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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

1 (collectively, "defendants"), in response to defendants'
2 imposition of a conservation over non-party California Insurance
3 Company ("CIC") in San Mateo Superior Court in November 2019 (the
4 "Conservation Proceeding"). (See First Amended Complaint ("FAC")
5 (Docket No. 26).) Plaintiffs--affiliates of CIC--allege that
6 defendants' actions leading up to and including the Conservation
7 violated their rights to equal protection and due process under
8 the Fourteenth Amendment, as well as their First Amendment right
9 to criticize officials in the press and petition the government,
10 in violation of 42 U.S.C. § 1983. (FAC ¶¶ 135-90.) Plaintiffs
11 further allege that defendants' actions constituted unlawful
12 takings in violation of the Fifth and Fourteenth Amendments, and
13 levy an as-applied challenge against California Insurance Code
14 § 1011(c) under the Dormant Commerce Clause of the United States
15 Constitution, Art. I, § 8, cl. 3. (Id.)

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

20 I. Factual and Procedural Background

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

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

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

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

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

2 In response, Applied, CIC, and Menzies created a new
3 entity in New Mexico, "CIC II," and sought to merge CIC with CIC
4 II so that the transaction could be completed under the
5 supervision of New Mexico's Insurance Department rather than CDI.
6 (FAC ¶¶ 64-66.) This process culminated in a conference call and
7 Form A approval hearing on October 9, 2019, in which regulators
8 from New Mexico, Texas, and California (including CDI)
9 participated and attended. (Id.) According to plaintiffs, CDI
10 did not object to the merger or the sale's consummation during
11 the hearing, during which New Mexico's Superintendent of
12 Insurance, Superintendent Franchini, approved the merger. (Id.)
13 Rather, plaintiffs allege that CDI attorneys told Superintendent
14 Franchini that the "proposed merger presented no risks to
15 California policyholders." (Id.) Following Superintendent
16 Franchini's order approving the merger, Berkshire informed the
17 New Mexico Department of Insurance that, based on the lack of
18 objection at the Form A approval hearing, it planned to proceed
19 with the closing scheduled for October 10, 2019.¹ (Id. at ¶ 69.)

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

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

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

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

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

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

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

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

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

5 As of the date of this Order, the Superior Court has
6 not yet approved or denied the Proposed Rehabilitation Plan; a
7 hearing on the Commissioner's application is scheduled for April
8 15, 2021. (See Defs.' Req. for Judicial Notice, Ex. 5.)

9 II. Discussion

10 Federal Rule of Civil Procedure 12(b)(1) authorizes
11 dismissal for lack of subject matter jurisdiction. Motions to
12 dismiss based on exclusive in rem jurisdiction of a state court
13 are properly analyzed under Rule 12(b)(1). See Chapman v.
14 Deutsche Bank Nat. Trust Co., 651 F.3d 1039, 1043 (9th Cir.
15 2011). A motion to dismiss on Younger² abstention grounds is
16 also properly brought under Rule 12(b)(1). Steel Co. v. Citizens
17 for a Better Env't, 523 U.S. 83, 100 n.3 (1998) (treating Younger
18 abstention as jurisdictional); Washington v. Los Angeles Cnty.
19 Sheriff's Dep't, 833 F.3d 1048, 1058 (9th Cir. 2016) (recognizing
20 "a dismissal due to Younger abstention [is] similar to a
21 dismissal under Rule 12(b)(1)").

22 A. Requests for Judicial Notice

23 Though a court generally may not consider material
24 outside the complaint on a motion to dismiss under Rule 12(b)(1),
25 the court may look beyond the pleadings "at documents
26 incorporated into the complaint by reference, and matters of
27

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

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

3 A defendant may seek to incorporate a document by
4 reference into the complaint “if the plaintiff refers extensively
5 to the document or the document forms the basis of the
6 plaintiff’s claim.” United States v. Ritchie, 342 F.3d 903, 907
7 (9th Cir. 2003). “The court may treat such a document as ‘part
8 of the complaint’” and “may assume that its contents are true for
9 purposes of a motion to dismiss,” Marder v. Lopez, 450 F.3d 445,
10 448 (9th Cir. 2006) (emphases added), so long as such assumptions
11 do not only serve to dispute facts in the complaint. Khoja v.
12 Orexigen Therapeutics, Inc., 899 F.3d 988, 1003 (9th Cir. 2018).

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

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

1 342 F.3d at 907. Plaintiffs refer extensively to these documents
2 throughout the FAC, and they are central to the plaintiffs'
3 claims of injury. (See FAC ¶¶ 106-108, 176.)

4 The court also takes judicial notice of Exhibit A to
5 Exhibit 3, and Exhibits 4, 5, 6, 7, 10, 11, 12, 13, 14, and 15 to
6 defendants' request for judicial notice. Exhibit A to Exhibit 3
7 is a copy of the Proposed Rehabilitation Plan, and is judicially
8 noticeable both as a matter of public record and pursuant to the
9 incorporation by reference doctrine. See Cnty. of Orange, 682
10 F.3d at 1132; Ritchie, 342 F.3d at 907. The Superior Court's
11 Procedural Order, Order to Continue Certain Briefing Deadlines
12 for the Conservator's Rehabilitation Plan, Clerk's Notice of
13 Hearing, the Conservation Order, Order Denying Respondent's
14 Verified Application to Vacate the Conservation Order, Order
15 Denying Petition for Writ of Mandate, Memorandum of Points and
16 Authorities and Reply in Support of Application to Vacate the
17 Conservation Order, and Petition for Writ of Mandate (Exhibits 4,
18 5, 6, 7, 10, 11, 13, 14, and 15 to defendants' Request for
19 Judicial Notice, respectively) are all judicially noticeable on
20 the ground that they are matters of public record as documents on
21 file in the state court. Cnty. of Orange, 682 F.3d at 1132. The
22 court further notes that plaintiffs do not object to defendants'
23 request for Exhibits 5, 6, 7, 11, 13, 14, or 15.

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

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

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

10 B. Prior Exclusive Jurisdiction

11 The "ancient and oft-repeated . . . doctrine of prior
12 exclusive jurisdiction" holds "that when a court of competent
13 jurisdiction has obtained possession, custody, or control of
14 particular property, that possession may not be disturbed by any
15 other court." State Eng'r of State of Nev. v. S. Fork Band of
16 Te-Moak Tribe of W. Shoshone Indians of Nev., 339 F.3d 804, 809
17 (9th Cir. 2003) (quoting 14 Charles Alan Wright, Arthur R.
18 Miller, Edward H. Cooper, Federal Practice and Procedure § 3631,
19 at 8 (3d ed. 1998)). "That is, when one court is exercising in
20 rem jurisdiction over a res, a second court will not assume in
21 rem jurisdiction over the same res." Sexton v. NDEX West, LLC,
22 713 F.3d 533, 536 (9th Cir. 2013) (citations omitted). "The
23 purpose of the rule is the maintenance of comity between courts;
24 such harmony is especially compromised by state and federal
25 judicial systems attempting to assert concurrent control over the
26 res upon which jurisdiction of each depends." Id.

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

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

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

14 The question of whether an action is in rem, quasi in
15 rem, or in personam "turns on what, precisely, is at issue in the
16 state and federal court proceedings." Goncalves by and through
17 Goncalves v. Rady Childs. Hosp. San Diego, 865 F.3d 1237, 1253
18 (9th Cir. 2017). An action is in rem when it "determine[s]
19 interests in specific property as against the whole world."
20 State Eng'r, 339 F.3d at 811 (quoting In Rem, BLACK'S LAW
21 DICTIONARY (6th ed. 1990)). "Under California law, a suit
22 proceeds in rem [only] where property is 'seized and sought to be
23 held for the satisfaction of an asserted charge against property
24 without regard to the title of individual claimants to the
25 property.'" Hanover Ins. Co. v. Fremont Bank, 68 F. Supp. 3d
26 1085, 1109 (N.D. Cal. 2014) (quoting Lee v. Silva, 197 Cal. 364,
27 240 P. 1015, 1016 (1925)). An action is quasi in rem when it is
28 brought "against the defendant[s] personally" but "the [parties']

1 interest[s] in the property ... serve[] as the basis of the
2 jurisdiction." State Eng'r, 339 F.3d at 811 (alterations in
3 original). "On the other hand, where a party initiates an action
4 merely to 'determine the personal rights and obligations of the
5 [parties],' the court asserts in personam jurisdiction." Hanover
6 Ins. Co., 68 F.Supp.3d at 1109 (quoting Pennoyer v. Neff, 95 U.S.
7 714, 727 (1877)).

8 The court's jurisdiction in the underlying suit may be
9 in rem or quasi in rem even if the property at issue was not
10 "actually seized under judicial process before a second suit
11 [was] instituted." Goncalves, 865 F.3d at 1254 (quoting United
12 States v. Bank of N.Y. & Tr. Co., 296 U.S. 463, 477 (1936)). The
13 doctrine "applies as well where suits are brought to marshal
14 assets, administer trusts, or liquidate estates, and in suits of
15 a similar nature, where, to give effect to its jurisdiction, the
16 court must control the property." Id. "When applying the
17 doctrine, courts should not 'exalt form over necessity,' but
18 instead should 'look behind the form of the action to the
19 gravamen of a complaint and the nature of the right sued on.'" Chapman,
20 651 F.3d at 1044 (quoting State Eng'r, 339 F.3d at 810).

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

1 of any and all assets of CIC, to maintain and invest any of those
2 assets or funds according to his discretion, and to exercise all
3 powers of the directors, officers, and managers of CIC.

4 (Conservation Order at ¶¶ 11-14.)

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

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

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

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

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

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

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

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

11 Therefore, though plaintiffs do not explicitly ask the
12 court to "seize" CIC or its assets from the Superior Court, they
13 do ask the court to issue orders that would "disturb" the state
14 court's control of CIC and its assets in a manner that would
15 amount to the assertion of in rem, or, at the least, quasi in rem
16 jurisdiction.³ See Bank of N.Y., 296 U.S. at 478; State Eng'r,
17 339 F.3d at 810 (holding that, although contempt action was
18 styled as an in personam action, there could "be no serious
19 dispute that [it] was brought to enforce a decree over a res"--
20 the Humboldt River--and, therefore, adjudication by the federal
21

22 ³ The fact that plaintiffs also seek declaratory relief
23 does not alter the court's analysis. Though plaintiffs seek
24 declarations that the Commissioner has acted unconstitutionally,
25 the gravamen of their complaint is clearly to bring an end to the
26 Conservation Proceeding currently pending in Superior Court. See
27 Pascua v. OneWest Bank, No. CV 16-00016 LEK-KSC, 2017 WL 424851,
28 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").

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

5 C. Younger Abstention

6 Alternatively, the court finds that dismissal of
7 plaintiffs’ claims is warranted under the doctrine of Younger
8 abstention. The Supreme Court’s decision in Younger v. Harris,
9 401 U.S. 37 (1971) and those that have followed “espouse a strong
10 federal policy against federal-court interference with pending
11 state judicial proceedings absent extraordinary circumstances.”
12 Middlesex Cnty. Ethics Comm. v. Garden State Bar Assoc., 457 U.S.
13 423, 431 (1982). Though abstention is not required “simply
14 because a pending state-court proceeding involves the same
15 subject matter . . . [the Supreme Court] has recognized . . .
16 certain instances in which the prospect of undue interference
17 with state proceedings counsels against federal relief.” Sprint
18 Commc’ns, Inc. v. Jacobs, 571 U.S. 69, 72 (2013) (citing New
19 Orleans Pub. Serv., Inc. v. Council of City of New Orleans, 491
20 U.S. 350, 373 (1989) (“NOPSI”).

21 Younger exemplified one class of cases in which

22 ⁴ Defendants also urge the court to dismiss plaintiffs’
23 claims under the Barton doctrine, which requires that, “before
24 suit is brought against a receiver, leave of the court by which
25 he was appointed must be obtained.” Barton v. Barbour, 104 U.S.
26 126, 127 (1881). Similar to the prior exclusive jurisdiction
27 doctrine, the Barton doctrine precludes courts from exercising
28 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.

1 federal-court abstention is required: when there is a parallel,
2 pending state criminal proceeding, federal courts must refrain
3 from enjoining the state prosecution. Id. The Supreme Court has
4 since extended Younger abstention to two additional categories:
5 civil enforcement proceedings and "civil proceedings involving
6 certain orders that are uniquely in furtherance of the state
7 courts' ability to perform their judicial functions." Id.
8 (citing NOPSI, 491 U.S. at 367-78). "[T]hese three categories
9 are known as the NOPSI categories." Herrera v. City of Palmdale,
10 918 F.3d 1037, 1044 (9th Cir. 2019).

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

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

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

1 compliance with the judgments of its courts.”

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

7 are characteristically initiated to sanction
8 the federal plaintiff, i.e., the party
9 challenging the state action, for some
10 wrongful act. In cases of this genre, a
11 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.

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

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

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

11 Even the provisions of § 1011 authorizing conservation
12 based on the financial health of an insurer are inextricably
13 linked to California laws requiring adequate capitalization,
14 reserves, and other mandates governing the company's relationship
15 to its policyholders. See, e.g., Cal. Ins. Code § 923.5 ("Each
16 insurer transacting business in this state shall at all times
17 maintain reserves in an amount estimated in the aggregate to
18 provide for the payment of all losses and claims for which the
19 insurer may be liable"). Section 1011 therefore provides
20 the Commissioner with a tool to enforce various provisions of the
21 Insurance Code and protect the public once he determines that an
22 insurance provider has committed a "wrongful" or harmful action
23 by violating one of the Code's provisions. See Cal. Ins. Code
24 § 1011; (Superior Court's Order Denying CIC's Application to
25 Vacate the Conservation Order, at 4 ("The Legislature has given
26 the Commissioner the discretion to deal with this case under
27 either section 1011 or section 1215.2 and the choice of
28 enforcement tool is [his] to make.")).

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

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

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

1 over them in a state official does not constitute a "sanction,"
2 the Supreme Court has rejected the premise that Younger
3 abstention is inappropriate simply because a proceeding may be
4 aimed at "remedying" harmful conduct. See Sprint, 571 U.S. at
5 593 n.6 (rejecting inquiry adopted by several courts of appeals
6 as to whether a state proceeding is "coercive" rather than
7 "remedial" as not "necessary or inevitably helpful, given the
8 susceptibility of the designations to manipulation"); see also
9 Worldwide Church of God, Inc. v. State of Cal., 623 F.2d 613, 614
10 (9th Cir. 1980) (affirming abstention over suit, brought by
11 California Attorney General, to enjoin court-appointed
12 receivership of a church to prevent diversion of church assets).

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

1 Squibb, 979 F.3d at 737.⁵

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

21 Here, CIC and plaintiffs are both subject to the

22
23 ⁵ Plaintiffs also suggest that the Conservation
24 Proceeding should not be considered a civil enforcement action
25 because defendants have utilized private counsel, rather than
26 turning to the California Attorney General's Office. (See Pls.'
27 Opp'n at 55-56.) The Ninth Circuit has expressly stated,
28 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.").

