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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

CATHERINE CASTELLANOS, *et al.*,

Plaintiffs,

v.

CITY OF RENO, *et al.*,

Defendants.

Case No. 3:19-cv-00693-MMD-CLB

ORDER

I. SUMMARY

In this putative class action, adult interactive cabaret performers and patrons challenge provisions of the Reno Municipal Code as violating the First and Fourteenth Amendments of the Constitution. (ECF No. 1.) Before the Court is Plaintiffs’ motion to certify three classes: the Dancers Class, the All Female Dancers Class, and the 18 to 21 Year Old Patron Class.¹ (ECF No. 49 (“Motion”).) The Court heard argument on the Motion on July 26, 2021.

As further explained below, the Court finds that Plaintiffs have failed to demonstrate the requirements for class certification are met for each class. Specifically, Plaintiffs have not shown that joinder would be impracticable for the Under 21 Dancers Class, that proposed class counsel is adequate to represent the Under 21 Dancers and All Female Dancers Classes, that the Named Plaintiffs’ claims are typical of the entire All Female Dancers Class, or that the 18 to 21 Year Old Patron Class is so numerous that a class mechanism is preferable to an individual action. Accordingly, the Court will deny Plaintiffs’ Motion as to each proposed class.

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¹Defendants responded (ECF No. 52) and Plaintiffs replied (ECF No. 55.)

1 **II. BACKGROUND**

2 Named Plaintiffs are seven adult interactive cabaret performers and one adult
3 interactive cabaret patron. Plaintiffs challenge several provisions of the Reno Municipal
4 Code (“RMC”), which were amended and adopted in 2019.

5 **A. Amendments to the Reno Municipal Code**

6 On May 8, 2019, the Reno City Council adopted ordinances amending RMC
7 provisions applicable to adult interactive cabarets, performers, and patrons. (ECF No. 52-
8 4 at 27-30.) As part of those amendments, the City deleted certain licensing provisions
9 from Chapter 8 of the RMC, made certain modifications, and incorporated them into
10 Chapter 4. (ECF Nos. 52-5, 52-6.) Chapter 8 of the RMC addresses “Public Peace,
11 Safety, and Morals,” and Chapter 4 is Reno’s “Business License Code.” (ECF Nos. 52-5,
12 52-6.) The City also amended some provisions in Chapter 5, which addresses “Privileged
13 Licenses, Permits and Franchises.” (ECF No. 52-8.)

14 **1. Adult Interactive Cabaret Performer Defined**

15 Relevant to each of Plaintiffs’ challenges is how the City defines an “adult
16 interactive cabaret performer. The definition is found in Chapters Four and Five of the
17 RMC:

18 any person male or female who is an employee or independent contractor
19 of an adult interactive cabaret and who, with or without any compensation
20 or other form of consideration, performs as a sexually-oriented dance,
21 exotic dancer, stripper or similar dancer, actor, model, entertainer or worker
whose performance on a regular and substantial basis emphasizes
exposure of and focus on the adult interactive cabaret performer’s specified
anatomical areas . . .

22 (ECF Nos. 52-8 at 6 (RMC § 5.06.011(a)(i)); 52-6 at 4 (RMC § 4.07.007(b)).)² This
23 definition turns in part on the definition of ‘specified anatomical areas,’ which the City
24 states are:

25 (1) Less than completely or opaquely covered: human genitals or pubic
26 region; buttock; or female breast below a point immediately above the top

27 ²These definitions are identical and are located in Chapter 4.07, titled “Adult
28 Business” (ECF No. 52-6 at 3), and Chapter 5.06, titled “Adult Interactive Cabarets” (ECF
No. 52-8 at 3).

1 of the areola; and (2) Human male genitals in a discernibly turgid state, even
2 if completely or opaquely covered.³

3 (ECF No. 52-8 at 7 (RMC § 5.06.011(h)).)

4 These provisions are the foundation for Plaintiffs' first equal protection claim
5 alleged by the All Female Dancers Class. (ECF No. 1 at 27-31)

6 **2. Age Restriction**

7 A provision the City Council deleted from Chapter 8, modified, and added to
8 Chapter 5 is RMC § 5.06.080, "Adult interactive cabaret operations." (ECF No. 52-8 at
9 13-14.) In relevant part, the new section states:

10 No person, whether patron, performer, or otherwise, under the age of
11 eighteen years shall be admitted to, or permitted to remain on the premises
12 of, an adult interactive cabaret. No person, including employees and
13 performers, under the age of twenty-one years shall be admitted to, or
14 allowed to remain on the premises of, an adult interactive cabaret wherein
15 alcohol is provided, served, sold, or consumed.⁴

14 (*Id.* (RMC § 5.06.080(b).) The previous iteration of this regulation stated "[n]o *patron*
15 under the age of 21 years shall be admitted to an adult interactive cabaret wherein alcohol
16 is provided, served, or consumed," but did not bar employees or performers who were
17 under 21 from working at an adult interactive cabaret where alcohol was served. (ECF
18 No. 52-5 at 7 (RMC § 8.21.060(b)) (emphasis added).) The only restriction on performers
19 in the previous regulation was the prohibition for all persons under eighteen from being
20 admitted to or remaining on the premises of adult interactive cabarets. (*Id.*) Under the
21 newly enacted regulation, performers and patrons alike under the age of 21 may not be
22 admitted to an adult interactive cabaret that served alcohol.

