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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

MONICA BRUCE and DONNA
STUBBS, on behalf of themselves and on
behalf of all others similarly situated,

Plaintiffs,

v.

TELEFLORA, LLC,

Defendant.

Case No. 2:13-cv-03279-ODW(CWx)

**ORDER DENYING PLAINTIFFS'
MOTION FOR CLASS
CERTIFICATION [43] AND
DEFENDANT'S MOTION TO
EXCLUDE EXPERT OPINIONS [68]**

I. INTRODUCTION

Deeply dissatisfied with the floral arrangements they received from Teleflora LLC, Plaintiffs Monica Bruce and Donna Stubbs moved to certify a consumer class against the online floral retailer. (ECF No. 43.) Bruce and Stubbs assert that a class action is the only way to remedy Teleflora's wrongful acts of providing materially inferior floral arrangements and delivering arrangements long past the anticipated arrival date—or not at all. Teleflora objects to Plaintiffs' class certification on the grounds that individual questions of fact and law predominate and the Motion will yield far too many individualized inquiries. The Court finds that since one would have to assess the contents and quality of each arrangement received by Teleflora customers during the class period, Plaintiffs have not satisfied the commonality

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1 element. These individualized inquiries would also predominate over any classwide
2 issues. The Court therefore **DENIES** Plaintiffs’ Motion for Class Certification.¹

3 **II. FACTUAL BACKGROUND**

4 Monica Bruce and Donna Stubbs, residents of Texas and Kansas, respectively,
5 purchased floral arrangements from Teleflora. (FAC ¶¶ 13, 14, 44–45, 51–52.)
6 Teleflora is not a florist, nor does it hold any flowers in inventory. (*Id.* ¶ 21.)
7 Teleflora instead maintains a network of more than 18,000 local florists to fill
8 customers’ orders and offers over 500 different floral arrangements containing a
9 unique variety of flowers, greenery, and hard goods. (*Id.* ¶¶ 21, 26; Martin Decl.
10 ¶ 12.) Customers purchase floral arrangements through Teleflora by visiting
11 www.Teleflora.com, selecting products for purchase, inputting specific delivery dates,
12 and paying Teleflora. (FAC ¶¶ 22–23.) Although Teleflora is incorporated in
13 Delaware and headquartered in Los Angeles, California, it markets and sells floral
14 products to consumers throughout the United States via its member-florist network,
15 various websites, advertisements, and toll-free phone numbers. (*Id.* ¶¶ 15–16, 21.)

16 Teleflora’s website provides an extensive photo gallery of all its floral
17 arrangements for sale. (*Id.* ¶ 22.) Teleflora creates the photographed arrangements
18 using the same set of instructions that member-florists use to construct the
19 arrangements. (Martin Decl. ¶ 18.) Alongside each color photo, Teleflora provides a
20 generic description of the arrangement, detailing the types of flowers, vase,
21 approximate height, and siding.² (*Id.* ¶ 15; *see* Walker-Roletter Decl. Ex. A.) For an
22 additional charge, customers may also include add-ons to their floral arrangement,
23 including balloons, chocolate, or stuffed animals. (Martin Decl. ¶ 13.) During the
24 checkout process—but before customers purchase their arrangement—the website

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26 ¹ After carefully considering the papers filed with respect to this Motion, the Court deems the matter
27 appropriate for decision without oral argument. Fed. R. Civ. P. 78; L.R. 7-15.

28 ² In any given description, the arrangement is either “one-sided,” meaning that the flowers are
designed to be viewed solely from one side, or “all-around,” meaning that the arrangement can be
viewed from all angles. (Martin Decl. ¶ 15.)

1 displays Teleflora’s substitution policy, which states that if “the exact flowers or
2 container you have selected are not available, our expert florists will create a beautiful
3 bouquet with the freshest available flowers. We will only substitute items of equal or
4 higher value.” (*Id.* ¶ 19; Ex. K.)

5 After a customer orders an arrangement, the member-florist must create the
6 selected arrangement by following instructions dictating the exact number and type of
7 floral stems, greenery, and hard goods. (Martin Decl. ¶ 16.) Teleflora provides these
8 instructions to member-florists in its Rules and Regulations handbook. (*Id.* Ex. J.)
9 Because Teleflora takes a 27-percent commission from the retail price on all
10 arrangements, member-florists are left with 73 percent of the retail price to fulfill an
11 order. (*Id.* ¶ 26.) Teleflora maintains that this commission is in line with reasonable
12 industry standards because each arrangement is priced according to set profit margins
13 of approximately 3.5 times the reasonable wholesale cost of the specific flowers and
14 twice the cost of hard goods. (*Id.* ¶ 28.) The prices also incorporate a 25-percent
15 markup for labor and other costs. (*Id.*) Moreover, Teleflora does not require member-
16 florists to fulfill an order they deem unprofitable. (*Id.* ¶ 33.) And if a member-florist
17 rejects an order, Teleflora will not charge them a fee or discharge them from the
18 member-florist network. (*Id.*)

19 Bruce purchased two floral arrangements after relying on corresponding
20 photographs and descriptions on Teleflora’s website. (FAC ¶¶ 44–45.) On December
21 21, 2012, she bought a “Sunny Smiles” arrangement, which was delivered to Silvia
22 Arevalo, her cousin in Virginia. (*Id.* ¶ 44; Bruce Dep. 79:20.) When making her
23 purchase, Bruce relied upon the arrangement’s online photograph because she thought
24 the bright colors would cheer up her cousin. (FAC ¶ 46, Ex. 11;.) Arevalo then called
25 Bruce to thank her for the floral arrangement. About two days later, Arevalo’s
26 daughter Kim emailed Bruce a photograph of the Sunny Smiles arrangement Arevalo
27 received. (*Id.*, Exs. 3, 4.) Upon viewing this photograph, Bruce was “extremely
28 disappointed” that the arrangement was “far different and inferior to” the

1 representative photograph on Teleflora’s website because there were fewer yellow
2 roses in the delivered arrangement than appeared in the photograph online. (FAC
3 ¶¶ 46–47.)

4 On December 26, 2012, Bruce purchased a “Jumping for Joy” arrangement for
5 her mother. (*Id.* ¶ 45.) Bruce’s mother received this arrangement in Florida. (*Id.*) As
6 she did with the Sunny Smiles arrangement, Bruce did not review written descriptions
7 of the product but rather selected the deluxe arrangement because “the combination
8 and kinds of flowers and the vase all looked nice together.” (*Id.* ¶ 47, Ex. 5–6.)
9 Bruce’s mother also showed Bruce pictures of the Jumping for Joy arrangement. (*Id.*)
10 Again, Bruce found the arrangement to be materially inferior because she was
11 expecting the deluxe version to be fuller with more flowers. When Bruce complained
12 to Teleflora about the inferior arrangements, she received a 30-percent-off coupon,
13 which she deemed worthless. (*Id.* ¶¶ 48–49.) Teleflora did not refund her purchases.
14 (*Id.* at ¶ 49.)

15 On August 21, 2011, Stubbs ordered two “Rosy Birthday Presents”
16 arrangements with balloons and chocolates from Teleflora’s website. (*Id.* at ¶ 51.)
17 On her purchase order, Stubbs requested that the arrangements be delivered to her
18 relatives on their birthdays, September 1, 2011, and September 8, 2011. (*Id.*) The
19 member-florist allegedly incorrectly recorded the delivery date as September 2, 2011,
20 and failed to timely deliver the arrangement on September 1. (Tenumah Decl. ¶ 9.)
21 Stubbs then called Teleflora requesting a full refund and cancelled the September 8
22 order. (*Id.*) On September 2, 2011, Teleflora refunded Stubbs for the September 1
23 non-delivery. (Ex. B.) Stubbs’s credit-card company also fully refunded her for the
24 cancelled order. (*Id.*)

25 In May 2012, Stubbs ordered the “Always a Lady” deluxe arrangement, with a
26 balloon and chocolates, to be delivered to her sister on May 12, 2012. (FAC ¶ 52;
27 Tenumah Decl. ¶ 10.) Because the member-florist could not fulfill the order by May
28 12, Stubbs accepted May 14, 2012, as an alternative delivery date. (Tenumah Decl. ¶

1 10..) When the member-florist informed Teleflora that it could not deliver on May 14,
2 Mother’s Day, Teleflora notified Stubbs. (*Id.* at Ex. B.) Stubbs then cancelled her
3 order and was granted a full refund on May 15, 2012. (*Id.*)

4 In their First Amended Complaint, Plaintiffs allege claims for violation of
5 California Consumer Legal Remedies Act, Cal. Civ. Code §§ 1750–84; violation of
6 California’s Unfair Competition Law, Civ. Code §§ 17200–10; and breach of express
7 contract and express warranty. (ECF No. 18.)

8 On October 1, 2013, Plaintiffs moved for class certification under Federal Rule
9 of Civil Procedure 23. (ECF No. 43.) Teleflora timely opposed the Motion. (ECF
10 No. 61.) That Motion is now before the Court for decision.

11 III. LEGAL STANDARD

12 Under Federal Rule of Civil Procedure 23(a), a party seeking class certification
13 must initially meet four requirements:

14 (1) the class is so numerous that joinder of all members is impracticable;

15 (2) there are questions of law or fact common to the class;

16 (3) the claims or defenses of the representative parties are typical of the
17 claims or defenses of the class; and

18 (4) the representative parties will fairly and adequately protect the
19 interests of the class.

20 The proposed class must also satisfy at least one of the three requirements listed
21 in Rule 23(b). *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2548 (2011). Rule
22 23(b)(3) states that a class may be maintained where “questions of law or fact
23 common to class members predominate over any questions affecting only individual
24 members,” and a class action would be “superior to other available methods for fairly
25 and efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3).

26 The plaintiff bears the burden of demonstrating that the putative class satisfies
27 each of Rule 23(a)’s elements along with one component of Rule 23(b). *Conn. Ret.*
28 *Plans & Trust Funds v. Amgen Inc.*, 660 F.3d 1170, 1175 (9th Cir. 2011). In that

1 regard, “Rule 23 does not set forth a mere pleading standard. A party seeking class
2 certification must affirmatively demonstrate his compliance with the Rule—that is, he
3 must be prepared to prove that there are in fact sufficiently numerous parties, common
4 questions of law or fact, etc.” *Dukes*, 131 S. Ct. at 2551.

5 A district court must perform a “rigorous analysis” to ensure that the plaintiff
6 has satisfied each of Rule 23(a)’s prerequisites. *Dukes*, 131 S. Ct. at 2551; *Ellis v.*
7 *Costco Wholesale Corp.*, 657 F.3d 970, 980 (9th Cir. 2011). In many cases, “that
8 ‘rigorous analysis’ will entail some overlap with the merits of the plaintiff’s
9 underlying claim. That cannot be helped.” *Dukes*, 131 S. Ct. at 2551. When
10 resolving such factual disputes in the context of a class-certification motion, district
11 courts must consider “the persuasiveness of the evidence presented.” *Ellis*, 657 F.3d
12 at 982 (holding that a district court must judge the persuasiveness and not merely the
13 admissibility of evidence bearing on class certification). Ultimately the decision to
14 certify a class reposes within the district court’s discretion. *Zinser v. Accufix*
15 *Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001).

16 IV. DISCUSSION

17 Plaintiffs define their putative class as all “persons who purchased pre-designed
18 floral arrangements from Teleflora’s website www.teleflora.com between May 9,
19 2009, and the present.” (Mot. 2.) Plaintiffs also propose the following subclass:

20 All persons who purchased pre-designed floral arrangements from
21 Teleflora’s website www.teleflora.com between May 9, 2009 and the
22 present, requested that the purchased arrangement be delivered on a
23 specific day, other than orders for same day delivery that were not placed
24 before 3:00 P.M., Monday–Friday or before 12:00 P.M. on Saturdays and
25 Sundays in the recipient’s time zone, but whose arrangement was
26 actually delivered on any other day or not at all, as evidenced in
27 Teleflora’s books and records.

28 (*Id.*)

1 **A. Commonality**

2 Rule 23(a)'s commonality element requires a plaintiff to show that there are
3 questions of law or fact common to the class. *Dukes*, 131 S. Ct. at 2251. Moreover,
4 the Supreme Court has held that commonality requires a common contention that is
5 “of such a nature that it is capable of classwide resolution—which means that
6 determination of its truth or falsity will resolve an issue that is central to the validity
7 of each one of the claims in one stroke.” *Dukes*, 131 S. Ct. at 2551. The focus is not
8 just on raising common questions, “even in droves—but, rather the capacity of a
9 classwide proceeding to generate common *answers* apt to drive the resolution of the
10 litigation.” *Id.* (internal quotation marks omitted).

11 Plaintiffs argue that their putative class satisfies the commonality requirement
12 because “Teleflora’s business practices have caused Teleflora to breach all of its
13 promises regarding quality to Class members, and timeliness to Subclass members.”
14 (Mot. 21.) Plaintiffs further contend that Teleflora’s practice of deducting from class
15 members’ payments make it impossible for member-florists to furnish floral
16 arrangements that match the quality of the arrangements depicted online. (Mot. 3.)
17 They also assert that there are common legal questions, such as whether the
18 photographs on Teleflora’s website constitute “definite offers.” (Mot. 7–8.)

19 To support this alleged “known systemic problem,” Plaintiffs cite sales reports
20 from member-florists and other Teleflora employees. In a May 2013 Field Summary,
21 Teleflora’s Regional Vice President Mike Valarde remarked that some member-
22 florists “come to the conclusion that with the high cost of the container, the low SRP
23 we place on the bouquet and the fact that they’re getting it at 73% minus transmission
24 fee minus all other fees . . . they just can’t make any money.” (Thigpen Decl. ¶ 8.)
25 And in a June 2012 report, Vice President Darrell Housden notes that “many shops . . .
26 are not making money on the orders that they do receive.” (*Id.* ¶ 9.) Plaintiffs also
27 cite a sales report that notes customers have complained about Teleflora’s “one-sided”

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1 arrangements and that their expectations from online images of floral arrangements
2 have not been met. (*Id.* ¶ 19.)

3 Teleflora does not specifically address the commonality requirement, instead
4 focusing on whether common legal and factual questions predominate over
5 noncommon questions.

6 Plaintiffs have demonstrated that there are common factual questions applicable
7 to their putative class, such as Teleflora’s pricing policy. *See General Tel. Co. of Sw.*
8 *v. Falcon*, 457 U.S. 147, 159 n.15 (noting that a “general policy” could satisfy the
9 commonality element). But as the Supreme Court made clear in *Dukes*, common
10 questions alone are not enough to certify a class. 131 S. Ct. at 2551. Rather, those
11 common questions must yield common answers that will resolve classwide issues in a
12 uniform manner. *Id.*

13 Even if Plaintiffs prove that Teleflora has a uniform policy of deducting 27
14 percent from each order, and even if Plaintiffs prove that member-florists are left with
15 low profit margins, Plaintiffs would have proved nothing with respect to each
16 individual arrangement—and therefore each individual claim. This is because
17 Telefora’s pricing policy, though relevant, is not an element of any of Plaintiffs’
18 claims. Rather, the operative issues include how each arrangement looked, the quality
19 and number of the flowers used, whether superior-quality flowers were substituted,
20 and whether the arrangement was timely delivered. These questions are the heart of
21 Plaintiffs’ breach claims—and would still be left unresolved even if Plaintiffs prove
22 their common pricing questions. *See Champion v. Old Republic Home Prot. Co., Inc.*,
23 272 F.R.D. 517, 531 (S.D. Cal. 2011) (finding that even if an insurer had a uniform
24 policy of encouraging the wrongful denial of claims, adjudication would require
25 individual inquiries to determine whether the insurer wrongfully denied each claim).

26 Plaintiffs contend that the “evidence necessary to prove the Class members’
27 claims would be the same regardless of whether they brought multitudes of individual
28 actions or a streamlined class action.” (Mot. 3.) But this is not necessarily true. If

1 Plaintiffs proved, for example, that Class Member X received an arrangement with
2 only five roses instead of seven, or that the arrangement was of inferior quality to that
3 depicted online, that evidence would prove nothing with respect to Class Member Y.
4 This is because X and Y received different arrangements—even if the same style—
5 made up of different components and likely from different member-florists. A breach
6 of one contract is not a breach of all contracts.

7 The Court thus finds that Plaintiffs have not established Rule 23(a)'s
8 commonality requirement.

9 **B. Predominance and superiority**

10 The crux of this case is predominance. The Supreme Court has held that Rule
11 23(b)(3)'s predominance inquiry evaluates “whether the proposed classes are
12 sufficiently cohesive to warrant adjudication by representation.” *Amchem Prods., Inc.*
13 *v. Windsor*, 521 U.S. 591, 623 (1997). The predominance element is “far more
14 demanding” than Rule 23(a)'s commonality requirement. *Id.* at 624. Under the
15 Supreme Court's recent decision in *Comcast Corp. v. Behrend*, damages must be
16 “capable of measurement on a classwide basis” to establish predominance. 133 S. Ct.
17 1426, 1433 (2013). Otherwise, questions of “individual damages calculations will
18 inevitably overwhelm questions common to the class.” *Id.* Rule 23(b)(3) also
19 requires that class-action treatment be the superior method of adjudicating the dispute.

20 Plaintiffs aver that the predominant factual questions are whether Teleflora
21 breached its promises to deliver high quality and timely floral arrangements due to its
22 business practices. (Mot. 19.) Plaintiffs assert that individual questions do not
23 predominate just because there are slight differences in class members' positions.

24 Teleflora responds that individual questions of fact will predominate in the
25 breach-of-contract inquiry because class members will need a “mini-trial” to
26 determine what each unique arrangement looked like, when it was delivered, whether
27 it met the consumer's expectations, and how the consumer was damaged. (Opp'n 15.)
28 Teleflora also contends that Plaintiffs cannot prove whether substitutions were of

1 equal, greater, or lesser value and whether every customer was dissatisfied with their
2 purchases without engaging in individualized inquires. (*Id.*)

3 Just like the flowers themselves, each arrangement received by a putative class
4 member was in one way or another unique. While Teleflora may well have common
5 pricing policies that render it difficult for member-florists to produce a profitable
6 arrangement that lives up to the samples depicted online, one would have to assess
7 each individual arrangement delivered to each putative class member to determine
8 whether she received an inferior-quality arrangement and whether it was timely. This
9 is especially true considering that Plaintiffs argue in their First Amended Complaint
10 that Teleflora violates its substitution policy by providing arrangements that are
11 “typically small, less full, wilted, or near dead.” (FAC ¶ 31.) Only upon individual
12 review of the arrangements would one be able to discern whether Teleflora breached
13 its substitution policy by actually supplying wilted, dead, or poor-quality flowers on a
14 discrete occasion.

15 There is also no indication that Teleflora’s uniform policies detrimentally
16 affected every floral arrangement produced by Teleflora 18,000 member-florists
17 across the country. In fact, Teleflora argues that it has a 94-percent customer-
18 satisfaction level. (Opp’n 1.) This figure, whether true, bolsters the common-sense
19 conclusion that resolution of this case would require assessing each individual
20 arrangement during the class period to determine whether a breach or other violation
21 occurred.

22 This is not a situation where the representative class members have
23 demonstrated that a common policy necessarily produces some uniform result=
24 Instead, the nature of the handmade floral arrangements and natural components
25 invariably results in each arrangement being unique.

26 Neither have Plaintiffs demonstrated that damages are capable of resolution on
27 a classwide basis. *See Comcast*, 133 S. Ct. at 1433. Plaintiffs submitted a report from

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1 their proposed expert, Thomas J. Maronick.³ (Thigpen Decl. Ex. 24.) Maronick
2 organized an online survey with 787 respondents who reviewed various comparisons
3 between photographs of arrangements depicted on Teleflora’s website and those
4 actually delivered. The survey revealed that the average net perceived difference⁴
5 between the images of products as ordered and received for consumers in the “Target
6 Market” of actual or potential Teleflora customers was 18.37 percent. (Maronick
7 Decl. 25–26.) Maronick opined based on the survey data that putative class members
8 suffered damages in the amount of “44% of the price they had paid for a floral
9 arrangement that was not of the same quality or appearance as delivered as it was
10 represented on Teleflora’s website.” (*Id.* at 30.)