1 management and control of Steven Menzies and Jeffrey Silver.
2 (See FAC ¶¶ 48, 51, 52; Defs.' Req. for Judicial Notice, Exs. 8,
3 9.) Applied and ARS' operative agreements with CIC indicate that
4 they both remain subject to CIC's supervision and control or act
5 as its behalf as its agent. (See Defs.' Req. for Judicial
6 Notice, Exs. 1, 2.) Plaintiffs also allege in their complaint
7 that their income stream and value depend on providing policy and
8 payroll services to CIC policyholders. (See FAC ¶ 49.) In fact,
9 plaintiffs' complaint is replete with allegations that their
10 reputation is connected to that of CIC's, and that imposition of
11 the Conservation has severely impaired plaintiffs' goodwill and
12 standing in the business community. (See id. at ¶¶ 127, 131,
13 134, 142, 176.) Any interests plaintiffs have in "contractual
14 rights with CIC," id. at ¶ 168, are wholly derivative of CIC's
15 right to continue operating in California--precisely what it is
16 at issue in the pending Conservation Proceeding. Plaintiffs'
17 interests are therefore not only aligned with CIC's, they are
18 wholly "intertwined" in that they share the same interest in
19 contesting the validity of the state litigation. See Herrera,
20 918 F.3d at 1047 ("The federal claims of Mona and her children
21 present the same risk of interference in the state proceeding as
22 do the federal claims of Bill and Palmdale Lodging--indeed, all
23 the federal plaintiffs seek the same relief from the state court
24 proceedings.").

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

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

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

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

1 affect whether a civil proceeding is considered a "civil
2 enforcement action" for the purposes of Younger abstention. To
3 the contrary, courts analyzing whether state enforcement
4 proceedings qualify for Younger abstention under Sprint have
5 largely focused on whether the state itself initiated the
6 proceeding, and whether the proceeding is aimed at sanctioning a
7 party for some wrongful act--factors which, as described above,
8 are met by California conservation proceedings. See, e.g.,
9 Sprint, 571 U.S. at 80 (holding that Younger did not apply
10 because "a private corporation, Sprint, initiated the action . .
11 . no state authority conducted an investigation into Sprint's
12 activities," and "the [state agency's] adjudicative authority was
13 invoked to settle a dispute between two private parties, not to
14 sanction Sprint for commission of a wrongful act"); ReadyLink
15 Healthcare, Inc. v. State Compensation Ins. Fund, 754 F.3d 754,
16 760 (9th Cir. 2014) (holding that Younger did not apply to state
17 court proceedings because the proceedings involved a dispute
18 between private parties, which was adjudicated by a state
19 officer).

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

23 2. Whether the Middlesex Factors are Met

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

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

4 a. Important State Interests

5 The Younger doctrine recognizes that a state's ability
6 to enforce its laws "'against socially harmful conduct that the
7 State believes in good faith to be punishable under its laws and
8 Constitution'" is a "basic state function" with which federal
9 courts should not interfere. Miofsky v. Superior Court of the
10 State of Cal., in and for Sacramento Cnty, 703 F.2d 332, 336 (9th
11 Cir. 1983) (quoting Younger, 401 U.S. at 51-52). "Where the
12 state is in an enforcement posture in the state proceedings, the
13 'important state interest' requirement is easily satisfied, as
14 the state's vital interest in carrying out its executive
15 functions is presumptively at stake." Potrero Hills Landfill,
16 Inc. v. Cnty. of Solano, 657 F.3d 876, 884 (9th Cir. 2011)
17 (citing Fresh Int'l Corp. v. Agric. Labor Rels. Bd., 805 F.2d
18 1353, 1360 n.8 (9th Cir. 1986)).

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

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

9 Plaintiffs argue that defendants cannot simply
10 “invo[ke] . . . the subject matter of California Insurance law”
11 to argue that the Conservation Proceeding implicates important
12 state interests. (See Pls.’ Opp’n at 62 (quoting Potrero Hills,
13 657 F.3d at 884 (“[I]t is not the bare subject matter of the
14 underlying state law that we test to determine whether the state
15 proceeding implicates an ‘important state interest’ for *Younger*
16 purposes.”)).) However, plaintiffs overlook the Ninth Circuit’s
17 statement later in Potrero Hills that “the content of state laws
18 becomes ‘important’ for *Younger* purposes . . . when coupled with
19 the state executive’s interest in enforcing such laws.” Potrero
20 Hills, 657 F.3d at 885 (“Had Solano County enforced Measure E
21 against Potrero Hills and denied it the revised Use Permit, no
22 doubt the second *Younger* requirement would be satisfied.”).
23 Because the State, through the Commissioner, is indisputably in
24 an enforcement posture in this case, the content of California’s
25 state insurance laws is a relevant--indeed, persuasive--factor
26 indicating that the Conservation Proceeding satisfies the second
27 Middlesex factor.

28 Plaintiffs further argue that the Conservation

1 Proceeding cannot implicate important state interests because
2 defendants had allegedly concluded that the CIC-CIC II merger
3 would not harm policyholders and, in any event, CIC had allegedly
4 agreed not to move forward with the merger. (See Pls.' Opp'n at
5 61-62.) Plaintiffs again contend that defendants have never
6 explained why a conservation, rather than other relief, such as
7 an injunction, was necessary to stop the merger. (See id.) This
8 argument does not alter the court's analysis, however, because,
9 as the court has already noted, the court does "not look narrowly
10 to [the State's] interest in the outcome of the particular case,"
11 but instead to "the importance of the generic proceedings to the
12 State." NOPSI, 491 U.S. at 365 (emphasis omitted). The court
13 therefore concludes that the second Middlesex factor is met.

14 b. Adequate Opportunity to Raise Constitutional
15 Challenges

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

1 opportunity to present federal constitutional claims in the state
2 proceeding, but rather whether such an opportunity exists.”
3 Herrera, 918 F.3d at 1046; Canatella v. Cal., 404 F.3d 1106, 1111
4 (9th Cir. 2005). “[T]he burden on this point rests on the
5 federal plaintiff to show ‘that state procedural law barred
6 presentation of [its] claims.’” Pennzoil, 481 U.S. at 14.

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

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

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

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

11 Plaintiffs further argue that certain procedural
12 characteristics of California conservation proceedings either
13 have or will preclude them from adequately presenting their
14 constitutional claims to the state court. (See Pls.' Opp'n at
15 69-72.)⁶ Plaintiffs point to the fact the Commissioner only has
16 to prove that he has determined that grounds for conservation
17 exist--rather than proving that the grounds in fact exist--when
18 initially applying for a conservation order ex parte under
19 Insurance Code § 1011; that the burden shifts to the conserved
20 party or the Commissioner to show that the condition which gave
21 rise to the conservation no longer exists under § 1012; that
22 conservation proceedings are not subject to California Code of
23 Civil Procedure § 632 regarding findings of fact or conclusions
24 of law; and that the appellate court presumes there was a

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

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

8 Some of these objections ignore other provisions of
9 California law that provide additional opportunities to object to
10 the conservation proceedings and other procedural protections.
11 For instance, while the Superior Court may defer to the
12 Commissioner's judgment as to whether a conservation is warranted
13 under § 1011, § 1012 guarantees the conserved party a full
14 hearing before the court to show that the ground which gave rise
15 to the conservation no longer exists, a process which has
16 repeatedly been upheld as satisfying due process by state and
17 federal courts who have considered the issue. See, e.g., Rhode
18 Island, 95 Cal. App. 2d 220, 238-39 (1st Dist. 1949). Plaintiffs
19 also ignore the substantial body of published appellate cases
20 arising from California conservation proceedings, which
21 demonstrates that, although superior courts are not required to
22 issue formal findings of fact or conclusions of law, appellate
23 courts routinely receive decisions and records from the
24 conservation court sufficient to permit appellate review,
25 including of constitutional objections. See, e.g., Carpenter, 10
26 Cal. 2d at 328-29; In re Exec. Life Ins. Co., 32 Cal. App. 4th at
27 391.

28 This substantial body of case law also reveals that

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

10 In Carpenter v. Pacific Mutual Life Insurance of
11 California, for instance, non-conserved third parties appealed
12 the conservation court's approval of the rehabilitation plan for
13 Pacific Mutual Life on grounds that it violated the Due Process,
14 Equal Protection, and Contract Clauses of the United States
15 Constitution. Carpenter, 10 Cal. 2d at 328-29. The California
16 Supreme Court heard the third-parties' constitutional arguments
17 and affirmed the conservation court's approval of the plan. Id.
18 at 331, 335, 341. The United States Supreme Court affirmed the
19 decision as well. Neblett v. Carpenter, 305 U.S. 297 (1938). A
20 number of other decisions by California Courts of Appeals
21 illustrate that state appellate courts routinely hear
22 constitutional challenges to procedures employed by the Superior
23 Court. See, e.g., In re Exec. Life Ins. Co., 32 Cal. App. 4th at
24 391 (reviewing third party's First Amendment claims raised before
25 conservation court); Rhode Island, 95 Cal. App. 2d at 238-39
26 (reviewing constitutional objections to § 1012 on petition for
27 writ of mandate directing Superior Court to vacate its order
28 appointing conservator).

1 Here, plaintiffs have already been invited to present
2 their objections to the Proposed Rehabilitation Plan as part of
3 the Superior Court's consideration of whether to approve the
4 Plan. (See Procedural Order at 3.) Plaintiffs will be free to
5 pursue interlocutory review of the Superior Court's orders
6 through emergency writ--an avenue CIC has already pursued, albeit
7 unsuccessfully, because the Court of Appeal was unconvinced that
8 it was entitled to emergency relief--or other appellate review of
9 the Superior Court's decisions within the California court system
10 and, ultimately, the United States Supreme Court. See Rhode
11 Island, 95 Cal. App. 2d at 238-39; Carpenter, 10 Cal. 2d at 328-
12 41; Neblett, 305 U.S. at 297.

13 California's courts are entitled to the presumption
14 that these avenues for challenging the Conservation Proceeding on
15 constitutional grounds will satisfy the law. See Pennzoil, 481
16 U.S. at 14 ("We must assume that state procedures afford an
17 adequate remedy, in the absence of unambiguous authority to the
18 contrary."). Because plaintiffs have failed to point to any
19 "unambiguous authority" to the contrary, Pennzoil, 481 U.S. at
20 14, the court finds that the third Middlesex factor also weighs
21 in favor of abstention.⁷

22 _____
23 ⁷ The Ninth Circuit has articulated an "implied fourth
24 requirement that the federal court action would enjoin the
25 proceeding, or have the practical effect of doing so." Potrero
26 Hills, 657 F.3d at 882. For the same reasons that the court has
27 found that adjudicating plaintiffs' claims in the federal action
28 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

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

3 Even if all the requirements for Younger abstention
4 have been met, the Supreme Court has stated that a federal court
5 must nevertheless intervene in a state proceeding upon a showing
6 of "bad faith, harassment, or any other unusual circumstance that
7 would call for equitable relief." See Younger, 401 U.S. at 45.
8 "A plaintiff who seeks to head off Younger abstention bears the
9 burden of establishing that one of the exceptions applies."
10 Diamond "D" Const. Corp. v. McGowan, 282 F.3d 191, 198 (2d Cir.
11 2002) (citations omitted). For the following reasons, no such
12 showing has been made here.

13 a. Bad Faith

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

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

1 and must be more than the prosecution of close cases.” Kihagi v.
2 Francisco, No. 15-CV-01168-KAW, 2016 WL 5682575, at *4 (N.D. Cal.
3 Oct. 3, 2016) (citations omitted). Accordingly, “[t]here is no
4 case since Younger was decided in which the [Supreme] Court has
5 found that the exception for bad faith or harassment was
6 applicable,” Wright & Miller, 17B Fed. Prac. & Proc. Juris.
7 § 4255 (3d ed.), and plaintiffs do not cite to a single case from
8 this circuit in which a court has found the bad-faith exception
9 to apply (see Pls.’ Opp’n at 74-79).

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

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

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

10 Plaintiffs seek to impeach the Conservation Order by
11 claiming that the Superior Court granted it on false pretenses,
12 as defendants allegedly made several misrepresentations and
13 omissions when applying to the Superior Court. See (Pls.' Opp'n
14 at 77). However, CIC presented these exact arguments to the
15 Superior Court when it filed its motion to vacate the
16 Conservation Order, and to the California Court of Appeals when
17 it petitioned for a writ of mandate setting aside the denial of
18 its motion to vacate. (See Defs.' Req. for Judicial Notice, Exs.
19 13-15.) Both courts rejected CIC's application, and the Superior
20 Court maintained the conservation, even after becoming aware of
21 the alleged misrepresentations which plaintiffs raise. See
22 Phelps v. Hamilton, 59 F.3d 1058, 1066 (10th Cir. 1995).

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

1 18 F.3d 96, 103 (2d Cir. 1994); (FAC ¶¶ 6-8, 13.) But in order
2 to show bad faith, plaintiffs must show that "the state
3 proceeding [was] brought with no legitimate purpose." Diamond
4 "D" Const. Corp. v. McGowan, 282 F.3d 191, 200 (2d Cir. 2002).
5 In other words, plaintiffs must prove that "the statute was
6 enforced against them with no expectation of convictions but only
7 to discourage exercise of protected rights." Cameron v. Johnson,
8 390 U.S. 611, 621 (1968) (emphasis added).

9 Plaintiffs' own allegations describe efforts by CIC and
10 plaintiffs to create a New Mexico Company, CIC II, into which CIC
11 could merge its assets to avoid California's regulatory process.
12 (See FAC ¶¶ 64-75.) The FAC acknowledges that defendants did not
13 consent to the merger, as they warned CIC that the merger would
14 extinguish its certificate of authority by operation of law.
15 (See id.) Probable cause therefore existed to believe that CIC
16 was attempting to merge with another entity or transfer
17 substantially its entire property to another person without
18 consent, a valid basis for instituting conservation proceedings
19 under California Insurance Code § 1011(c). Because plaintiffs'
20 own allegations provide a valid basis for the Conservation, and
21 because defendants' actions have received repeated authorization
22 from state courts, this court cannot find that the state
23 proceeding lacks "[any] legitimate purpose," and instead must
24 find that plaintiffs have failed to prove the existence of bad
25 faith in this case. See Diamond "D", 282 F.3d at 200.⁸

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

1 b. Irreparable Injury

2 To establish the irreparable injury exception to
3 Younger abstention, plaintiffs must show the existence of
4 "extraordinary circumstances" that present a "danger of
5 irreparable loss [that] is both great and immediate." Younger,
6 401 U.S. at 45. "[S]uch circumstances must be 'extraordinary' in
7 the sense of creating an extraordinarily pressing need for
8 immediate federal equitable relief, not merely in the sense of
9 presenting a highly unusual factual situation.'" Moore v. Sims,
10 442 U.S. 415, 433 (1979) (quoting Kugler v. Helfant, 421 U.S.
11 117, 124 (1975)).

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

19
20 ruling, underscores the propriety of Younger abstention in this
21 case. Even if the court were to agree with plaintiffs that the
22 provisions of the Proposed Rehabilitation Plan violate
23 plaintiffs' Constitutional rights to Due Process and Free
24 Expression, or constitute a taking without just compensation, it
25 is possible that the Superior Court will approve a version of the
26 Rehabilitation Plan that does not include these provisions or
27 will deny the Commissioner's request entirely. Younger
28 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.

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

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

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

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

1 Dated: March 30, 2021


WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE

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