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26 ³Only the text in § 5.06.011(h)(2)—"Human male genitals in a discernibly turgid
27 state, even if completely or opaquely covered."—was added by the 2019 amendment.
(ECF Nos. 52-5 at 4; 52-8 at 7.)

28 ⁴This provision formerly appeared at RMC § 8.21.060(b) under "Adult interactive
cabaret regulations.

1 This provision is the basis for Plaintiffs’ second equal protection claim alleged by
2 the Under 21 Dancers Class and the 18 to 21 Year Old Patron Class, as well as the Under
3 21 Dancers’ Class’s regulatory taking claim. (ECF No. 1 at 32-36.)

4 **3. Work Cards and Business Licenses**

5 The City Council also deleted provisions regarding work card requirements for
6 adult interactive cabaret performers from Chapter 8, and added similar provisions to
7 Chapter 5. (ECF Nos. 52-5 at 4-5 (RMC § 8.21.040(a); 52-8 at 12 (RMC 5.06.080(a)).)
8 The old provision required the “owners or operators of any adult interactive cabaret” to
9 ensure that “each independent contractor or subcontractor has a current business license
10 and work card” prior to contracting for their services. (ECF No. 52-5 at 4.) The old
11 provision further required the owner/operators to ensure “each adult cabaret performer
12 employed by them as an employee has a current and valid work card” prior to and during
13 the course of employment. (*Id.* at 5.) The new provision at RMC § 5.06.080(a) echoes
14 this sentiment, but is not identical:

15 No adult interactive cabaret licensee shall allow an employee to work who
16 does have a valid work card and a performer to perform who does not have
17 a valid business license and valid work card, as required by Title 4 and Title
18 5.

18 (ECF No. 52-8 at 12.) The new provision’s language appears to differentiate between
19 ‘employees’ and ‘performers,’ requiring the former to obtain only a work card but the latter
20 to obtain a work card and a valid business license. However, the definition of ‘adult
21 interactive cabaret performer’ includes “any person who is an employee or independent
22 contractor.” (ECF No. 52-8 at 6 (RMC § 5.06.011(a)(i)).)

23 The amended RMC § 5.05.012 sets out the specific requirements for work cards.
24 (ECF No. 52-7 at 9.) “Each adult interactive cabaret employee and . . . performer
25 employed or conducting business as an independent contractor in an adult interactive
26 cabaret” must obtain a work card. (*Id.* (RMC § 5.05.012(a)).) The regulation goes on to
27 require “[a]n adult interactive cabaret performer shall maintain evidence of an active
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1 business license,” but does not distinguish between independent contractors and
2 employees. (*Id.* (RMC § 5.05.012(b)).)

3 This provision is the basis for Plaintiffs’ regulatory taking claim alleged by the All
4 Female Dancers Class and the Under 21 Dancers Class. (ECF No. 1 at 35-37.)

5 **B. Implementation and COVID-19**

6 As stated above, the amended RMC provisions were enacted on May 8, 2019.
7 (ECF No. 52-4.) On March 20, 2020, Governor Sisolak issued an emergency directive
8 closing non-essential businesses, including adult entertainment establishments.⁵ At issue
9 in this litigation is the period between May 8, 2019, when the amended RMC provisions
10 went into effect, and March 20, 2020, when the clubs were closed due to the COVID-19
11 emergency. During this period, performers with the proper work cards and/or business
12 licenses were permitted to work at adult interactive cabarets, subject to the amended
13 RMC provisions. Moreover, patrons over the age of 21 were permitted to remain on the
14 premises of adult interactive cabarets that sold alcohol, but patrons and performers
15 between ages 18 and 21 were not.

16 Plaintiffs allege that their claims arose during this period of time because the
17 amended provisions (1) discriminate on the basis of sex and age; (2) impermissibly
18 interfere with their First Amendment rights of freedom of expression, both in performing
19 and viewing others’ performances at adult interactive cabarets; and (3) work a regulatory
20 taking on the by depriving them of the right to perform after they paid for business
21 licensing and work cards. This suit followed.

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24 ⁵Plaintiffs reference an executive order issued March 17, 2020, but do not attach
25 any documentation to clarify. (ECF No. 49 at 19.) Defendants suggest that Plaintiffs are
26 referring to Emergency Directive 002, issued March 18, 2020, which mandated the
27 general public “cease gathering at gaming establishments” effective March 17, 2020.
28 (ECF No. 52 at 4, n.3.) The Court takes judicial notice of Emergency Directive 003, issued
March 20, 2020, which ordered that “Non-Essential Businesses . . . including, but not
limited to . . . adult entertainment establishments” must close by 11:59 p.m. that same
day. See “Declaration of Emergency for COVID-19 – Directive 003,”
[https://gov.nv.gov/News/Emergency_Orders/2020/2020-03-20 - COVID-
19 Declaration of Emergency Directive 003 \(Attachments\)/](https://gov.nv.gov/News/Emergency_Orders/2020/2020-03-20_-_COVID-19_Declaration_of_Emergency_Directive_003_(Attachments)/).

1 **III. LEGAL STANDARD**

2 “The class action is ‘an exception to the usual rule that litigation is conducted by
3 and on behalf of the individual named parties only.’” *Wal-Mart Stores, Inc. v. Dukes*, 564
4 U.S. 338, 348 (2011) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979)). The
5 party seeking class certification “must affirmatively demonstrate his compliance with”
6 Federal Rule of Civil Procedure 23. *Id.* at 350. “Rule 23 does not set forth a mere pleading
7 standard.” *Id.* Instead, “certification is proper only if the ‘trial court is satisfied, after a
8 rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.’” *Id.* at 350-51
9 (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982)). The four Rule 23(a)
10 requirements are numerosity, commonality, typicality, and adequacy of representation.
11 *See id.* at 349; *see also* Fed. R. Civ. P. 23(a).

12 “In addition to satisfying Rule 23(a)’s prerequisites, parties seeking class
13 certification must show that the action is maintainable under Rule 23(b)(1), (2), or (3).”
14 *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997). A Rule 23(b)(2) class is one
15 where “the party opposing the class has acted or refused to act on grounds that apply
16 generally to the class, so that final injunctive relief or corresponding declaratory relief is
17 appropriate respecting the class as a whole[.]” Fed. R. Civ. P. 23(b)(2). “The key to the
18 (b)(2) class is ‘the indivisible nature of the injunctive or declaratory remedy warranted—
19 the notion that the conduct is such that it can be enjoined or declared unlawful only as to
20 all of the class members or as to none of them.’” *See Parsons v. Ryan*, 754 F.3d 657,
21 687 (9th Cir. 2014) (quoting *Dukes*, 564 U.S. at 350).

22 In addition to the explicit requirements of Rule 23, an implied prerequisite to class
23 certification is that the class must be sufficiently definite. The party seeking certification
24 must demonstrate that an identifiable and ascertainable class exists. *See Kristensen v.*
25 *Credit Payment Servs.*, 12 F. Supp. 3d 1292, 1302 (D. Nev. 2014). To satisfy the
26 ascertainability requirement, a class must be determinable from objective, rather than
27 subjective, criteria. *See id.* at 1303. The moving party must also affirmatively demonstrate
28 that he or she meets the above requirements. *See Parsons*, 754 F.3d at 674. However,

1 a court should not “turn class certification into a mini-trial’ on the merits.” *Edwards v. First*
2 *Am. Corp.*, 798 F.3d 1172, 1178 (9th Cir. 2015) (quoting *Ellis v. Costco Wholesale Corp.*,
3 657 F.3d 970, 983 n.8 (9th Cir. 2011)).

4 **IV. DISCUSSION**

5 The Court must determine whether each class meets the four Rule 23(a)
6 prerequisites for certification. Because the All Female Dancers Class presents problems
7 with typicality and adequacy, the Court will not certify that class. While the Under 21
8 Dancers Class presents the same problems as the All Female Dancers Class, but with
9 an additional numerosity problem. The Court therefore will not certify that class. Finally,
10 Plaintiffs have failed to establish that the 18 to 21 Year Old Patron Class is sufficiently
11 numerous. Because that class will not be certified either, the Motion will be denied. The
12 Court will explain its reasoning for each class in turn.

13 **A. All Female Dancers Class**

14 Plaintiffs initially sought to certify a class of “all female Adult Interactive Cabaret
15 Performers who were required to pay a fee to the City of Reno as a condition of dancing
16 topless.” (ECF No. 49 at 2.) When further explaining the nature of the class, Plaintiffs
17 asserted the “essential characteristic of a member of the All Female Dancers Class is
18 simply being a female licensed topless dancer in Reno.” (*Id.* at 6-7.) The crux of Plaintiffs
19 argument is that female performers may not dance topless without a work card and, in
20 some cases, a business license, while male dancers may dance topless without either.
21 (ECF No. 55 at 7-9.) Plaintiffs argue this distinction violates the equal protection clause
22 of the Fourteenth Amendment. (*Id.*)

23 Defendants argued in their opposition that such a class presented problems with
24 three of the Rule 23(a) requirements, in part based on discrepancies between performers
25 classified as independent contractors and those who were employees. (ECF No. 52 at
26 15-18.) First, Defendants argued that there were typicality and commonality issues with
27 a class comprised of both independent contractors and employees because the owners
28 of the adult interactive cabarets determined whether to consider performers independent