11 The problems with this purported damages model are manifold. First, the
12 survey respondents were not necessarily actual putative class members. Plaintiffs
13 therefore ask the Court to assume damages based on what people who are not
14 necessarily class members believe about arrangements that were not actually received
15 by anyone during the class period.

16 Second, Maronick’s 44-percent damages finding is limited by his own terms to
17 only those putative class members who “paid for a floral arrangement that was not of
18 the same quality or appearance as delivered as it was represented on Teleflora’s
19 website.” (*Id.*) This means that even if the Court were to accept Maronick’s figure,
20 the calculation only applies once one determines that a putative class member received
21 an inferior-quality arrangement. So while Plaintiffs have attempted to solve their cart-
22 before-the-horse damages problem, they instead only compounded the problem. Their
23 very solution—Maronick’s 44-percent figure—only comes into play once one

24 ³ Teleflora filed a Motion to exclude Maronick’s report as inadmissible under Federal Rule of
25 Evidence 702. Since the Court finds that the report does not establish that damages are capable of
26 measurement on a classwide basis—even with the report—the Court need not wade into the ticket of
27 the parties’ arguments regarding the report’s admissibility. The Court accordingly **DENIES** the
28 Teleflora’s Motion. (ECF No. 68.)

⁴ The “net perceived difference” takes into account what Maronick terms the “Preexisting Belief
Bias”—the level of inferiority consumers inevitably expect between an arrangement as depicted
online and as received. (Maronick 25–26.)

1 assesses each putative class member’s case on a singular basis. This defeats the
2 purpose of having Maronick attempt to establish a classwide damages model. *See In*
3 *re Rail Freight Fuel Surcharge Antitrust Litig.-MDL No. 1869*, 725 F.3d 244, 253
4 (D.C. Cir. 2013) (“When a case turns on individualized proof of injury, separate trials
5 are in order.”).

6 The Court therefore finds that individual issues will necessarily predominate
7 over common questions, thereby precluding class certification under Rule 23(b). The
8 Court also finds that Plaintiffs have not demonstrated that damages are capable of
9 measurement on a classwide basis so that individual calculations will not “inevitably
10 overwhelm questions common to the class.” *Comcast*, 133 S. Ct. at 1433.

11 Plaintiffs argue that a class action is “the only realistic means for Monica Bruce
12 and Donna Stubbs, as well as the not less than tens of thousands of other individuals
13 like them, to get redress for Teleflora’s breaches.” (Mot. 2.) The Court understands
14 that the damages for each individual arrangement, if any, are small—thus making it
15 unlikely that each putative class member will bring her own suit. But Rule 23 is only
16 a solution when the plaintiffs can establish how their putative class satisfies each of
17 the Rule’s requirements; there is no leeway to certify a class simply based on the
18 difficulty of adjudicating individual claims. The Court therefore finds that in this
19 case, a class action is not the superior method of adjudicating the putative class’s
20 disputes.

21 **C. Ascertainability, numerosity, typicality, and adequate representation**

22 Since Plaintiffs have not demonstrated that their putative class satisfies either
23 commonality or predominance, the Court need not address Rule 23’s remaining
24 requirements.

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V. CONCLUSION

The Court finds that Plaintiffs have not demonstrated Rule 23's elements and therefore cannot certify Plaintiffs' proposed class. The Court consequently **DENIES** Plaintiffs' Motion for Class Certification. (ECF No. 43.) Teleflora's Motion to Exclude Expert Opinions is also **DENIED**. (ECF No. 68.)

IT IS SO ORDERED.

December 18, 2013



OTIS D. WRIGHT, II
UNITED STATES DISTRICT JUDGE