 800-FLOWERS excluded improperly from the royalty payment within the statute of limitations period.

Entered this 21st day of October, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge