UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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APPLIED UNDERWRITERS, INC., a Nebraska corporation; and APPLIED RISK SERVICES, INC., a Nebraska Corporation, Plaintiffs, v. INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA RICARDO LARA, in his official Capacity; et al., Defendants.	No. 2:20-cv-02096 WBS AC ORDER RE: DEFENDANTS' MOTION TO DISMISS

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Plaintiffs Applied Underwriters, Inc. ("Applied") and Applied Risk Services, Inc. ("ARS") (collectively, "plaintiffs") brought this action against defendants Ricardo Lara, Insurance Commissioner of the State of California ("Lara" or "Commissioner"), and Kenneth Schnoll and Bryant Henley, California Department of Insurance Deputy Commissioners

(collectively, "defendants"), in response to defendants' imposition of a conservation over non-party California Insurance Company ("CIC") in San Mateo Superior Court in November 2019 (the "Conservation Proceeding"). (See First Amended Complaint ("FAC") (Docket No. 26).) Plaintiffs--affiliates of CIC--allege that defendants' actions leading up to and including the Conservation violated their rights to equal protection and due process under the Fourteenth Amendment, as well as their First Amendment right to criticize officials in the press and petition the government, in violation of 42 U.S.C. § 1983. (FAC ¶¶ 135-90.) Plaintiffs further allege that defendants' actions constituted unlawful takings in violation of the Fifth and Fourteenth Amendments, and levy an as-applied challenge against California Insurance Code § 1011(c) under the Dormant Commerce Clause of the United States Constitution, Art. I, § 8, cl. 3. (Id.)

Defendants have moved to dismiss plaintiffs' complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted. (See Defs.' Mot. to Dismiss ("Mot. to Dismiss") (Docket No. 35).)

I. Factual and Procedural Background

Plaintiffs write workers' compensation insurance through multiple insurance companies in all 50 states. (FAC ¶ 2.) CIC is the largest of those companies. (Id.) Plaintiffs and CIC are closely related companies. All three are subject to common management and control: Steven Menzies indirectly owns CIC and serves as its CEO, and is the President of CIC, Applied, and ARS. (See FAC ¶¶ 48, 51, 52; Defs.' Req. for Judicial Notice, Exs. 8, 9 (Docket No. 36.) The three entities also share the

same Secretary and General Counsel, Jeffrey Silver. (See id. at Exs. 8, 9.) According to the Nebraska Secretary of State's website, Menzies and Silver serve as the sole directors of both Applied and ARS, and Menzies serves as President and Treasurer for both Applied and ARS. (See id.) Moreover, Applied and ARS' operative agreements with CIC indicate that they remain subject to CIC's supervision and control. (See id. at Exs. 1, 2.)

The First Amended Complaint ("FAC") alleges that Applied profits from CIC's operations by receiving administrative fees from CIC clients--which Applied charges as a percentage of each client's payroll--pursuant to the CIC and Applied's Management Services Agreement ("MSA"). (FAC ¶ 106.) Plaintiffs allege that ARS profits from its Underwriting Agent Agreement ("UAA") with CIC in a manner similar to Applied. (Id. at ¶ 107.)

Plaintiffs allege that defendants have engaged in a bad-faith campaign of unlawful activity aimed at CIC, beginning in 2019, when Menzies (at the time an indirect owner of 11.5% of CIC's shares) sought to purchase Berkshire Hathaway's ("Berkshire") controlling interest in CIC. (See FAC ¶¶ 48-63.) In January 2019, Menzies entered into an agreement with Berkshire to purchase the company by September 30th, or else Menzies would be subject to a $50 million "breakup fee" (the "Berkshire/Menzies Agreement"). (See id.) Though Applied, Menzies, and CIC informed defendants of the details of the proposed sale, due to additional requests for information from the California Department of Insurance ("CDI"), Menzies had to submit new "Form A" filings multiple times between April and September, and CDI ultimately did not rule on Menzies' pending application prior to

the September 30, 2019 deadline. (Id. at ¶¶ 53-63.)

In response, Applied, CIC, and Menzies created a new entity in New Mexico, "CIC II," and sought to merge CIC with CIC II so that the transaction could be completed under the supervision of New Mexico's Insurance Department rather than CDI. (FAC ¶¶ 64-66.) This process culminated in a conference call and Form A approval hearing on October 9, 2019, in which regulators from New Mexico, Texas, and California (including CDI) participated and attended. (Id.) According to plaintiffs, CDI did not object to the merger or the sale's consummation during the hearing, during which New Mexico's Superintendent of Insurance, Superintendent Franchini, approved the merger. (Id.) Rather, plaintiffs allege that CDI attorneys told Superintendent Franchini that the "proposed merger presented no risks to California policyholders." (Id.) Following Superintendent Franchini's order approving the merger, Berkshire informed the New Mexico Department of Insurance that, based on the lack of objection at the Form A approval hearing, it planned to proceed with the closing scheduled for October 10, 2019.[1] (Id. at ¶ 69.)

On October 18, 2019, defendants informed CIC that, due to CIC's merger into CIC II, CIC's California-issued Certificate of Insurance--which authorizes CIC to sell insurance in the state--would be extinguished by operation of law and that the surviving entity would not be qualified to transact insurance in California. (Id. at ¶ 75.) Though plaintiffs allege that CIC

[1] Though the FAC does not explicitly state that Berkshire and Menzies completed the sale of CIC, paragraph 31 indicates that CIC has been "wholly owned by Steven Menzies" since October 10, 2019. (FAC ¶ 31.)

voluntarily refrained from taking any further action relating to the merger, on November 4, 2019, the Commissioner filed an ex parte application in San Mateo County Superior Court (the "Superior Court"), requesting that the court place CIC in conservation, with Lara as conservator, because CIC had attempted to effect a merger without regulatory approval in violation of California Insurance Code § 1011. (Id. at ¶¶ 79, 81, 101.) The Superior Court granted the Commissioner's request. (See Defs.' Req. for Judicial Notice, Ex. 7 (the "Conservation Order").) As a result, defendants have exercised control over the assets and operations of CIC since November 4, 2019, and CIC has been unable to transfer its assets to CIC II. (Id.; FAC ¶ 92.)

CIC has posed multiple challenges to the Conservation Proceeding in state court, arguing that the Commissioner acted arbitrarily and capriciously, that his basis for imposing the Conservation was pretextual, and that the Proceeding violates CIC's constitutional rights. First, CIC filed an application with the Superior Court to vacate the conservatorship. (Defs.' Req. for Judicial Notice, Exs. 10, 13.) After the Superior Court denied the application, CIC filed an application for interlocutory appellate review with the California Court of Appeal, which was also denied. (See id., Exs. 11, 15).

Defendants then filed an application for approval of a non-consensual rehabilitation plan in Superior Court (the "Proposed Rehabilitation Plan"). (FAC at ¶ 102.) This Proposed Rehabilitation Plan would (1) require CIC to transfer and reinsure its book of California business to another California-admitted insurer, and (2) require CIC and plaintiffs to settle

over 40 separate pending legal proceedings regarding CIC and plaintiffs' "EquityComp" program--a loss sensitive workers' compensation program that has been the subject of dozens of lawsuits involving plaintiffs and CIC--by paying claimants in the pending legal proceedings any of three restitution amounts that the claimant selects. (Id. at ¶¶ 38-47; 104-110.) The Proposed Rehabilitation Plan would also limit the amount CIC and plaintiffs may collect under the policies they issue or service. (Id.) Plaintiffs allege that these portions of the Proposed Rehabilitation Plan constitute an unconstitutional transfer of contract and other property rights from one set of private litigants to another, depriving CIC and plaintiffs of their due process right to litigate the claims. (Id.)

On July 30, 2020, the Superior Court set a briefing schedule and hearing date, and established procedures for opposing the Commissioner's application for an order approving the Proposed Rehabilitation Plan. (See Defs.' Req. for Judicial Notice, Ex. 4 (the "Procedural Order").) The Procedural Order expressly invites plaintiffs and other affiliates of CIC to present their objections to the Proposed Rehabilitation Plan in writing and orally at the scheduled hearing. (See id.)

Following the Superior Court's issuance of the Procedural Order, plaintiffs filed this suit, requesting that this court intervene in the ongoing state court proceeding by "vacating the Commissioner's conservatorship of CIC" and "enjoining the Commissioner from continuing to hold CIC under conservation." (See Compl., Prayer for Relief ¶ C (Docket No. 1).) While plaintiffs have since amended their complaint, the

FAC still requests that this court effectively enjoin the ongoing state court proceeding by directing the Commissioner to terminate the Conservation and withdraw the Proposed Rehabilitation Plan. (See FAC, Prayer for Relief ¶¶ C-G.)

As of the date of this Order, the Superior Court has not yet approved or denied the Proposed Rehabilitation Plan; a hearing on the Commissioner's application is scheduled for April 15, 2021. (See Defs.' Req. for Judicial Notice, Ex. 5.)

II. Discussion

Federal Rule of Civil Procedure 12(b)(1) authorizes dismissal for lack of subject matter jurisdiction. Motions to dismiss based on exclusive in rem jurisdiction of a state court are properly analyzed under Rule 12(b)(1). See Chapman v. Deutsche Bank Nat. Trust Co., 651 F.3d 1039, 1043 (9th Cir. 2011). A motion to dismiss on Younger[2] abstention grounds is also properly brought under Rule 12(b)(1). Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 100 n.3 (1998) (treating Younger abstention as jurisdictional); Washington v. Los Angeles Cnty. Sheriff's Dep't, 833 F.3d 1048, 1058 (9th Cir. 2016) (recognizing "a dismissal due to Younger abstention [is] similar to a dismissal under Rule 12(b)(1)").

A. Requests for Judicial Notice

Though a court generally may not consider material outside the complaint on a motion to dismiss under Rule 12(b)(1), the court may look beyond the pleadings "at documents incorporated into the complaint by reference, and matters of

[2] Younger v. Harris, 401 U.S. 37 (1971).

which a court may take judicial notice." Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322 (2007).

A defendant may seek to incorporate a document by reference into the complaint "if the plaintiff refers extensively to the document or the document forms the basis of the plaintiff's claim." United States v. Ritchie, 342 F.3d 903, 907 (9th Cir. 2003). "The court may treat such a document as 'part of the complaint'" and "may assume that its contents are true for purposes of a motion to dismiss," Marder v. Lopez, 450 F.3d 445, 448 (9th Cir. 2006) (emphases added), so long as such assumptions do not only serve to dispute facts in the complaint. Khoja v. Orexigen Therapeutics, Inc., 899 F.3d 988, 1003 (9th Cir. 2018).

Under Federal Rule of Evidence 201, a court may take judicial notice of an adjudicative fact that is "not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). Accordingly, a court may take judicial notice of matters of public record. Khoja, 899 F.3d at 999. Courts routinely take judicial notice of documents on file in federal or state courts, see, e.g., Harris v. Cnty. of Orange, 682 F.3d 1126, 1132 (9th Cir. 2012) (taking judicial notice of declaration filed in prior litigation), and information on government websites, Gerritsen v. Warner Brothers Entertainment Inc., 112 F. Supp. 3d 1011, 1033 (C.D. Cal. 2015).

The court hereby takes judicial notice of Exhibits 1 and 2 to defendants' Request for Judicial Notice, the MSA and UAA, under the incorporation-by-reference doctrine. See Ritchie,

342 F.3d at 907. Plaintiffs refer extensively to these documents throughout the FAC, and they are central to the plaintiffs' claims of injury. (See FAC ¶¶ 106-108, 176.)

The court also takes judicial notice of Exhibit A to Exhibit 3, and Exhibits 4, 5, 6, 7, 10, 11, 12, 13, 14, and 15 to defendants' request for judicial notice. Exhibit A to Exhibit 3 is a copy of the Proposed Rehabilitation Plan, and is judicially noticeable both as a matter of public record and pursuant to the incorporation by reference doctrine. See Cnty. of Orange, 682 F.3d at 1132; Ritchie, 342 F.3d at 907. The Superior Court's Procedural Order, Order to Continue Certain Briefing Deadlines for the Conservator's Rehabilitation Plan, Clerk's Notice of Hearing, the Conservation Order, Order Denying Respondent's Verified Application to Vacate the Conservation Order, Order Denying Petition for Writ of Mandate, Memorandum of Points and Authorities and Reply in Support of Application to Vacate the Conservation Order, and Petition for Writ of Mandate (Exhibits 4, 5, 6, 7, 10, 11, 13, 14, and 15 to defendants' Request for Judicial Notice, respectively) are all judicially noticeable on the ground that they are matters of public record as documents on file in the state court. Cnty. of Orange, 682 F.3d at 1132. The court further notes that plaintiffs do not object to defendants' request for Exhibits 5, 6, 7, 11, 13, 14, or 15.

The court further takes judicial notice of Exhibits 8 and 9 to defendants' Request for Judicial Notice, which are business entity profiles for plaintiffs Applied and ARS, retrieved from the Nebraska Secretary of State website, and thus matters of public record not subject to reasonable dispute. See

Gerritsen, 112 F. Supp. 3d at 1033.

Finally, plaintiffs request that the court take judicial notice of defendants' Ex Parte Application for an Order Appointing the Insurance Commissioner as Conservator and of the Commissioner's Memorandum in Opposition to Respondent's Application to Vacate Order Appointing Conservator. (Pls.' Req. for Judicial Notice, Exs. P2, P7 (Docket No. 44).) The court hereby takes notice of these documents on the ground that they are matters of public record. Cnty. of Orange, 682 F.3d at 1132.

B. Prior Exclusive Jurisdiction

The "ancient and oft-repeated . . . doctrine of prior exclusive jurisdiction" holds "that when a court of competent jurisdiction has obtained possession, custody, or control of particular property, that possession may not be disturbed by any other court." State Eng'r of State of Nev. v. S. Fork Band of Te-Moak Tribe of W. Shoshone Indians of Nev., 339 F.3d 804, 809 (9th Cir. 2003) (quoting 14 Charles Alan Wright, Arthur R. Miller, Edward H. Cooper, Federal Practice and Procedure § 3631, at 8 (3d ed. 1998)). "That is, when one court is exercising in rem jurisdiction over a res, a second court will not assume in rem jurisdiction over the same res." Sexton v. NDEX West, LLC, 713 F.3d 533, 536 (9th Cir. 2013) (citations omitted). "The purpose of the rule is the maintenance of comity between courts; such harmony is especially compromised by state and federal judicial systems attempting to assert concurrent control over the res upon which jurisdiction of each depends." Id.

To determine whether prior exclusive jurisdiction applies, the court first must evaluate the priority of the

actions. See Gustafson v. Bank of Am., N.A., Case No. 16cv1733 BTM (KSC), 2016 WL 7438326, at *6 (S.D. Cal. Dec. 27, 2016). Second, the court must determine how to characterize the concurrent actions. See Pascua v. OneWest Bank, No. CV 16-00016 LEK-KSC, 2017 WL 424851, at *3 (D. Haw. Jan. 31, 2017) (citing Gustafson, 2016 WL 7438326, at *6). "If both of the pending actions are in rem or quasi in rem, the prior exclusive jurisdiction doctrine applies." Id.