1 contractors or employees, which in turn required some performers to obtain a business
2 license in addition to a work card, as opposed to a work card alone. (*Id.* at 15-16) That
3 determination, according to Defendants, is the actual cause of the bulk of putative class
4 members' damages. (*Id.*) Defendants further argued that class counsel does not meet
5 Rule 23(a)(4)'s adequacy requirement. (*Id.* at 17-18.) Because class counsel represents
6 the owner of the majority of Reno's adult interactive cabarets opposing some female
7 performers in pending labor litigation, Defendants argue there is at least an appearance
8 of divided loyalties, if not an actual conflict of interest. (*Id.*)

9 Plaintiffs in their reply moved to redefine the All Female Dancers Class. (ECF No.
10 55 at 2.) The proposed new definition includes "all females who are, or should legally be,
11 licensed by the City of Reno as an adult interactive cabaret performer, as that term is
12 defined in RMC 5.06.011." (*Id.* at 2-3.) Arguing that performers benefit most from a
13 damages perspective by assuming that they are independent contractors rather than
14 employees, the reply states that "Named Plaintiffs in this lawsuit agree with Counsel's
15 position that dancers are independent contractors rather than employees." (*Id.* at 3.)
16 Plaintiffs proceed to argue that the RMC provisions burden performers beyond the
17 employee/independent contractor distinction because the gendered regulation also
18 impacts whether an establishment is classified as an adult interactive cabaret to begin
19 with. (*Id.* at 8-9.)

20 The Court agrees with Defendants' argument that the Named Plaintiffs' claims
21 present commonality and typicality concerns that defeat class certification. While
22 Plaintiffs' attempt to redefine all performers as independent contractors may theoretically
23 cure the All Female Dancers' Class commonality and typicality problems, the new class
24 definition and its explanation further exacerbates the adequacy issue. For these reasons,
25 the Court will not certify the All Female Dancers Class.

26 **1. Commonality and Typicality**

27 Defendants argue that the Named Plaintiffs are not typical of the class and that the
28 class lacks commonality. Both the commonality and typicality arguments stem from the

1 distinction between performers who are employees and those who are independent
2 contractors. Plaintiffs allege in their Motion that each Named Plaintiff performer was
3 registered as an independent business. (ECF No. 49 at 5.) Although Plaintiffs' argument
4 appears to shift somewhat between the Complaint, Motion, and reply, the Court
5 understands that the proposed All Female Dancers Class alleges that the definition of
6 "interactive adult cabaret performer" discriminates on the basis of gender by requiring
7 female performers to obtain work cards and/or business licenses while male performers
8 are not so required.

9 Defendants note that not only are the Named Representatives classified as
10 independent contractors, but Plaintiffs Castellanos, Courtney, Jasper, Rachet, and
11 Stagner were each licensed independent business owners who had worked at a club
12 owned or operated by Keshmiri Entertainment Group ("KEG").⁶ (ECF No. 52 at 10-12.)
13 KEG owns or operates three of the four licensed adult interactive cabarets in Reno—Wild
14 Orchid, Spice House, and Fantasy Girls ("KEG Clubs"). (*Id.* at 7-8.) Defendants assert
15 that KEG required its performers to sign an independent contractor agreement as a
16 condition of performance. (ECF Nos. 52 at 8; 52-11 at 20-29.) By contrast, the fourth and
17 only licensed adult interactive cabaret in Reno not owned or operated by KEG—Men's
18 Club—permits performers to choose to be either hired as a part-time employee or to work
19 as an independent contractor. (ECF Nos. 52 at 8-9; ECF No. 52-12.) In light of KEG's
20 requirements, Defendants argue that class members who performed at KEG Clubs were
21 not obligated to register as independent businesses because of the amended RMC
22 provisions. Rather, class members incurred those costs because KEG required them to

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25 ⁶Three of the Named Plaintiffs—Morales, Wells, and Whittle—did not respond to
26 Defendants' written discovery requests and the Court previously deemed their answers
27 to Defendants' requests for admissions admitted. (ECF Nos. 32, 33, 46.) Accordingly, the
28 Court considers that Plaintiffs Morales, Wells, and Whittle have been deemed to have
admitted they did not obtain business licenses (ECF Nos. 32-3 at 5; 32-6 at 5; 32-8 at 5),
and further that they were classified as independent contractors (ECF Nos. 32-3 at 6; 32-
6 at 6, 32-8 at 6). As Morales, Wells, and Whittle have not complied further with this
litigation, the Court will focus on the remaining five Named Plaintiff performers.

1 each register as an independent business owner instead of hiring them as part-time
2 employees.

3 The Court agrees that the distinction between performers who are independent
4 contractors and performers who were part-time employees divides the class and defeats
5 commonality. To satisfy Rule 23(a)'s commonality requirements, "a plaintiff must
6 'affirmatively demonstrate' that their claims depend upon at least one common contention
7 the truth or falsity of which 'will resolve an issue that is central to the validity' of each one
8 of the class members' 'claims in one stroke.'" *James v. Uber Techs. Inc.*, 338 F.R.D. 123,
9 131 (N.D. Cal. 2021) (quoting *Wal-Mart v. Dukes*, 564 U.S. 338, 350 (2011)). The Court
10 agrees with Defendants that KEG Clubs' requirement that all performers register as
11 independent business owners splits those class members' arguments (and Defendants'
12 defenses) from the arguments of class members who were not required to incur the
13 business licensure requirements as a condition precedent to performing. The class
14 members' claims do not rise and fall together, but suffer from an interceding action by
15 KEG. Because the All Female Dancers Class is seeking "disgorgement of all fees" paid
16 for their work cards and licenses, the Court anticipates that Defendants will focus on the
17 causation distinction throughout the litigation, which may prove dispositive to some class
18 members but not others. Accordingly, the Court finds that commonality is not met.

19 Typicality is not met for similar reasons. "The test of typicality is whether other
20 members have the same or similar injury, whether the action is based on conduct which
21 is not unique to the named plaintiffs, and whether other class members have been injured
22 by the same course of conduct." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th
23 Cir. 1992). "The purpose of the typicality requirement is to assure that the interest of the
24 named representative aligns with the interests of the class." *Wolin v. Jaguar Land Rover*
25 *N. Am., LLC*, 617 F.3d 1168, 1175 (9th Cir. 2010). None of the Named Plaintiffs were
26 employees, nor do they contest their classification as independent contractors. But
27 several class members do. As Defendants note, many absent class members have
28 objected to their classification as independent contractors in the pending *Harris* suit. (ECF

1 No. 52 at 17.) Moreover, Plaintiffs do not account for potential class members who were
2 never classified as independent contractors and were therefore not obligated to obtain
3 business licenses. The Named Plaintiffs are therefore not typical of the entire class.

4 The Court is not persuaded by Plaintiffs' argument that the distinction between
5 performers who are employees and independent contractors is immaterial. Contrary to
6 Plaintiffs' concerns, the Court does not rely on the finding in another suit that some
7 performers were misclassified to conclude that some performers here are or are not
8 employees.⁷ The fact of whether the class members were in fact employees or
9 independent contractors is not directly at issue in this case, and the Court need not
10 determine whether each class member is properly classified. Instead, the Court finds
11 there is a lack of class cohesion because the Named Plaintiffs, who were each classified
12 as independent contractors, ask that all members of the All Female Dancers Class be
13 treated as independent contractors despite the fact that some class members disagree
14 with that classification and its resulting licensure costs. (ECF No. 55 at 2-3.) But the Court
15 cannot ignore that some class members are not independent contractors, or that some
16 consider themselves misclassified.

17 Plaintiffs' attempt to redefine the All Female Dancers Class in their reply does not
18 cure these defects, but raises new concerns. While the new definition purports to assume
19 that all class members are independent contractors, this revision does not address
20 Defendants' argument that KEG's contracting agreement is the proximate cause of
21 performers being required to obtain business licenses. Even if the new definition did
22 resolve the commonality and typicality concerns, the Court would still deny the Motion
23 because proposed class counsel is not adequate to represent the All Female Dancers
24 Class.

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26 ⁷That case is *Harris v. Diamond Dolls of Nevada, LLC*, Case No. 3:19-cv-00598-
27 RCJ-CLB. The Court likewise finds Plaintiffs' application of *Myers v. Reno Cab Co., Inc.*,
28 -- P.3d --, 2021 WL 3238818 (Nev. Jul. 29, 2021), inapposite. (ECF No. 58 at 3.) The
class members may be employees under the FLSA but not employees for other
purposes—but that does not change the fact that Named Plaintiffs seek to represent a
class of performers that includes a subgroup of persons alleging they were improperly
required to register as independent business owners by KEG Clubs.

2. Adequacy

Defendants' adequacy argument centers on proposed class counsel's representation of Kamy Keshmiri, owner KEG, in prior and pending litigation. As noted above, Keshmiri and KEG own or operate three of the four adult interactive cabarets Plaintiffs reference in the Complaint—Wild Orchid, Fantasy Girls, and Spice House. Proposed class counsel represents Keshmiri in two Fair Labor Standards Act lawsuits filed by dancers in this District.⁸ One of those suits, *Harris v. Diamond Dolls of Nevada, LLC*, is still pending. In that suit, performers sued Keshmiri and KEG Clubs for allegedly misclassifying them as independent contractors.⁹ Some of the opt-in class members in *Harris* are female adult interactive cabaret performers who were classified as independent contractors in Reno during the time period at issue here. (ECF No. 52 at 18.) As a result, proposed class counsel is litigating against absent class members in ongoing litigation that involves overlapping issues with this case.

"The responsibility of class counsel to absent class members whose control over their attorneys is limited does not permit even the appearance of divided loyalties of counsel." *Kayes v. Pac. Lumber Co.*, 51 F.3d 1449, 1446 (9th Cir. 1995). The 'appearance' of divided loyalties includes even situations where there may be "potentially conflicting interests and is not limited to instances manifesting such conduct." *Id.* The All Female Dancers Class purports to represent all female adult interactive cabaret performers who were required to pay a fee as a condition of performance. (ECF No. 49 at 2.) If the Court were to certify the All Female Dancers Class, proposed class counsel would then be representing class members who he was opposing in currently pending litigation.

The Court does not doubt proposed class counsel's experience or qualifications to litigate a class action suit. But when considering whether class counsel and the named

⁸*Becker v. Keshmiri*, Case No. 3:19-cv-00602-LRH-WGC, and *Harris v. Diamond Dolls of Nevada, LLC*, Case No. 3:19-cv-00598-RCJ-CLB.

⁹*Harris*, Case No. 3:19-cv-00598-RCJ-CLB (ECF No. 1 at 2.)

1 representatives are adequate, the Court is concerned most with the interests of absent
2 class members. *See Kayes*, 51 F.3d at 1446. Even if no actual conflict manifests in this
3 litigation, as Plaintiffs contend, the circumstances raise an appearance of proposed class
4 counsel's divided loyalties between the performers and their employer, a long-standing
5 client of proposed class counsel. The appearance of a potential conflict is intensified by
6 the fact that all named representatives allege they are independent contractors, while
7 many performers in the Reno area are currently alleging that they are employees under
8 the Fair Labor Standards Act and that proposed counsel's clients, Keshmiri and KEG
9 Clubs, misclassified them.

10 Plaintiffs exacerbated the appearance of divided loyalties in their reply by
11 attempting to redefine the class to either exclude members who did not conform with their
12 earlier definition, or to remove the classification issue by simply assuming all members
13 are independent contractors. Instead of proposing subclasses to mitigate the problem of
14 divisions in the All Female Dancers Class, Plaintiffs instead ask the Court to treat all class
15 members as independent contractors and ignore the potential causation problems caused
16 by Keshmiri and KEG. Moreover, Plaintiffs' articulation of how the amended RMC
17 provisions burden the All Female Dancers Class members expressly raises how the
18 provisions also regulate the adult interactive cabarets themselves. When considered
19 holistically, the Court finds that there is at least an appearance of divided loyalties
20 between the class members and proposed class counsel's other clients whose interests
21 are opposed to class members in currently pending litigation.

22 Due to the protective concerns of Rule 23(a)(4) and for the reasons explained
23 above, the Court therefore will deny the Motion as to the All Female Dancers Class.

24 **B. Under 21 Dancers Class**

25 Plaintiffs also seek to certify a class of "all Adult Interactive Cabaret Performers
26 who are between 18 and 21 years of age and who have a work card and/or license as
27 required under any provision of the Reno Municipal Code[] . . . as well as all potential
28 Adult Interactive Cabaret Performers at any of the existing licensed Adult Interactive

1 Cabarets in Reno.” (ECF No. 49 at 2.) The Under 21 Dancers Class is a subclass of the
2 All Female Dancers Class, but claims additionally that RMC § 5.06.080(b) impermissibly
3 barred them from performing because RMC § 5.06.080(b) infringes on their First
4 Amendment right to perform at adult interactive cabarets. Plaintiffs assert there are 44
5 known members of the Under 21 Dancers Class, not including the potential class
6 members who would have begun performing but were deterred by the amended RMC
7 provisions. (ECF No. 49 at 6.) Defendants argue that the Under 21 Dancers Class should
8 not be certified because Plaintiffs have not shown joinder is impracticable. (ECF No. 52
9 at 13-15.) The Court agrees with Defendants.

10 1. Numerosity

11 Rule 23(a)(1)’s numerosity requirement means that “the difficulty or inconvenience
12 of joining all members of the class makes class litigation desirable.” *Acuna v. S. Nev.*
13 *T.B.A. Supply Co.*, 324 F.R.D. 367, 380 (D. Nev. 2018). “Generally, courts have held that
14 numerosity is satisfied when the class size exceeds forty members.” *Anderson v. Briad*
15 *Rest. Grp., LLC*, 333 F.R.D. 194, 202 (D. Nev. 2019). But the analysis “requires
16 examination of the specific facts of each case and imposes no absolute limitations.”
17 *Acuna*, 324 F.R.D. at 380. When considering whether joinder is practicable, courts may
18 evaluate “whether the proposed class members are known and identifiable,” the
19 “geographical diversity of class members,” and the “ability of individual claimants to
20 institute separate suits.” *Jordan v. Los Angeles Cnty.*, 669 F.2d 1311, 1319-20 (9th Cir.
21 1982), *vacated on other grounds by* 459 U.S. 810 (1982).

22 Defendants argue several reasons why numerosity is not met for the Under 21
23 Dancers Class. First, Defendants contend the accurate number of class members is not
24 44, but 35, as that is the number of performers between 18 and 21 when the litigation was
25 initiated who had valid, unexpired licenses. (ECF No. 52 at 14.) Next, Defendants argue
26 that even with a higher number of class members, joinder would be practicable in this
27 instance because the identities of all then-working performers are publicly available. (*Id.*)
28 Third, Defendants note that 38 of the 44 identified Under 21 Dancers Class members are

1 geographically concentrated in Nevada, with remaining residing in Northern California.
2 (*Id.*) Finally, Defendants argue that because the alleged damages amount per class
3 member is in the thousands, unnamed class members will be more likely to pursue their
4 claims individually should they so desire. (*Id.* at 15).

5 Setting aside Defendants' argument that only 35 class members had valid licenses
6 at the time this suit was filed, the Court finds that joinder would be practicable in this
7 circumstance. Not only are there relatively few potential class members, but they are easy
8 to locate and not widely geographically dispersed. Moreover, any plaintiffs seeking lost
9 wages would have sufficient incentive to bring their own claims.

10 Plaintiffs' argument that privacy concerns of the litigants favors certification is
11 unpersuasive. Not only is the identifying information for each under 21 performer already
12 available via the various licensing procedures, any additional concern stemming from the
13 publicity of litigation could be mitigated by moving to appear anonymously. Although
14 Plaintiffs asserted at oral argument that certification provides anonymity for class
15 members who could not proceed under a fictitious name in federal court, they are
16 mistaken.¹⁰ District courts may authorize parties to proceed under fictitious names
17 pursuant to their authority to manage pretrial proceedings under Rule 16(b), and may
18 issue protective orders limiting disclosures of a party's name under Rule 26(c). *See Does*
19 *I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1069 (9th Cir. 2000) (noting there
20 is a balance between a party's need for anonymity the public's interest in open judicial
21 proceedings); *see also Doe v. Kamehameha Schs./Bernice Pauahi Bishop Estate*, 596
22 F.3d 1036, 1042 (9th Cir. 2010) (outlining the four-factor test for permitting fictitious name
23 use).

24 Finally, Plaintiffs seek to include all persons who would have begun working as an
25 adult interactive cabaret performer but were deterred from doing so by the amended RMC
26

27 ¹⁰In fact, Plaintiffs acknowledge in their reply that U.S. Magistrate Judge Valerie
28 Cooke permitted an adult interactive cabaret performer to proceed under a pseudonym
in *Discopolus LLC v. City of Reno*, Case No. 3:17-cv-00574-MMD-VPC. Such a path
would be available for performers who fear to bring their claims in their own name.

1 provisions. The Court will not consider these speculative class members in its numerosity
2 consideration. While there may indeed be some, even many, who fit this description,
3 Plaintiffs have not provided any evidence that these potential class members exist, how
4 many class members there are, or what criteria establishes them as a member of the
5 Under 21 Dancers Class. The Court agrees with Defendants that the potential Under 21
6 Dancers comprise a class that is too nebulous to certify. (ECF No. 52 at 24-25.) Without
7 more, the Court cannot use the speculative potential performers to satisfy numerosity of
8 the Under 21 Dancers Class.

9 **2. Adequacy**

10 Even if the Court were to find that joinder was impractical, however, the adequacy
11 concerns that the Court explained above likewise apply to the Under 21 Dancers Class.
12 Proposed class counsel cannot avoid the appearance of divided loyalties in representing
13 a class of performers while simultaneously representing their employers. First, because
14 the Under 21 Dancers Class assumes the claims of the All Female Dancers Class, the
15 same issues Court explains above apply here. But the issues unique to the Under 21
16 Dancers Class also implicate appearances of divided loyalties. Defendants argue that it
17 is not the City, but the owners of the adult interactive cabarets who decide whether to
18 serve alcohol, thereby triggering the provisions that bar performers under 21 from
19 remaining on the premises. While the Court does not weigh in on the merits of the City's
20 argument, Plaintiffs once again must consider whether KEG shares in the causation of
21 the Under 21 Dancers Class members' damages. Because proposed class counsel still
22 represents Keshmiri and KEG, there is at least an appearance that the class members'
23 interests may be compromised to promote other clients' interests.

24 Because both numerosity and adequacy are not met, the Court will deny the
25 Motion as to the Under 21 Dancers Class.

26 **C. 18 to 21 Year Old Patron Class**

27 Unlike the other proposed classes, the 18 to 21 Year Old Patron Class seeks only
28 injunctive and declaratory relief. Defendants argue that Plaintiffs lack standing to bring an

1 age-based discrimination claim because they cannot demonstrate that they are treated
2 differently from a similarly situated group. The Court is unpersuaded by this argument
3 because Plaintiffs argue that they are treated differently from other 18 to 21 year olds who
4 patron establishments that serve alcohol, not that they are treated differently from patrons
5 over 21.

6 However, plaintiffs who seek certification under Rule 23(b)(2) must still
7 demonstrate the four requirements of Rule 23(a). Because Plaintiffs have failed to
8 demonstrate numerosity, the Court will deny the Motion.

9 **1. Standing**

10 Defendants argue that because persons under 21 are not similarly situated to
11 those over 21, Plaintiffs cannot demonstrate an injury in fact. (ECF No. 52 at 21.)
12 Defendants misunderstand Plaintiffs argument. Plaintiffs do not assert that they are
13 treated differently from those over 21, but that they are treated differently from 18 to 21
14 year old patrons of other establishments that serve alcohol. Specifically, Plaintiffs argue
15 the law prohibiting under 21 patrons from remaining on the premises of establishments
16 that are not adult interactive cabarets but do serve alcohol is not enforced and that these
17 regulations are not narrowly tailored¹¹ because other establishments that serve alcohol
18 may use other measures to prevent serving to underage persons, such as carding patrons
19 at the bar or issuing wristbands to those under 21. (ECF No. 55 at 10-11.) If Plaintiffs are
20 correct that the generally applicable statutes, NRS § 202.030 and RMC § 5.07.030, are
21 not similarly enforced at other establishments, then they have articulated an injury for
22 which enjoining § 5.08.080(b) may grant relief.

23 ///

24 ///

26 ¹¹The Court notes that “[s]tates may discriminate on the basis of age without
27 offending the Fourteenth Amendment if the age classification in question is rationally
28 related to a legitimate government interest.” *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 83
(2000). Accordingly, Defendants will not be required to “match age distinctions and the
legitimate interests they serve with razorlike precision.” *Id.* However, this is a question on
the merits for the Court to determine later.

2. Numerosity

The seven named plaintiff dancers, as under 21 performers, and Plaintiff Maryann Rose Brooks, as a patron, seek to represent a class of “thousands of people between 18 and 21 years of age” who would like to visit a strip club in Reno but are prohibited from doing so. (ECF No. 49 at 8.) Although Plaintiffs aver that there are “countless” persons who fit the class definition (*id.* at 5), they provide no evidence or facts to support this allegation, despite the fact that discovery is now completed.¹² Because “[m]ere speculation as to the number of class members is insufficient,” the Court lacks the requisite information to determine whether numerosity is satisfied. *Berry v. Baca*, 226 F.R.D. 398, 403 (C.D. Cal. 2005) (finding numerosity was not met when plaintiff alleged 10,000 similarly situated plaintiffs but only had evidence of 33 possible members). The Court therefore will deny the Motion as to the 18 to 21 Year Old Patron Class.

Defendants do not argue that numerosity is not met for the 18 to 21 Patron Class. The Court arrives at this conclusion through its own “rigorous analysis.” *Wal-Mart*, 564 U.S. at 350. The party seeking class certification “must affirmatively demonstrate his compliance with” Federal Rule of Civil Procedure 23. *Id.* at 350. “Rule 23 does not set forth a mere pleading standard.” *Id.* Instead, “certification is proper only if the ‘trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.’” *Id.* at 351. However, because the issue is a lack of evidence rather than demonstrated evidence to the contrary, and because it was not disputed by Defendants in their opposition to the Motion, the Court will permit Plaintiffs to file a renewed motion within 30 days if they wish to cure the numerosity issue as to the 18 to 21 Patron Class only.¹³ If Plaintiffs do not file an amended motion to certify only the 18 to 21 Patron Class within 30 days, Plaintiffs may proceed with their claims for injunctive relief as individuals.

¹²The scheduling order set the discovery deadline as April 2, 2021 (ECF No. 42 at 2), over a month after Plaintiffs’ filing of the Motion on February 25, 2021 (ECF No. 49).

¹³Defendants argue that the class action mechanism is not necessary for Named Plaintiffs to pursue injunctive relief. (ECF No. 52 at 22.) Apart from the fact that Defendants argue in the same breath that Plaintiffs lack standing, the Court considers the

1 **V. CONCLUSION**

2 The Court notes that the parties made several arguments and cited to several
3 cases not discussed above. The Court has reviewed these arguments and cases and
4 determines that they do not warrant discussion as they do not affect the outcome of the
5 motion before the Court.

6 It is therefore ordered that Plaintiffs' motion to certify class (ECF No. 49) is denied.

7 It is further ordered that Plaintiffs are granted leave to file a renewed motion within
8 30 days as to the 18 to 21 Year Old Patron Class only. The motion must establish that
9 the class meets the numerosity requirement as outlined herein. If Plaintiffs do not file a
10 renewed motion, they may proceed with their claims individually.

11 DATED THIS 16th Day of August 2021.

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MIRANDA M. DU
15 CHIEF UNITED STATES DISTRICT JUDGE

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risk of mootness should class certification be denied. Given that the Complaint was filed
27 in 2019 and age of the class members in question is limited to a three year age period,
28 there is a risk that all Named Plaintiffs could turn 21 before the case is resolved, risking
that injunctive relief would be unnecessary to redress their harm. *Cf. De Funis v. Odegaard*, 416 U.S. 312, 318-19 (1974) (explaining that a student challenging admissions procedures claim was moot because he would soon graduate).