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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 JUAN R. AND JUANA DURRUTHY,  
12 Plaintiffs,  
13 v.  
14 ADRIENNE WEIL, MTC FINANCIAL,  
15 INC., AND CAPITAL ONE, N.A.,  
16 Defendants.

Case No.: 17-cv-02261-AJB-BGS

**ORDER DENYING PLAINTIFFS’  
PETITION TO PERPETUATE  
TESTIMONY**

(Doc. No. 1)

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18 On November 6, 2017, Plaintiffs Juan R. and Juana Durruthy, proceeding pro se,  
19 filed a petition to perpetuate the testimony of Amy Lemus, Veronica Cavazos, and Miguel  
20 Ochoa (the “Petition”). (*See generally* Doc. No. 1.) In response Defendant Capital One,  
21 N.A., filed a motion to dismiss the Petition. (Doc. No. 5.) Plaintiffs did not file an  
22 opposition to the motion. Pursuant to Civil Local Rule 7.1.d.1, the Court finds the matter  
23 suitable for determination on the papers and without oral argument. Accordingly, the  
24 motion hearing set for April 12, 2018, is hereby **VACATED**. For the reasons set forth  
25 below, the Court **GRANTS** Capital One’s motion to dismiss the Petition.

26 **DISCUSSION**

27 At the outset, the Court **GRANTS** Capital One’s request for judicial notice. (Doc.  
28 No. 6.) Capital One requests notice of three documents from Plaintiffs’ initial case filed

1 with this Court and Plaintiffs’ eight bankruptcy cases filed with the Bankruptcy Court for  
2 the Southern District of California. (*Id.* at 2.) Courts have routinely found these documents  
3 to be public records that can be “accurately and readily” determined from reliable sources.  
4 Fed. R. Evid. 201(b). Accordingly, judicial notice of the documents requested by Capital  
5 One is warranted. *See Reyn’s Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6  
6 (9th Cir. 2006) (taking judicial notice of briefs, transcripts, pleadings, memoranda, and  
7 expert reports that were filed in another lawsuit).

8 Next, turning to the issue at hand, the Court outlines that the subject matter that  
9 Plaintiffs wish to establish through the perpetuated testimony are that (1) “the Defendant  
10 has never acquired any legal rights, including servicing rights, or any interest in the  
11 petitioners’ title to their home, or the note and trust deed that was recorded against the  
12 title”; (2) “the defendant is involved with the theft of the petitioners’ identifying, banking,  
13 financial and credit information for its own profit”; and (3) “the defendant is using the state  
14 and county foreclosure process to launder counterfeit and forged instruments.” (*See*  
15 *generally* Doc. No. 1.)

16 Federal Rule of Civil Procedure 27 states that:

17 A person who wants to perpetuate testimony about any matter  
18 cognizable in a United States court may file a verified petition in  
19 the district court for the district where any expected adverse party  
20 resides. The petition must ask for an order authorizing the  
21 petitioner to depose the named persons in order to perpetuate  
22 their testimony.

23 Fed. R. Civ. P. 27(a)(1). Specifically, the petitioner must show: (1) “that the petitioner  
24 expects to be a party to an action cognizable in a United States court but cannot presently  
25 bring it or cause it to be brought;” (2) “the subject matter of the expected action and the  
26 petitioner’s interest;” (3) “the facts that the petitioner wants to establish by the proposed  
27 testimony and the reasons to perpetuate it;” (4) “the names or a description of the persons  
28 whom the petitioner expects to be adverse parties and their addresses, so far as known;”

1 and (5) “the name, address, and expected substance of the testimony of each deponent.” *Id.*  
2 at (a)(1)(A)–(D).

3 Rule 27 applies where testimony or evidence might be lost to a prospective litigant  
4 unless a deposition is taken immediately to preserve the testimony for future use. *See Ash*  
5 *v. Cort*, 512 F.2d 909, 911 (3rd Cir. 1975). However, the Ninth Circuit and many other  
6 courts have clearly and repeatedly held that “Rule 27 cannot be used as a substitute for  
7 discovery to determine whether a cause of action exists or to preserve unknown information  
8 that may be helpful in future litigation.” *In re Certain Investor in EFT Holdings Inc. to*  
9 *Perpetuate Testimony of Mr. Jack Qin*, No. CV 13-0218 UA (SS), 2013 WL 3811807, at  
10 \*4 (C.D. Cal. July 22, 2013). “The grant or denial of a petition to preserve testimony is  
11 within the discretion of the Court.” *In re Provident Life and Acc. Ins. Co. to Perpetuate*  
12 *Testimony*, No. MC 13-231 UA (JC), 2013 WL 3946517, at \*1 (C.D. Cal. July 26, 2013)  
13 (citation omitted).

14 As a threshold issue, the Court notes that Plaintiffs have failed to oppose Capital  
15 One’s motion to dismiss. Thus, pursuant to Civil Local Rule 7.1 this constitutes a “consent  
16 to the granting of a motion . . . .” CivLR 7.1.f.3.c. Despite this deficit, the Court wishes to  
17 reach the merits of Plaintiffs’ Petition. Unfortunately, due to the various procedural and  
18 substantive factual deficiencies with the Petition, the Court is unwilling to perpetuate  
19 testimony in this case.

20 First, as Capital One points out, Plaintiffs’ Petition is not verified as Rule 27  
21 requests. (Doc. No. 1 (*see Coulter v. Baca*, No. 13-cv-6090-CBM (AGR<sub>x</sub>), 2014 WL  
22 12589652, at \*3 (C.D. Cal. May 23, 2014) (illustrating that a verified complaint needs to  
23 be signed under penalty of perjury)). Next, the Petition fails to establish the majority of the  
24 prerequisites for the application of Rule 27. The Court notes that the Petition does not  
25 clearly demonstrate why Plaintiffs cannot presently bring their action or that the testimony  
26 might be lost unless taken immediately. *See Tennison v. Henry*, 203 F.R.D. 435, 440 (N.D.  
27 Cal. 2001) (“In order to demonstrate that there is significant risk of loss, [i]t is advisable,  
28 though not necessary, to show particular circumstances indicating a concrete danger of


1 loss.”) (citation omitted); *see also Matter of Ricci & Kruse Lumber Co.*, No. 18-mc-80021-  
2 MEJ, 2018 WL 732498, at \*2 (N.D. Cal. Feb. 6, 2018) (discussing whether the proposed  
3 witnesses advanced age demonstrated an immediate need for the perpetuation of his  
4 testimony). Moreover, the Petition does not provide the name and addresses of the  
5 prospective deponents as required by Rule 27. (*See* Doc. No. 1.)

6 In sum, the Court is not persuaded that Plaintiffs are entitled to obtain discovery  
7 before litigation has commenced and is not satisfied that the perpetuation of testimony  
8 “may prevent a failure or delay of justice[.]” Fed. R. Civ. P. 27(a)(3). Most notable is  
9 Plaintiffs’ failure to adequately identify the risk or risks which would justify the immediate  
10 need to perpetuate testimony in the instant case. *See In re Provident Life*, 2013 WL  
11 3946517, at \*2 (“Among the factors that courts have found to be persuasive in justifying  
12 the need to perpetuate testimony are: 1) advanced age or infirmity of witness; 2) the  
13 possibility that the witness will not be willing to testify if discovery is delayed; and 3) the  
14 uniqueness of the information at issue.”) (citation omitted).

### 15 CONCLUSION

16 In light of its factual and procedural deficiencies, Plaintiffs’ Petition is **DENIED** and  
17 the action is dismissed **WITHOUT PREJUDICE**.<sup>1</sup> The Clerk of Court is **DIRECTED** to  
18 **CLOSE** this case.

19 Dated: March 15, 2018

20   
21 Hon. Anthony J. Battaglia  
22 United States District Judge  
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25 <sup>1</sup> Capital One requests that the Petition be dismissed with prejudice as Plaintiffs filed  
26 another lawsuit against Defendants in January of 2017—17-cv-0055-AJB-BGS. (Doc. No.  
27 5 at 3.) This case was dismissed for failure to pay the filing fee. (Doc. No. 6 at 30–31.)  
28 However, without more information as to the nature of the lawsuit in the current matter,  
the Court declines to dismiss with prejudice.

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