Here, the Conservation Proceeding clearly has priority, as it was commenced almost a year before plaintiffs filed this action. (See FAC ¶ 81). The court must therefore dismiss this action if it determines that both actions are in rem or quasi in rem. See Chapman, 651 F.3d at 1044.

The question of whether an action is in rem, quasi in rem, or in personam "turns on what, precisely, is at issue in the state and federal court proceedings." Goncalves by and through Goncalves v. Rady Childs. Hosp. San Diego, 865 F.3d 1237, 1253 (9th Cir. 2017). An action is in rem when it "determine[s] interests in specific property as against the whole world." State Eng'r, 339 F.3d at 811 (quoting In Rem, BLACK'S LAW DICTIONARY (6th ed. 1990)). "Under California law, a suit proceeds in rem [only] where property is 'seized and sought to be held for the satisfaction of an asserted charge against property without regard to the title of individual claimants to the property.'" Hanover Ins. Co. v. Fremont Bank, 68 F. Supp. 3d 1085, 1109 (N.D. Cal. 2014) (quoting Lee v. Silva, 197 Cal. 364, 240 P. 1015, 1016 (1925)). An action is quasi in rem when it is brought "against the defendant[s] personally" but "the [parties']

interest[s] in the property ... serve[ ] as the basis of the jurisdiction." State Eng'r, 339 F.3d at 811 (alterations in original). "On the other hand, where a party initiates an action merely to 'determine the personal rights and obligations of the [parties],' the court asserts in personam jurisdiction." Hanover Ins. Co., 68 F.Supp.3d at 1109 (quoting Pennoyer v. Neff, 95 U.S. 714, 727 (1877)).

The court's jurisdiction in the underlying suit may be in rem or quasi in rem even if the property at issue was not "actually seized under judicial process before a second suit [was] instituted." Goncalves, 865 F.3d at 1254 (quoting United States v. Bank of N.Y. & Tr. Co., 296 U.S. 463, 477 (1936)). The doctrine "applies as well where suits are brought to marshal assets, administer trusts, or liquidate estates, and in suits of a similar nature, where, to give effect to its jurisdiction, the court must control the property." Id. "When applying the doctrine, courts should not 'exalt form over necessity,' but instead should 'look behind the form of the action to the gravamen of a complaint and the nature of the right sued on.'" Chapman, 651 F.3d at 1044 (quoting State Eng'r, 339 F.3d at 810).

It cannot seriously be doubted that, here, the Superior Court's jurisdiction over CIC is in rem. The Superior Court's Order appointing the Commissioner as conservator of CIC, pursuant to California Insurance Code § 1011(c), effectively seizes the res--all property and assets of CIC--and vests full title and control to the Commissioner, as conservator. (See Conservation Order at ¶ 12); Hanover, 68 F. Supp. 3d at 1109. The Conservation Order authorizes the Commissioner to take possession

of any and all assets of CIC, to maintain and invest any of those assets or funds according to his discretion, and to exercise all powers of the directors, officers, and managers of CIC. (Conservation Order at ¶¶ 11-14.)

Contrary to plaintiffs' contention, it makes no difference that the Conservation Order vests title to CIC and its assets in the Commissioner, rather than the court itself. (See Pls.' Opp'n at 44-45.) In United States v. Bank of N.Y., the Supreme Court addressed the issue of prior exclusive jurisdiction in the context of a court-ordered liquidation of the Moscow Fire Insurance Company. See Bank of N.Y., 296 U.S. at 471. There, the state court had directed the state's superintendent of insurance to take possession of the Bank of N.Y.'s United States branches and "conserve those assets until its further order." Id. Though the superintendent was a statutory liquidator, the Supreme Court held that that the proceeding was "essentially one in rem" because the superintendent "took possession under the direction of the court," "the fund was at all times subject to the court's control," and "the superintendent was protected by a sweeping injunction in the unimpeded liquidation of the sequestered property." See id.

Likewise, here, the Commissioner--a statutory conservator--has taken title to CIC and its assets "under the direction" of the Superior Court. (See Conservation Order.) Though the Commissioner may take possession of the property and conduct the business of CIC, he merely does so "as a minister of the superior court in its statutory responsibility to protect the public interest and conserve the rights of the creditors and

policyholders of the conservatee." In re Pac. Std. Life Ins. Co., 9 Cal. App. 4th 1197, 1201 (1992). The Commissioner ultimately remains subject to the control of the Superior Court, who both grants him the authority to act and must find, after a full hearing, that the ground for the Conservation Order no longer exists or has been removed before the conservation may be lifted. See Cal. Ins. Code § 1012; see also id. at § 1037(d) (requiring that the Commissioner, in his capacity as liquidator or conservator, obtain permission of the court prior to entering transactions for the sale or transfer of estate property exceeding $20,000 in fair market value). The Commissioner is further protected by a "sweeping injunction" allowing him to proceed with the Conservation unimpeded by third parties, similar to the statutory liquidator in Bank of N.Y. (See Conservation Order ¶ 17); Cal. Ins. Code § 1020(a) ("Upon the issuance of an order . . . under Section 1011 . . . the court shall issue such other injunctions or orders as may be deemed necessary to prevent . . . interference with the commissioner or the proceeding."); see also Garamendi v. Exec. Life, 17 Cal. App. 4th 504, 523 (2d Dist. 1993) (holding that the superior court's in rem jurisdiction under § 1020 extends to assets of third parties that have an "identity of interest" with an insolvent insurer).

Adjudicating plaintiffs' claims in this case would also require this court to assert in rem jurisdiction, or at the least, quasi in rem jurisdiction, over the res at issue, CIC and its assets. Plaintiffs argue that the federal action cannot be classified as in rem because their operative complaint does not ask this court to "seize and control" any property. (See Pls.'

Opp'n at 42.) Rather, plaintiffs urge, the relief they seek is directed "exclusively at defendants to remedy their constitutional violations." (See id.)

However, this argument takes an unduly narrow view of the nature of the right plaintiffs have sued upon and the relief they seek. Binding precedent dictates that the court must "look behind the form of the action to the gravamen of a complaint . . . lest we exalt form over necessity." See State Eng'r, 339 F.3d at 810. In Bank of N.Y., for instance, the Supreme Court held that suits brought in federal court by the United States for accounting and delivery of funds originally owned by several insurance companies invoked the court's in rem jurisdiction because they would "necessarily interfere with the jurisdiction or control by the state court," which had placed the funds in the hands of court-appointed receivers. See Bank of N.Y., 296 U.S. at 477-78. Though the United States argued that it had brought its suits in personam, the Court rejected this characterization, concluding that "the object of the suits [was] to take the property from the depositaries and from the control of the state court, and to vest the property in the United States to the exclusion of all those whose claims are being adjudicated in the state proceedings." Id. at 478.

Here, though plaintiffs nominally ask this court to enter orders aimed at the Commissioner and his deputy commissioners at the California Department of Insurance, it is clear that their ultimate goal is similarly to "interfere with," or even terminate, the Conservation Proceeding. Id. Plaintiffs' original complaint simply requested that this court "vacat[e] the

Commissioner's conservatorship of CIC." (See Compl., Prayer for Relief ¶ C.) While plaintiffs have since amended their Prayer for Relief, the operative complaint still seeks orders directing the Commissioner to "take all necessary steps to end CIC's conservatorship" and "enjoining the Commissioner from continuing the conservation." (See FAC, Prayer for Relief ¶ C.) The operative complaint also asks this court to order the Commissioner to withdraw the Proposed Rehabilitation Plan (id. at ¶¶ D-G), which was filed pursuant to an order of the Superior Court and which the Superior Court is currently reviewing.

