



## B. The Petition.

Code of Civil Procedure, §§ 2035.030(a) and 2035.040 provide a procedure for perpetuating/preserving evidence before the filing of the complaint. It requires the filing of a petition in the superior court of the county of residence of at least one of the adverse parties and notice to the adverse parties. There is no dispute that Respondents reside in the County of Santa Clara.

This Court has an observation of whether the moving papers do indeed constitute a "verified petition." This Court was expecting to see documents similar to a verified petition used to obtain a temporary restraining order.<sup>3</sup> Instead, the moving papers contain declarations of James F. Hannawalt and of Joanne Hoeper. Do these two declarations, along with the statement of factual contentions, constitute a "verified petition"?

Respondents have not raised this particular issue.

This court makes to additional observations.

First, "[i]n the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed, with a view to substantial justice between the parties." Code of Civil Procedure, § 452.

Second, verified complaints and sworn declarations have the same effect as a verified petition in tending to discourage frivolous allegations by requiring the claimants to put their assertions under oath. *Burtscher v. Burtscher* (1994) 26 Cal. App. 4th 720, 727.

According to Code of Civil Procedure, § 2035.030(b), the petition shall set forth all of the following:

- (1) The expectation that the petitioner or the petitioner's successor in interest will be a party to an action cognizable in a court of the State of California.
- (2) The present inability of the petitioner and, if applicable, the petitioner's successor in interest either to bring that action or to cause it to be brought.
- (3) The subject matter of the expected action and the petitioner's involvement. A copy of any written instrument the validity or construction of which may be called into question, or which is connected with the subject matter of the proposed discovery, shall be attached to the petition.
- (4) The particular discovery methods described in Section 2035.020 that the petitioner desires to employ.
- (5) The facts that the petitioner desires to establish by the proposed discovery.
- (6) The reasons for desiring to perpetuate or preserve these facts before an action has been filed.
- (7) The name or a description of those whom the petitioner expects to be adverse parties so far as known.
- (8) The name and address of those from whom the discovery is to be sought.
- (9) The substance of the information expected to be elicited from each of those from whom discovery is being sought.

This Court concludes that the papers presented to this Court by the petitioners to constitute "petitions" in proper form. The verified facts submitted by each petitioner allow this Court to reach the merits of the petition filed by each Petitioner.

## C. Merits Of Each Petition.

As a general proposition, California law does not require parties to preserve relevant evidence prior to a lawsuit or a discovery demand or court order for its production. See *Dodge, Warren & Peters Insurance Services, Inc. v. Riley*

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<sup>3</sup> A verified complaint may be sufficient by itself to support an application for a Temporary Restraining Order or Preliminary Injunction if (and only if) it contains sufficient evidentiary facts. [See Ca Civ Pro § 527(a); *Bank of America Nat'l Trust & Sav. Ass'n v. Williams* (1948) 89 Cal.App.2d 21, 29.]

(2003) 105 Cal.App.4th 1414, 1419. However, under Code of Civil Procedure, § 2035.010 *et seq.* and F.R.C.P. 27, the Petitioners are provided a procedure to perpetuate/preserve testimony and evidence that might otherwise be lost if the Petitioners had to wait until Respondents or others a lawsuit filed a lawsuit.

Much of the evidence submitted by petitioners is speculative in nature. The petitioners have provided this Court with hearsay statements from media sources and have not provided declarations under oath about what evidence is expected to be found or preserved.

Case law on the subject of the perpetuation/preservation of testimony and evidence are few and far between. It seems that discovery devices utilized pursuant to the procedures of Code of Civil Procedure section 2035.010 may be used, in any action involving the same subject matter that is brought in a court of the State of California against any party, or the successor in interest of any party, named in the petition as an expected adverse party. See *N.V.V. v. Am. Ass'n of Blood Banks* (1999) 75 Cal. App. 4th 1358, 1396.

In general, however, it can be fairly stated that the purpose of the statutes is not intended that they be a substitute for discovery, but rather they are intended for perpetuation of known evidence.

On the one hand, "[c]itizens and others within the jurisdiction of our courts should not be compelled to submit to meddlesome examinations concerning their property or business transactions or methods, where the application therefor is made in bad faith, not for the purpose of obtaining, preserving, and using . . . material testimony, but to annoy, harass, or embarrass, or for some ulterior object . . . In no case, therefore, should a person be forced to surrender his private books and papers to another who does not claim to own or have any interest in them except upon convincing proof that such books or papers contain evidence which materially affects the rights in litigation of the person demanding them." *Irving v. Superior Court of El Dorado County* (1926) 79 Cal. App. 361, 364-365. "Persons should not be compelled to submit to examinations "concerning their property or business transactions or methods," except upon allegations of fact, duly verified, reasonably showing that the evidence sought is material to some present or anticipated controversy." *Id.* at 366.

In *State of Nevada v. O'Leary*, 63 F.3d 932 (1995), the Court held that the petitioner was not entitled to perpetuate testimony regarding of the scientists' opinions, thoughts, views and background information, absent showing of substance of testimony sought to be preserved. *Id.* The court found that the information the petitioner sought from the scientists was not in exclusive control of the government nor was the government in a position to render it unavailable. *Id.* at 936.

On the other hand, a minor injured in a traffic accident has been ordered to submit to a physical examination at the request of the other driver prior to the filing of a lawsuit by the minor. The minor's parents had notified the other driver that a claim would be made but refused to provide any information as to the child's injuries. Prelawsuit discovery was proper because suit might not be filed for years since the statute of limitations would not begin to run until the child reached the age of majority). *Block v. Superior Court* (1963) 219 Cal.App.2d 469, 478.

In *Martin v. Reynolds Metals Corporation*, 297 F.2d 49 (1961), the court granted Reynolds Metals' petition to perpetuate the discovery of physical evidence because it found that it is likely that the physical evidence could be disposed of the adverse party before a lawsuit is filed. *Id.* at 55. The court further found that Reynolds must submit to the appellants, in advance of taking the deposition, a list of the matters into which it intends to inquire. *Id.* The court noted that the potential abuse of Rule 27 is avoided by the requirement that the party seeking the deposition be unable to bring the suit or cause it to be brought. *Id.* at \*55. Here, Reynolds expected to be sued by the Appellants because of alleged discharge of fluorides from a aluminum reduction plant situated on property that Reynolds owned. *Id.* at \*52. Appellants claim the fluorides were responsible for the deaths of their cattle which they raise on an adjoining property. *Id.* Reynolds sought examination of physical evidence because it would demonstrate that the death of the cattle did not result from fluoride. *Id.*

#### D. Order.

Applying these standards, this Court concludes as follows:

The request of the petitioners to inspect the automobile is DENIED. The only statements provided to this Court

concerning the contents of the automobile are that the zookeeper found a metal washer in the tiger pit and others may have seen a bottle of alcohol inside the car. The Court cannot consider any other hearsay evidence that was not properly presented to this Court in petitions. Further, to allow inspection on the matters presented to this Court would encourage nothing more than a fishing expedition and encourage speculation.

The request of the petitioners to inspect the cell phones in question is GRANTED. Under the maxim that a picture is worth a thousand words" the Court believes that the allegation of existence or nonexistence of any photographs is specific enough to justify an attempt to perpetuate them. The court will limit inspection of the telephones for one hour prior to the first 911 telephone call and for one hour after the first 911 telephone call.

This Court will retain jurisdiction over this matter.

**DATED: 18 January 2007**

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**HON. SOCRATES PETER MANOUKIAN**  
*Judge of the Superior Court*  
*County of Santa Clara*