

ARGUMENT

Class certification should be denied, because Plaintiffs' claims for declaratory and injunctive relief either fail to present live controversies, or are barred by the abstention doctrine of *Younger v. Harris*. .

a. Case or controversy issues.

Rule 23(c)(1)(a), F.R.Civ.P., provides that the determination of whether to certify a class is to be made “[a]t an early practicable time.” It is well settled that the decision to certify a class can be postponed until the resolution of threshold jurisdictional questions. *See, e.g., Rivera v. Wyeth-Ayerst Labs.*, 283 F.3d 315, 319 (5th Cir. 2002)(reviewing the issue of standing first, “because it determines the court's fundamental power even to hear the suit”); *Mahon v. Ticor Title Ins. Co.*, 683 F.3d 59, 64 (2d Cir. 2012)(same); *Zaycer v. Sturm Foods, Inc.*, 896 F. Supp. 2d 399, 407 (D. Md. 2012)(challenge to standing would be addressed before class certification).¹

If Defendants' summary judgment motion is granted on the issue of the absence of a case or controversy, it goes without saying that a class of such plaintiffs cannot be certified. As the Supreme Court held in *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974), “if none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class.”

b. *Younger v. Harris* issues.

Issues regarding the need for *Younger* abstention also should be addressed prior to any determination of class certification. In *Trainor v. Hernandez*, 431 U.S. 434 (1977), a case that was subject to *Younger* abstention, the Supreme Court noted that the “class should never have

¹ Some cases have cited *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999) for the notion that class certification issues should be resolved prior to the consideration of the plaintiffs' standing, at least in some cases. However, in *Ortiz*, the denial of class certification marked the end of the case. As the Second Circuit noted in *Mahon v. Tricor Title*, *supra*, it makes sense to resolve class certification issues first only “when resolution of class certification obviates the need to decide issues of Article III standing.” 683 F.3d at 65.

been certified,” given the need for abstention. 431 U.S. at 470 n. 11. On remand, the district court held this to mean that “district courts are to reach the abstention issue first and only determine class certification if dismissal based on abstention is not proper.” *Hernandez v. Finley*, 471 F. Supp. 516, 521 (N.D. Ill. 1978). *Accord, e.g., Kelm v. Hyatt*, 44 F.3d 415, 419 (6th Cir. 1995)(“Because we find that the district court properly dismissed Kelm's claims for injunctive relief on abstention grounds, we do not reach the denial of class certification”); *Aiona v. Judiciary of State of Hawaii*, 17 F.3d 1244, 1250 n. 10 (9th Cir. 1994)(“We reject the plaintiffs' contention that the district court abused its discretion by denying their motion for class certification. Any possible plaintiffs either would have license revocation proceedings pending in state court, in which case *Younger* abstention applies, or would be collaterally attacking final state judgments, in which case the Rooker/Feldman doctrine applies”); *Anthony v. Council*, 316 F.3d 412, 424 (3d Cir. 2003)(same).

The cases cited above make it clear that in addition to requiring that *Younger* abstention be decided prior to class certification, the obvious next logical step is to dismiss any claims that are held to be subject to such abstention. Such a dismissal is what Defendants have requested in their summary judgment motion, ECF No. 29, and Defendants submit that it should lead to the conclusion that there is no need to consider class certification at all.²

CONCLUSION

For the foregoing reasons, Defendants respectfully submit that this Court should first address the issues raised in their original Motion for Summary Judgment, ECF No. 29, and that if

² Defendants' counsel are aware, of course, that if a plaintiff class is certified, the mootness of the named plaintiffs' individual claims will normally not require dismissal of the class action when the claim is viable only for a short time. However, that rule saves class actions from dismissal only when a plaintiff's claim is viable at least for the period of its short duration. The rule cannot apply to cases that, prior to becoming moot, cannot be maintained in any event, because of the application of *Younger* principles.

summary judgment is granted on those grounds, the Court should dismiss this action without the need to rule on Plaintiffs' class certification motion.

Should deny any part of the Defendants' Motion for Summary Judgment regarding declaratory or injunctive relief be denied, then Defendants would request that the Court permit a short period of time for the Defendants to address the merits of the class certification motion.

Respectfully submitted,

DAVIDSON, WREN & PLYLER, P.A.

BY: s/ Kenneth P. Woodington

WILLIAM H. DAVIDSON, II, Fed. I.D. No. 425

KENNETH P. WOODINGTON, Fed. I.D. No. 4741

DAVIDSON, WREN & PLYLER, P.A.

1611 DEVONSHIRE DRIVE, 2ND FLOOR

POST OFFICE BOX 8568

COLUMBIA, SOUTH CAROLINA 29202-8568

wdavidson@dml-law.com

kwoodington@dml-law.com

T: 803-806-8222

F: 803-806-8855

ATTORNEYS for Defendants

Columbia, South Carolina

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