Therefore, though plaintiffs do not explicitly ask the court to "seize" CIC or its assets from the Superior Court, they do ask the court to issue orders that would "disturb" the state court's control of CIC and its assets in a manner that would amount to the assertion of in rem, or, at the least, quasi in rem jurisdiction.[3] See Bank of N.Y., 296 U.S. at 478; State Eng'r, 339 F.3d at 810 (holding that, although contempt action was styled as an in personam action, there could "be no serious dispute that [it] was brought to enforce a decree over a res"--the Humboldt River--and, therefore, adjudication by the federal

[3] The fact that plaintiffs also seek declaratory relief does not alter the court's analysis. Though plaintiffs seek declarations that the Commissioner has acted unconstitutionally, the gravamen of their complaint is clearly to bring an end to the Conservation Proceeding currently pending in Superior Court. See Pascua v. OneWest Bank, No. CV 16-00016 LEK-KSC, 2017 WL 424851, at *9 (D. Haw. Jan. 31, 2017) (noting that "[a]lthough Plaintiff alleges constitutional violations [under the Fifth, Ninth, and Fourteenth Amendments] and infliction of emotional distress, the gravamen of her Complaint is that she is challenging Defendant's ability to bring the Foreclosure Action . . . [thus,] the instant case is an in rem — or at least a quasi in rem — action").

court would necessarily invoke in rem jurisdiction because it would "disturb[] the first court's jurisdiction over the res"). Accordingly, the doctrine of prior exclusive jurisdiction dictates that the court dismiss plaintiffs' claims.[4] See id.

C. Younger Abstention

Alternatively, the court finds that dismissal of plaintiffs' claims is warranted under the doctrine of Younger abstention. The Supreme Court's decision in Younger v. Harris, 401 U.S. 37 (1971) and those that have followed "espouse a strong federal policy against federal-court interference with pending state judicial proceedings absent extraordinary circumstances." Middlesex Cnty. Ethics Comm. v. Garden State Bar Assoc., 457 U.S. 423, 431 (1982). Though abstention is not required "simply because a pending state-court proceeding involves the same subject matter . . . [the Supreme Court] has recognized . . . certain instances in which the prospect of undue interference with state proceedings counsels against federal relief." Sprint Commc'ns, Inc. v. Jacobs, 571 U.S. 69, 72 (2013) (citing New Orleans Pub. Serv., Inc. v. Council of City of New Orleans, 491 U.S. 350, 373 (1989) ("NOPSI")).

Younger exemplified one class of cases in which

[4] Defendants also urge the court to dismiss plaintiffs' claims under the Barton doctrine, which requires that, "before suit is brought against a receiver, leave of the court by which he was appointed must be obtained." Barton v. Barbour, 104 U.S. 126, 127 (1881). Similar to the prior exclusive jurisdiction doctrine, the Barton doctrine precludes courts from exercising subject matter jurisdiction over a later-filed and unapproved action brought against a receiver appointed by another court. See id. Because the court finds in this Memorandum and Order that the prior exclusive jurisdiction applies, the court need not address whether dismissal under the Barton doctrine is warranted.

federal-court abstention is required: when there is a parallel, pending state criminal proceeding, federal courts must refrain from enjoining the state prosecution. Id. The Supreme Court has since extended Younger abstention to two additional categories: civil enforcement proceedings and "civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions." Id. (citing NOPSI, 491 U.S. at 367-78). "[T]hese three categories are known as the NOPSI categories." Herrera v. City of Palmdale, 918 F.3d 1037, 1044 (9th Cir. 2019).

If the state proceeding falls into one of the NOPSI categories, Younger abstention is appropriate as long as three additional factors, known as the Middlesex factors, are met: the state proceeding must be "(1) 'ongoing,' (2) 'implicate important state interests,' and (3) provide 'an adequate opportunity . . . to raise constitutional challenges.'" Herrera, 918 F.3d at 1044 (quoting Middlesex, 457 U.S. at 432).

1. Whether the Conservation Proceeding falls into one of the NOPSI Categories

The first and third NOPSI categories do not accommodate the Conservation Proceeding. The Conservation is plainly civil, not criminal, and does not involve the sort of order that uniquely touches on the state court's ability to perform its judicial function. See Sprint, 571 U.S. at 79. Unlike cases like Juidice v. Vail, 430 U.S. 327, 336 (1977), or Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 13 (1987), this case does not involve orders such as a contempt order or an order to post bond pending appeal--orders through which the state "compels

compliance with the judgments of its courts."

The court finds, however, that the Conservation falls within the second NOPSI category for certain civil enforcement proceedings. The civil enforcement proceedings to which Younger applies are "akin to a criminal prosecution" in "important respects," in that they

> are characteristically initiated to sanction the federal plaintiff, i.e., the party challenging the state action, for some wrongful act. In cases of this genre, a state actor is routinely a party to the state proceeding and often initiates the action. Investigations are commonly involved, often culminating in the filing of a formal complaint or charges.

Bristol-Myers Squibb Co. v. Connors, 979 F.3d 732, 735-36 (9th Cir. 2020) (quoting Sprint, 571 U.S. at 79 (citations omitted)). The Ninth Circuit has cautioned that, in setting forth these characteristics, the Supreme Court "described the characteristics of quasi-criminal enforcement actions in general terms by noting features that are typically present, not in specific terms by prescribing criteria that are always required." Id.

California conservation proceedings resemble the civil enforcement actions described in Sprint. California Insurance Code § 1011 authorizes the Commissioner, "acting under and within [the State's] police power," Carpenter v. Pac. Mut. Life Ins. Co. of Cal., 10 Cal. 2d 307, 331 (Cal. 1937), to apply for an order from the superior court establishing a conservatorship over an insurance provider if one or several conditions are present: if an insurer "has violated its charter or any law of the state," id. at § 1011(e), if an "officer or attorney in fact of the person has embezzled, sequestered, or wrongfully diverted any of

the assets of the person," id. at § 1011(g), if the insurer has not "compl[ied] with the requirements for the issuance to it of a certificate of authority," id. at § 1011(h), or if the insurer, "without first obtaining the consent in writing of the commissioner, has transferred, or attempted to transfer, substantially its entire property or business or, without consent, has entered into any transaction the effect of which is to merge, consolidate, or reinsure substantially its entire property or business in or with the property or business of any other person," id. at § 1011(c).

Even the provisions of § 1011 authorizing conservation based on the financial health of an insurer are inextricably linked to California laws requiring adequate capitalization, reserves, and other mandates governing the company's relationship to its policyholders. See, e.g., Cal. Ins. Code § 923.5 ("Each insurer transacting business in this state shall at all times maintain reserves in an amount estimated in the aggregate to provide for the payment of all losses and claims for which the insurer may be liable . . . ."). Section 1011 therefore provides the Commissioner with a tool to enforce various provisions of the Insurance Code and protect the public once he determines that an insurance provider has committed a "wrongful" or harmful action by violating one of the Code's provisions. See Cal. Ins. Code § 1011; (Superior Court's Order Denying CIC's Application to Vacate the Conservation Order, at 4 ("The Legislature has given the Commissioner the discretion to deal with this case under either section 1011 or section 1215.2 and the choice of enforcement tool is [his] to make.")).

The process of applying for a conservation and formulating a rehabilitation plan also involves "investigation." Sprint, 571 U.S. at 179-80. The Superior Court is only authorized to order a conservation "upon the filing by the commissioner of [a] verified application showing any of the conditions" set out in § 1011 exist. See Cal. Ins. Code § 1011. The Commissioner must perform an investigation to determine if any of those conditions exist and bring a verified application before the superior court, akin to a "formal complaint or charges." Sprint, 571 U.S. at 179-80. The Commissioner must similarly investigate and file a verified application with the superior court before the court may order a rehabilitation plan or terminate the conservation. See Cal. Ins. Code §§ 1012, 1043.

Plaintiffs present several arguments as to why the Conservation Proceeding cannot constitute a civil enforcement action, none of which is persuasive. Plaintiffs first argue that the Conservation Proceeding is not aimed at "sanctioning" CIC for any wrongful act because, once a conservation has been imposed, it becomes the Commissioner's "duty to operate the company and to try to remove the causes leading to its difficulties," Carpenter, 10 Cal. 2d at 331, and once the condition that led to the conservation has been lifted, the conservation is complete and must also be lifted. (See Pls.' Opp'n at 51-52.) If the Commissioner had intended to sanction CIC, plaintiffs contend, he would have pursued injunctive relief under California Insurance Code § 1215.2, rather than a conservation.

Not only does it strain credulity to accept that an order seizing a company's assets and vesting title to and control

over them in a state official does not constitute a "sanction," the Supreme Court has rejected the premise that Younger abstention is inappropriate simply because a proceeding may be aimed at "remedying" harmful conduct. See Sprint, 571 U.S. at 593 n.6 (rejecting inquiry adopted by several courts of appeals as to whether a state proceeding is "coercive" rather than "remedial" as not "necessary or inevitably helpful, given the susceptibility of the designations to manipulation"); see also Worldwide Church of God, Inc. v. State of Cal., 623 F.2d 613, 614 (9th Cir. 1980) (affirming abstention over suit, brought by California Attorney General, to enjoin court-appointed receivership of a church to prevent diversion of church assets).

Whether its purpose is remedial or coercive, the California Insurance Code authorizes the Commissioner to apply for a conservation if an insurer has committed any of the wrongful acts set forth in § 1011(a)-(j). As plaintiffs' counsel acknowledged at oral argument, the court must employ a categorical approach when assessing whether Younger abstention applies to a particular type of state proceeding. See Bristol-Meyers Squibb, 979 F.3d at 737 ("What matters for Younger abstention is whether the state proceeding falls within the general class of quasi-criminal enforcement actions--not whether the proceeding satisfies specific factual criteria."). The court therefore will not "accept [plaintiffs'] invitation to scrutinize the particular facts" of the Conservation Proceeding to determine whether the Commissioner's decision to pursue a conservation rather than injunctive relief to enforce the provisions of the California Insurance Code was appropriate. See Bristol-Myers

Squibb, 979 F.3d at 737.[5]

Plaintiffs further argue that Younger abstention is not appropriate in this case because they are not the subject of the Conservation Proceeding--rather, CIC is. (See Pls.' Opp'n at 51-52.) While Younger abstention traditionally applies when the federal plaintiffs are defendants in the ongoing state proceeding, most circuits, including the Ninth Circuit, have upheld decisions to abstain under Younger where the parties to the federal and state actions are not identical, but are "so closely related that they should all be subject to the Younger considerations which govern any one of them." See Herrera, 918 F.3d at 1046-47 (holding that co-founder of a motel subject to a state-court nuisance proceeding, as well her children, who lived at the motel, had sufficiently intertwined interests to warrant abstention); Hicks v. Miranda, 422 U.S. 332, 348-49 (1975) (holding that abstention from adjudicating a suit by owners of an adult movie theater to recover their obscene films was appropriate because the owners' interests were sufficiently "intertwined" with those of their employees, who faced prosecution in state court for showing the films).

Here, CIC and plaintiffs are both subject to the

[5] Plaintiffs also suggest that the Conservation Proceeding should not be considered a civil enforcement action because defendants have utilized private counsel, rather than turning to the California Attorney General's Office. (See Pls.' Opp'n at 55-56.) The Ninth Circuit has expressly stated, however, that the State's choice of counsel is irrelevant for determining whether the state proceeding qualifies for Younger abstention. See Bristol-Myers Squibb, 979 F.3d at 736 ("We see no reason why the application of Younger should turn on the State's choice of lawyers.").

management and control of Steven Menzies and Jeffrey Silver. (See FAC ¶¶ 48, 51, 52; Defs.' Req. for Judicial Notice, Exs. 8, 9.) Applied and ARS' operative agreements with CIC indicate that they both remain subject to CIC's supervision and control or act as its behalf as its agent. (See Defs.' Req. for Judicial Notice, Exs. 1, 2.) Plaintiffs also allege in their complaint that their income stream and value depend on providing policy and payroll services to CIC policyholders. (See FAC ¶ 49.) In fact, plaintiffs' complaint is replete with allegations that their reputation is connected to that of CIC's, and that imposition of the Conservation has severely impaired plaintiffs' goodwill and standing in the business community. (See id. at ¶¶ 127, 131, 134, 142, 176.) Any interests plaintiffs have in "contractual rights with CIC," id. at ¶ 168, are wholly derivative of CIC's right to continue operating in California--precisely what it is at issue in the pending Conservation Proceeding. Plaintiffs' interests are therefore not only aligned with CIC's, they are wholly "intertwined" in that they share the same interest in contesting the validity of the state litigation. See Herrera, 918 F.3d at 1047 ("The federal claims of Mona and her children present the same risk of interference in the state proceeding as do the federal claims of Bill and Palmdale Lodging--indeed, all the federal plaintiffs seek the same relief from the state court proceedings.").

Finally, plaintiffs argue that conservation proceedings cannot give rise to Younger abstention because they involve different procedural protections and burdens of proof than criminal prosecutions and analogous civil enforcement

proceedings. (See Pls.' Opp'n at 53.) Specifically, plaintiffs contend that the Superior Court reviews the Commissioner's actions in conservation proceedings under a deferential "abuse of discretion" standard, In re Exec. Life Ins. Co., 32 Cal. App. 4th at 358 (requiring only that the Commissioner's actions be "reasonably related to the public interest" and "not be arbitrary or improperly discriminatory"), that the burden rests on the conserved party to establish that the condition giving rise to the conservation no longer exists, Cal. Ins. Code § 1012, and that many provisions of the California Code of Civil Procedure governing statements of decision, post-trial motions, and automatic stays pending appeal do not apply to conservation proceedings. (See Pls.' Opp'n at 53-54; Pls.' Supp. Authority in Support of Opp'n (Docket No. 48).)

As discussed further below, the fact that certain provisions of the Code of Civil Procedure do not apply to conservation proceedings does not diminish the state court's ability to adjudicate plaintiffs' claims, constitutional or otherwise. More crucially, none of these factors were discussed by the Supreme Court when listing the "important respects" in which a civil proceeding must be akin to a criminal proceeding to determine if Younger should apply. See Sprint, 571 U.S. at 79. After all, civil proceedings typically apply different standards of review than criminal proceedings, and most involve different procedural protections.

Ultimately, plaintiffs do not identify a single case in which a court has found that the burden of proof, standard of review, or applicability of the Code of Civil Procedure should

affect whether a civil proceeding is considered a "civil enforcement action" for the purposes of Younger abstention. To the contrary, courts analyzing whether state enforcement proceedings qualify for Younger abstention under Sprint have largely focused on whether the state itself initiated the proceeding, and whether the proceeding is aimed at sanctioning a party for some wrongful act--factors which, as described above, are met by California conservation proceedings. See, e.g., Sprint, 571 U.S. at 80 (holding that Younger did not apply because "a private corporation, Sprint, initiated the action . . . no state authority conducted an investigation into Sprint's activities," and "the [state agency's] adjudicative authority was invoked to settle a dispute between two private parties, not to sanction Sprint for commission of a wrongful act"); ReadyLink Healthcare, Inc. v. State Compensation Ins. Fund, 754 F.3d 754, 760 (9th Cir. 2014) (holding that Younger did not apply to state court proceedings because the proceedings involved a dispute between private parties, which was adjudicated by a state officer).

For these reasons, the court finds that the Conservation Proceeding is a civil enforcement proceeding for the purposes of determining whether abstention is appropriate.

2. Whether the Middlesex Factors are Met

To qualify for Younger abstention, the Conservation Proceeding must also (1) be ongoing, (2) "implicate important state interests," and (3) there must be "an adequate opportunity in the state proceedings to raise constitutional challenges." ReadyLink, 754 F.3d at 759 (quoting Middlesex, 457 U.S. at 432).

Plaintiffs do not dispute that the Conservation Proceeding is ongoing. (See Pls.' Opp'n at 60.) They do, however, dispute that factors (2) or (3) are met in this case.

a. Important State Interests

The Younger doctrine recognizes that a state's ability to enforce its laws "'against socially harmful conduct that the State believes in good faith to be punishable under its laws and Constitution'" is a "basic state function" with which federal courts should not interfere. Miofsky v. Superior Court of the State of Cal., in and for Sacramento Cnty, 703 F.2d 332, 336 (9th Cir. 1983) (quoting Younger, 401 U.S. at 51–52). "Where the state is in an enforcement posture in the state proceedings, the 'important state interest' requirement is easily satisfied, as the state's vital interest in carrying out its executive functions is presumptively at stake." Potrero Hills Landfill, Inc. v. Cnty. of Solano, 657 F.3d 876, 884 (9th Cir. 2011) (citing Fresh Int'l Corp. v. Agric. Labor Rels. Bd., 805 F.2d 1353, 1360 n.8 (9th Cir. 1986)).

Here, California conservation proceedings implicate the state's interest in ensuring compliance with California Insurance Code provisions, including provisions that require the Commissioner's consent before an insurer attempts to transfer substantially its entire property or business or enters into a merger. See Cal. Ins. Code §§ 1011(c), 1215.2; Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 733 (1996) (Kennedy, J., concurring) ("States, as a matter of tradition and express federal consent, have an important interest in maintaining precise and detailed regulatory schemes for the insurance

industry."). Plaintiffs' own complaint acknowledges that plaintiffs, CIC, and Menzies created a new entity in New Mexico and sought to merge CIC with that entity to effect the Berkshire Hathaway ownership transfer. (See FAC ¶ 66.) Upon learning of these plans, defendants assumed an enforcement posture in state court, filing an application for a conservation "to prevent this illegal transfer . . . ." (See Pls.' Req. for Judicial Notice, Ex. P2 at ¶ 4.)

Plaintiffs argue that defendants cannot simply "invo[ke] . . . the subject matter of California Insurance law" to argue that the Conservation Proceeding implicates important state interests. (See Pls.' Opp'n at 62 (quoting Potrero Hills, 657 F.3d at 884 ("[I]t is not the bare subject matter of the underlying state law that we test to determine whether the state proceeding implicates an 'important state interest' for *Younger* purposes.")).) However, plaintiffs overlook the Ninth Circuit's statement later in Potrero Hills that "the content of state laws becomes 'important' for Younger purposes . . . when coupled with the state executive's interest in enforcing such laws." Potrero Hills, 657 F.3d at 885 ("Had Solano County enforced Measure E against Potrero Hills and denied it the revised Use Permit, no doubt the second Younger requirement would be satisfied."). Because the State, through the Commissioner, is indisputably in an enforcement posture in this case, the content of California's state insurance laws is a relevant--indeed, persuasive--factor indicating that the Conservation Proceeding satisfies the second Middlesex factor.

Plaintiffs further argue that the Conservation

Proceeding cannot implicate important state interests because defendants had allegedly concluded that the CIC-CIC II merger would not harm policyholders and, in any event, CIC had allegedly agreed not to move forward with the merger. (See Pls.' Opp'n at 61-62.) Plaintiffs again contend that defendants have never explained why a conservation, rather than other relief, such as an injunction, was necessary to stop the merger. (See id.) This argument does not alter the court's analysis, however, because, as the court has already noted, the court does "not look narrowly to [the State's] interest in the outcome of the particular case," but instead to "the importance of the generic proceedings to the State." NOPSI, 491 U.S. at 365 (emphasis omitted). The court therefore concludes that the second Middlesex factor is met.

b. Adequate Opportunity to Raise Constitutional Challenges

The inquiry under the third Middlesex prong is whether the Conservation Proceeding will provide plaintiffs a sufficient forum for raising their federal constitutional challenges. Younger abstention reflects a general sense of respect for the integrity of state proceedings, and a presumption "that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary." Pennzoil, 481 U.S. at 15. Thus, "[w]here vital state interests are involved, a federal court should abstain 'unless state law clearly bars the interposition of the constitutional claims.'" Lebbos v. Judges of Superior Court, 883 F.2d 810, 815 (9th Cir. 1989) (quoting Middlesex, 457 U.S. at 432). This factor "does not turn on whether the federal plaintiff actually avails himself of the

opportunity to present federal constitutional claims in the state proceeding, but rather whether such an opportunity exists." Herrera, 918 F.3d at 1046; Canatella v. Cal., 404 F.3d 1106, 1111 (9th Cir. 2005). "[T]he burden on this point rests on the federal plaintiff to show 'that state procedural law barred presentation of [its] claims.'" Pennzoil, 481 U.S. at 14.

Plaintiffs first argue that they cannot influence the Conservation Proceeding because they are not parties to it, relying primarily on Vasquez v. Rackauckas, 734 F.3d 1025 (9th Cir. 2013). Plaintiffs contend that federal plaintiffs who are nonparties to the proceedings in state court need not attempt to intervene in the state court proceedings or prove the inadequacy of those proceedings to avail themselves of their right to proceed in federal court. See Vasquez, 734 F.3d at 1035 ("Younger abstention cannot apply to one . . . who is a stranger to the state proceeding."). However, the situation in this case is distinct from the one in Vasquez. There, the federal plaintiffs were affirmatively excluded from the state proceedings at issue: the Orange County District Attorney "initially named Plaintiffs as parties in the Superior Court action but unilaterally dismissed them . . . precisely because of Plaintiffs' 'effort . . . to fight'--that is, to present a defense in state court." Id. Vasquez held that dismissal of the plaintiffs had made them "strangers" to the state case and caused their interests to diverge from those against whom the state court order was issued (as those who remained in the case did not contest their status as gang members to whom the injunction would apply). See id.

Plaintiffs, by contrast, have not been excluded from participating in the Conservation Proceeding. Although there is no statutory provision governing conservation proceedings that expressly permits third parties to intervene, conservation proceedings under California law differ from other civil actions in that a multitude of persons typically have stakes in the proceeding, and, therefore, the Superior Court judge has the flexibility to employ procedures appropriate to the rights to claimants and the orderly conduct of the conservation. See, e.g., In re Exec. Life Ins. Co., 32 Cal. App. 4th at 391 (describing how third parties were invited to participate in hearing before conservation court and allowed to raise due process arguments on appeal). Specifically in this case, the Superior Court has expressly invited plaintiffs to submit any objections--constitutional or otherwise--they have to the Proposed Rehabilitation Plan in writing and orally at the hearing on the Commissioner's application to approve the Plan. (Procedural Order at 2-4.)

CIC will also be able to adequately represent plaintiffs' interests in the state proceeding. As already discussed, plaintiffs and CIC remain under common management and control of Steven Menzies and Jeffrey Silver. (See FAC ¶¶ 48, 49.) Plaintiffs interests vis a vis the Conservation Proceeding are shared by CIC, as all of plaintiffs' alleged injuries stem from the same Conservation Order and Proposed Rehabilitation Plan that the Commissioner seeks to impose on CIC. See Hicks v. Miranda, 422 U.S. 332, 348-49 (1975) (holding that interests of owners of adult movie theater were intertwined with those of

their employees in showing that the basis for the state prosecution for showing obscene material--brought only against the employees--was unconstitutional). This case is therefore unlike Doran v. Salem Inn, 422 U.S. 922, 928-29 (1975), where the Supreme Court held that two bar owners who sought an injunction in federal court against the operation of a local ordinance prohibiting topless entertainment in bars could proceed with their federal case because they were "apparently unrelated in terms of ownership, control, and management" from a third bar owner who was prosecuted in state court.

Plaintiffs further argue that certain procedural characteristics of California conservation proceedings either have or will preclude them from adequately presenting their constitutional claims to the state court. (See Pls.' Opp'n at 69-72.)[6] Plaintiffs point to the fact the Commissioner only has to prove that he has determined that grounds for conservation exist--rather than proving that the grounds in fact exist--when initially applying for a conservation order ex parte under Insurance Code § 1011; that the burden shifts to the conserved party or the Commissioner to show that the condition which gave rise to the conservation no longer exists under § 1012; that conservation proceedings are not subject to California Code of Civil Procedure § 632 regarding findings of fact or conclusions of law; and that the appellate court presumes there was a

[6] Plaintiffs listed their grievances regarding the procedures employed by California superior courts in conservation proceedings on a PowerPoint slide presented at Oral Argument. (Docket No. 53). While the court does not reproduce this list verbatim, the substance of plaintiffs' objections is addressed herein.

reasonable factual basis for the lower court's decision as evidence of their inability to present constitutional claims to the state court. See Fin. Indem. Co. v. Superior Ct. In & For Los Angeles Cnty., 45 Cal. 2d 395, 401 (1955) (quoting Caminetti v. Imperial Mut. L. Ins. Co., 59 Cal. App. 2d 476, 487 (1942)); Garamendi, 128 Cal. App. 4th at 461 (2005) (citing Carpenter, 10 Cal. 2d at 328 (1937)).

Some of these objections ignore other provisions of California law that provide additional opportunities to object to the conservation proceedings and other procedural protections. For instance, while the Superior Court may defer to the Commissioner's judgment as to whether a conservation is warranted under § 1011, § 1012 guarantees the conserved party a full hearing before the court to show that the ground which gave rise to the conservation no longer exists, a process which has repeatedly been upheld as satisfying due process by state and federal courts who have considered the issue. See, e.g., Rhode Island, 95 Cal. App. 2d 220, 238-39 (1st Dist. 1949). Plaintiffs also ignore the substantial body of published appellate cases arising from California conservation proceedings, which demonstrates that, although superior courts are not required to issue formal findings of fact or conclusions of law, appellate courts routinely receive decisions and records from the conservation court sufficient to permit appellate review, including of constitutional objections. See, e.g., Carpenter, 10 Cal. 2d at 328-29; In re Exec. Life Ins. Co., 32 Cal. App. 4th at 391.

This substantial body of case law also reveals that

plaintiffs' objections suffer from a more fundamental defect: none of the purported infirmities to which plaintiffs point show that plaintiffs have or will be barred from presenting their constitutional claims, as it is their burden to show. See Pennzoil, 481 U.S. at 14. To the contrary, California case law shows that constitutional objections may be raised in a motion to lift the conservation, in conjunction with the Superior Court's review of the Proposed Rehabilitation Plan, or on subsequent appeals from decisions of the Superior Court.

In Carpenter v. Pacific Mutual Life Insurance of California, for instance, non-conserved third parties appealed the conservation court's approval of the rehabilitation plan for Pacific Mutual Life on grounds that it violated the Due Process, Equal Protection, and Contract Clauses of the United States Constitution. Carpenter, 10 Cal. 2d at 328-29. The California Supreme Court heard the third-parties' constitutional arguments and affirmed the conservation court's approval of the plan. Id. at 331, 335, 341. The United States Supreme Court affirmed the decision as well. Neblett v. Carpenter, 305 U.S. 297 (1938). A number of other decisions by California Courts of Appeals illustrate that state appellate courts routinely hear constitutional challenges to procedures employed by the Superior Court. See, e.g., In re Exec. Life Ins. Co., 32 Cal. App. 4th at 391 (reviewing third party's First Amendment claims raised before conservation court); Rhode Island, 95 Cal. App. 2d at 238-39 (reviewing constitutional objections to § 1012 on petition for writ of mandate directing Superior Court to vacate its order appointing conservator).

Here, plaintiffs have already been invited to present their objections to the Proposed Rehabilitation Plan as part of the Superior Court's consideration of whether to approve the Plan. (See Procedural Order at 3.) Plaintiffs will be free to pursue interlocutory review of the Superior Court's orders through emergency writ--an avenue CIC has already pursued, albeit unsuccessfully, because the Court of Appeal was unconvinced that it was entitled to emergency relief--or other appellate review of the Superior Court's decisions within the California court system and, ultimately, the United States Supreme Court. See Rhode Island, 95 Cal. App. 2d at 238-39; Carpenter, 10 Cal. 2d at 328-41; Neblett, 305 U.S. at 297.

California's courts are entitled to the presumption that these avenues for challenging the Conservation Proceeding on constitutional grounds will satisfy the law. See Pennzoil, 481 U.S. at 14 ("We must assume that state procedures afford an adequate remedy, in the absence of unambiguous authority to the contrary."). Because plaintiffs have failed to point to any "unambiguous authority" to the contrary, Pennzoil, 481 U.S. at 14, the court finds that the third Middlesex factor also weighs in favor of abstention.[7]

[7] The Ninth Circuit has articulated an "implied fourth requirement that the federal court action would enjoin the proceeding, or have the practical effect of doing so." Potrero Hills, 657 F.3d at 882. For the same reasons that the court has found that adjudicating plaintiffs' claims in the federal action would require the court to assert in rem or quasi in rem jurisdiction by "disturbing" the state court's control over the res, see Section II.B., supra, the court finds that this implied requirement is amply met. Not only does plaintiffs' operative complaint seek an order directing the Commissioner to "take all necessary steps to end CIC's conservatorship," it seeks orders

3. Younger Exceptions for "Bad Faith" and "Irreparable Injury"

Even if all the requirements for Younger abstention have been met, the Supreme Court has stated that a federal court must nevertheless intervene in a state proceeding upon a showing of "bad faith, harassment, or any other unusual circumstance that would call for equitable relief." See Younger, 401 U.S. at 45. "A plaintiff who seeks to head off Younger abstention bears the burden of establishing that one of the exceptions applies." Diamond "D" Const. Corp. v. McGowan, 282 F.3d 191, 198 (2d Cir. 2002) (citations omitted). For the following reasons, no such showing has been made here.

a. Bad Faith

The "bad faith" exception to Younger abstention is narrow: "[o]nly in cases of proven harassment or prosecutions undertaken by officials in bad faith without hope of obtaining a valid conviction . . . is federal injunctive relief against pending state prosecutions appropriate." Perez v. Ledesma, 401 U.S. 82, 85 (1971) (emphasis added); see also Hensler v. Dist. Four Grievance Comm., 790 F.2d 390-92 (5th Cir. 1986) (holding that court should not enjoin state court proceeding without "allegations and proof of bad faith" (emphasis added)). "Evidence of bad-faith harassment must be more than multiple prosecutions, must be more than conclusory statements about motive, must be more than a weak claim of selective prosecution,

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requiring the Commissioner to withdraw the Proposed Rehabilitation Plan, an integral part of the Conservation Proceeding that defendants have filed pursuant to the Superior Court's Procedural Order. (See FAC, Prayer for Relief ¶¶ C-G.)

and must be more than the prosecution of close cases." Kihagi v. Francisco, No. 15-CV-01168-KAW, 2016 WL 5682575, at *4 (N.D. Cal. Oct. 3, 2016) (citations omitted). Accordingly, "[t]here is no case since Younger was decided in which the [Supreme] Court has found that the exception for bad faith or harassment was applicable," Wright & Miller, 17B Fed. Prac. & Proc. Juris. § 4255 (3d ed.), and plaintiffs do not cite to a single case from this circuit in which a court has found the bad-faith exception to apply (see Pls.' Opp'n at 74-79).

Plaintiffs have not proven that bad faith exists in this case. First, it cannot constitute bad faith for defendants to rely on repeated judicial authorizations from California state courts. See Hicks, 422 U.S. at 351 (search and seizure based on valid judicial warrant cannot lead to finding of bad faith and harassment); Juidice, 430 U.S. at 338 (rejecting bad faith exemption because, though complaint alleged bad faith on the part of creditors, it made no such allegations about the state judges who issued and enforced the contempt orders). At each step of the Conservation Proceeding, defendants have received authorization to proceed from the Superior Court.

The Superior Court reviewed the Commissioner's ex parte application for an order appointing him as conservator of CIC and ordered that the Conservation Proceeding commence because the Commissioner had found that "the factual and legal conditions exist to conserve CIC pursuant to Insurance Code section 1011, subdivision (c)." (See Conservation Order at 2.) The Superior Court subsequently affirmed the decision to impose the Conservation, denying CIC's motion to vacate the Conservation

(Defs.' Req. for Judicial Notice, Ex. 10), and the California Court of Appeals denied CIC's writ petition for immediate review, (id. at Ex. 11). Finally, the Superior Court issued a Procedural Order establishing an orderly process for reviewing the Commissioner's Proposed Rehabilitation Plan after the Commissioner represented that "a rehabilitation plan may well result in CIC ceasing to do business in California." (Pls.' Req. for Judicial Notice, Ex. P7 at 12 n.5; Defs.' Req. for Judicial Notice, Ex. 10, at 4.)

Plaintiffs seek to impeach the Conservation Order by claiming that the Superior Court granted it on false pretenses, as defendants allegedly made several misrepresentations and omissions when applying to the Superior Court. See (Pls.' Opp'n at 77). However, CIC presented these exact arguments to the Superior Court when it filed its motion to vacate the Conservation Order, and to the California Court of Appeals when it petitioned for a writ of mandate setting aside the denial of its motion to vacate. (See Defs.' Req. for Judicial Notice, Exs. 13-15.) Both courts rejected CIC's application, and the Superior Court maintained the conservation, even after becoming aware of the alleged misrepresentations which plaintiffs raise. See Phelps v. Hamilton, 59 F.3d 1058, 1066 (10th Cir. 1995).

Plaintiffs further contend that defendants' inclusion of provisions in the Proposed Rehabilitation Plan requiring plaintiffs and CIC to settle EquityComp lawsuits proves that defendants are using the Conservation to retaliate against plaintiffs for their constitutionally-protected use of the court system and success in prior litigation. See Cullen v. Fliegner,

18 F.3d 96, 103 (2d Cir. 1994); (FAC ¶¶ 6-8, 13.) But in order to show bad faith, plaintiffs must show that "the state proceeding [was] brought with no legitimate purpose." Diamond "D" Const. Corp. v. McGowan, 282 F.3d 191, 200 (2d Cir. 2002). In other words, plaintiffs must prove that "the statute was enforced against them with no expectation of convictions but only to discourage exercise of protected rights." Cameron v. Johnson, 390 U.S. 611, 621 (1968) (emphasis added).

Plaintiffs' own allegations describe efforts by CIC and plaintiffs to create a New Mexico Company, CIC II, into which CIC could merge its assets to avoid California's regulatory process. (See FAC ¶¶ 64-75.) The FAC acknowledges that defendants did not consent to the merger, as they warned CIC that the merger would extinguish its certificate of authority by operation of law. (See id.) Probable cause therefore existed to believe that CIC was attempting to merge with another entity or transfer substantially its entire property to another person without consent, a valid basis for instituting conservation proceedings under California Insurance Code § 1011(c). Because plaintiffs' own allegations provide a valid basis for the Conservation, and because defendants' actions have received repeated authorization from state courts, this court cannot find that the state proceeding lacks "[any] legitimate purpose," and instead must find that plaintiffs have failed to prove the existence of bad faith in this case. See Diamond "D", 282 F.3d at 200.[8]

[8] The fact that plaintiffs ask this court to intervene in the state proceeding to effectively enjoin the Superior Court from ruling on the validity of the Proposed Rehabilitation plan, before the Superior Court has even had a chance to issue its own

b. Irreparable Injury

To establish the irreparable injury exception to Younger abstention, plaintiffs must show the existence of "extraordinary circumstances" that present a "danger of irreparable loss [that] is both great and immediate." Younger, 401 U.S. at 45. "[S]uch circumstances must be 'extraordinary' in the sense of creating an extraordinarily pressing need for immediate federal equitable relief, not merely in the sense of presenting a highly unusual factual situation.'" Moore v. Sims, 442 U.S. 415, 433 (1979) (quoting Kugler v. Helfant, 421 U.S. 117, 124 (1975)).

Plaintiffs contend that the alleged deprivation of their constitutional rights as a result of the Conservation constitutes such an "extraordinary circumstance." However, if allegations that a plaintiff's constitutional rights were being violated were sufficient to constitute "extraordinary circumstances," this exception to Younger would swallow the rule. As the Supreme Court stated in NOPSI, "it is clear that the mere

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ruling, underscores the propriety of Younger abstention in this case. Even if the court were to agree with plaintiffs that the provisions of the Proposed Rehabilitation Plan violate plaintiffs' Constitutional rights to Due Process and Free Expression, or constitute a taking without just compensation, it is possible that the Superior Court will approve a version of the Rehabilitation Plan that does not include these provisions or will deny the Commissioner's request entirely. Younger abstention embodies a policy whereby federal courts "give [the] state[] the first opportunity--but not the only, or last--to correct those errors of a federal constitutional dimension that infect its proceedings." See Diamond "D", 282 F.3d at 200. Intervening in the Conservation Proceeding to wrest the decision as to the Proposed Rehabilitation Plan's validity in the first instance away from the Superior Court would violate this principle.

assertion of a substantial constitutional challenge to state action will not alone compel the exercise of federal jurisdiction." NOPSI, 491 U.S. at 365.

Plaintiffs argue that the harm the Conservation has caused them is "irreparable" because they will be unable to recover money damages in this case. (See Pls.' Opp'n at 79.) Cal. Pharmacists Ass'n v. Maxwell-Jolly, 563 F.3d 847, 852 (9th Cir. 2009), cited by plaintiffs, was a preliminary injunction case, not a Younger abstention case. Plaintiffs offer no basis to apply the standard for a preliminary injunction here, where the exception requires not only irreparable harm but "extraordinary circumstances," and provide no further explanation as to why this case would present extraordinary circumstances. The court therefore finds that plaintiffs have failed to establish any of the Younger exceptions which would prevent its application in this case.

In sum, defendants have established that the Conservation Proceeding falls under the NOPSI category for civil enforcement proceedings, that the three Middlesex factors are met, that this action would have the practical effect of enjoining the state court proceeding, and that neither the bad-faith nor exceptional circumstances exceptions apply. Accordingly, dismissal under Younger is appropriate. See Younger, 401 U.S. at 37.

IT IS THEREFORE ORDERED that defendants' motion to dismiss (Docket Nos. 34-35) be, and the same hereby is, GRANTED. The Clerk is directed to enter Judgment in this action accordingly.

Dated: March 30, 2021

WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE