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RAYMOND T. BALVAGE and DEBORAH A. BALVAGE, husband and wife, and CHARLES E. WEAVER and SUSAN M. WEAVER, husband and wife, on their own behalf and on behalf of a class of similarly situated individuals, Plaintiffs, vs. RYDERWOOD IMPROVEMENT AND SERVICE ASSOCIATION, INC., a Washington non-profit corporation, Defendant.

ASE NO. C09-5409BHS

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, TACOMA DIVISION

2009 U.S. Dist. Ct. Motions 628017; 2010 U.S. Dist. Ct. Motions LEXIS 44243

March 29, 2010

Motion for Summary Judgment

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COUNSEL: [*1] Steven Goldstein, WSBA #11042, Richard D. Ross, WSBA #34502, Attorneys for Defendants, BETTS PATTERSON & MINES, P.S., Seattle, WA.

JUDGES: Honorable Benjamin H. Settle

TITLE: Defendant's Opposition To Plaintiffs' Motion For Partial Summary Judgment

TEXT: I. INTRODUCTION

Plaintiffs argue that Defendant Ryderwood Improvement and Service Association's ("RISA") alleged failure to comply with the Housing for Older Persons Act ("HOPA") in 2000 negates any right to rely on that defense in the future. Consequently, they ask this Court to order that Ryderwood - a 57 year old retirement community - can no longer enforce its status as an age restricted community. Pointedly, the Plaintiffs do not claim to be the victims of any act of discrimination, nor do they provide proof that any act of discrimination prohibited by the Fair Housing Act ("FHA") was committed against *any* family. Instead they conflate RISA's restricted age policies into affirmative evidence that RISA "discriminated" against families at some point between 2000 and 2006 and, based upon this supposition, argue that the HOPA defense can never be asserted in the future.

Neither conclusion is warranted and this motion should [*2] be denied.

First, the Plaintiffs lack standing. As in any FHA claim, the Plaintiffs must show they suffered an actual injury, that

those injuries stemmed from an actual act of discrimination, and that those injuries are redressable by this Court. They do not do so. They provide no proof of any act of discrimination at all, much less any act perpetrated against them. Nor could they allege any claims: each is over 55, none meet the familial status definition, and none provide evidence they suffered any harm. What they cite are alleged past violations of HOPA. But HOPA is not a cause of action, it is merely a defense to legitimate claims of familial status discrimination. This is not sufficient to provide them with standing.

Second, Plaintiffs claims are barred under the two year statute of limitations. The actions alleged all took place at some point prior to April, 2006. Even if allowed to proceed under their generalized "failure to comply with HOPA" theory, they cite no errors with the 2006 and 2007 HOPA surveys. Thus whatever allegations they raise took place, if at all, at least three years prior to the date their Complaint was filed: November, 2009.

Third, the Plaintiffs' [*3] "failure to convert to HOPA" theory is groundless. It is based on a flawed analysis that fails to recognize that HOPA is only relevant if some actual act of discrimination is shown. Furthermore, HUD regulations clearly state that RISA need only show compliance with HOPA as of the date of an *actual act of discrimination*. Under Plaintiffs' theory, a community would be required to show compliance from the date of inception until present. This is not the rule.

Taken as a whole, Plaintiffs' motion relies on the argument that any past failure to comply with HOPA negates any future right to assert the defense. However, they offer no evidence or legal precedent in support. And from that posture, they ask this Court to hold that Ryderwood - formed as a retirement community in 1953 - can no longer fulfill that purpose. Summary judgment should be denied.

II. FACTS

A. HOPA Is Not A Status, It Is A Defense.

Plaintiffs allege that RISA failed to comply with HOPA. To rely upon the defense, a retirement community must show:

- (1) at least 80 percent of the occupied units are occupied by at least one person 55 years of age or older;
- (2) the community publishes and adheres [*4] to policies and procedures that demonstrate an intent that the community be occupied by people 55 years of age or older; and
- (3) the community complies with age verification regulations established by [HUD].

42 USC § 3607(b)(2)(C). RISA policies met this standard well before HOPA was enacted.

B. Ryderwood Has Been A Retirement Community For 57 Years.

Ryderwood has existed as a retirement community since 1953 when Senior Estates platted the town as "Ryderwood No. 1." n1 All Ryderwood properties were devised by deed and subject to identical covenants and restrictions. The deeds state:

[Senior Estates] has acquired and developed the real property known and platted as Ryderwood No. 1 ... as a community to be occupied by and for the *use and benefit of persons who are bona fide recipients of a pension or retirement annuity...* n2

n1 See Declaration of Sally-Gene DeBriac in Support of Opposition to Motion for Partial Summary Judgment

and Motion for Summary Judgment (hereafter "DeBriac Dec"), Ex. A thereto (Ryderwood Plat Map).
[*5]

n2 DeBriac Dec. Ex. B thereto (sample Senior Estates Deed).

The deeds provide Senior Estates with the right to enforce those provisions as well as the right to transfer that power to its designee, RISA. As noted in the deed:

The Grantor, or Grantor's assigns, may at any time transfer and assign their rights to enforce the covenant and conditions contained in the deed to RYDERWOOD IMPROVEMENT AND SERVICE ASSOCIATION . . . n3

n3 *Id.*

The deed also provides RISA with the right to modify conditions by adopting and recording its bylaws:

Grantor, on behalf of Grantor and its assigns, hereby reserves the right, at its discretion, to modify or terminate any or all of the foregoing conditions by recording an instrument in the office of the County Recorder of Cowlitz County, Washington. n4

n4 *Id.*

[*6]

Senior Estates incorporated RISA in 1953 as well. n5 In 1975, RISA revised its bylaws and recorded them at the Cowlitz County Recorders' Office. n6 The amended bylaws clarified the original "pension and retirees" restrictions to limit residency to persons that:

Must be a bona fide recipient of an annuity or a pension.

Must not be less than fifty-five years of age.

Must have no additional permanent occupants of the home (other than [a] spouse) who do not meet the above requirements. n7

n5 DeBriac Dec. Ex. C thereto (RISA Articles of Incorporation).

n6 DeBriac Dec. Ex. D thereto (1975 RISA bylaws)

n7 *Id.*

There is no evidence that any of the homeowners challenged the right of RISA to record and enforce its bylaws at the time of the 1975 amendment. n8

n8 DeBriac Dec., P 5.

B. RISA's [*7] Age Restrictions Are Conditions Of Title.

The Plaintiffs contend that the age restrictions are imposed by RISA. Not so. RISA's rights and duties stem solely from the bylaws - which prior owners agreed to have placed in their chains of title - and the original deed restrictions. RISA did not decide to make Ryderwood a senior community, that decision was made by Senior Estates (via the deed restrictions), and prior owners (who agreed for the bylaws to be recorded with the County). n9 Thus the primary age enforcement mechanism is not some affirmative act of RISA, it is each prior homeowner's agreement to be bound and subsequent right to enforce those restrictions against others. n10 This includes the Plaintiffs here (*see* subsection C, below) as well as the other 270 homeowners in Ryderwood.

n9 *Id.* P 6 & Ex. B thereto.

n10 *Id.*

What RISA does do is make sure that prospective homeowners and visitors are aware of those age restrictions. n11 This process involves various components, such [*8] as signage throughout the community stating that it is a "55+ community," regular disclosures to real estate agents that work in the area, and notice to prospective homeowners and visitors who inquire about homes in Ryderwood. n12

n11 *Id.* P 7.

n12 *Id.*

Pursuant to the bylaws, at least one member of each household must join RISA. n13 RISA enforces this policy as part of the process of collecting monthly dues, a requirement that is also expressly authorized by the deeds and bylaws. n14 If a home sells, or a new resident moves in to a home, RISA will contact the new owners and inform that they at least one resident must join RISA. n15 RISA also updates its records via other informal processes, such as researching property sale records, by visiting homes when new residents arrive, and by notifying real estate agents that all new residents must join RISA. n16 All told, if these methods are not effective, RISA has the right to lien the properties, which it does if monthly dues remain unpaid. n17 [*9]

n13 *Id.* P 8.

n14 *Id.*; *see also* Ex. B (sample Senior Estates deed).

n15 *Id.* P 9.

n16 *Id.*

n17 *Id.*

C. The Plaintiffs Do Not Show They Were Discriminated Against.

The Plaintiffs are Charles and Susan Weaver and Raymond and Deborah Balvage. Neither couple offers *any* proof they suffered discrimination or were harmed by any alleged act of discrimination. Nor do they offer any evidence that RISA actually discriminated against any family at any time.

The Weavers admit they knew of the age restrictions before they moved to Ryderwood in 2005. n18 Indeed, they admit they moved to Ryderwood *because* it was a retirement community. n19 In a declaration filed in a lawsuit the Weavers brought against a fellow homeowner to enforce RISA's bylaws (*Weaver v. Bichler*, Cowlitz County Superior Court No. 05-2-01301-1 (2005)), Charles Weaver attested:

Ryderwood has always been a residential area for retirees, fifty-five years and older.

Central [*10] to the maintenance of the character of this area has been the legally imposed requirements regarding the use of the property under RISA's jurisdiction.

These requirements have been spelled out in [CC&Rs] . . .

In addition, these requirements have been spelled out in the RISA By-Laws. n20

n18 Declaration of Richard D. Ross in Support of Opposition to Motion for Partial Summary Judgment and Motion for Summary Judgment (hereafter "Ross Dec"), Ex. A thereto (Discovery Responses of Charles and Susan Weaver provided in the matter of *Weaver v. RISA*, Cowlitz County Superior Court No. 07-2-02001-3 (2008)), Response to Interrogatory No. 21 (located behind discovery requests).

n19 *Id.*

n20 Ross Dec, Ex. B (Declaration of Charles Weaver in matter of *Weaver v. Bichler*, Cowlitz County Superior Court No. 05-2-01301-1 (2005)).

The Weavers present no proof of any harm nor any proof they meet the definition of "familial status." n21 Although Mr. Weaver alleges he was forbidden from having [*11] his son live with him, no evidence is presented to support this assertion. n22 Further, it is not the basis for Plaintiffs' Complaint or this motion.

n21 Ross Dec. P 4.

n22 Ross Dec. P 5.

Raymond and Deborah Balvage have been residents of Ryderwood since 2002. n23 The Balvages admit they knew of the age restrictions before they moved to Ryderwood and admit they were informed of their duty to pay dues. n24 Before purchasing their home, they admit they were advised by real estate agent Clarine Meeks they were required to join RISA and pay monthly dues. n25 Ms. Balvage has also produced a document titled "my complaint," in which she describes her knowledge of the age restrictions, she states:

We thought that this was a 55+ community with requirements and restrictions. We were told that Ryderwood had a town governing body [RISA] with bylaws and covenants that were strictly enforced. Many realtors advertise for their clients and RISA also advertises that it is a 55+ community. Then in

2008 I [*12] was given evidence to the fact that RISA was operating and practicing discrimination, fraud and had never been a HOPA certified to be 55+ community." n26

n23 Ross Dec. Ex. C thereto (Raymond Balvage "My Complaint" Letter).

n24 Id.

n25 Id.

n26 Ross Dec. Ex. D thereto (Deborah Balvage "My Complaint" Letter).

As damages she claims that her son "lost his ability to claim this residence as a tax right off [sic]." PLA 358. She also seeks specific punishments for members of the RISA board for violating corporate laws and unlawfully attaching bylaws on her properties. *Id.* Neither Mr. or Ms. Balvage present any specific proof of harm, nor any facts to show they qualify as "familial status."

Finally, in support of their motion, the Plaintiffs provide the Declaration of Mr. Weaver as well as a declaration of their counsel, Joseph Lynam. Neither document attests or refers to any actual act of discrimination.

D. The Weavers' History At Ryderwood.

In support of this motion, [*13] Mr. Weaver declares that he was just a supporter of RISA, that he "held no official position with RISA," and merely "encourage[d] the Board to become HOPA complaint [sic]." Weaver Dec. PP 6, 13 & 14. These responses are disingenuous. In response to discovery propounded by RISA in a prior lawsuit brought by the Weavers against RISA, Mr. Weaver admitted that he served as "Treasurer" from June 22, 2006 to February 28, 2007, that he served as legal liaison to the Board for two different lawsuits, and that he was involved in RISA's efforts or decision to comply with HOPA. n27

n27 Ross Dec. Ex. A thereto, *see* Answers to Interrogatories 2, 3, 4 and 26.

In fact, Mr. Weaver's role as legal liaison was substantial. Although he alleges that he merely provided information with respect to two ongoing lawsuits that he was party to, documents show his involvement went far beyond that limited role. n28 He advised the RISA board on legal matters outside of those suits, general matters of compliance, and was the point [*14] of contact between RISA and its outside counsel. n29

n28 *See* DeBriac Dec. PP 11-13; *see also id.* Exs. E (Weaver email stating he is legal liaison) & F (transcript of presentation to Board by Weaver).

n29 DeBriac Dec. P 11.

More pertinently, Mr. Weaver was intimately involved with RISA's decision to conduct the HOPA survey in 2005 and 2006. n30 Indeed, it was Mr. Weaver who originally suggested to RISA's board that it needed to conduct an official HOPA survey (in fact, he is shown to be the author of that document on RISA's computer). n31 Mr. Weaver also directed the RISA volunteers who conducted that survey about what process they should use to collect signatures, what forms of identification were acceptable to verify age, and his interpretation of HOPA requirements. n32

n30 DeBriac Dec. P 14.

n31 *Id.*

n32 *Id.*

[*15]

In September, 2007, Mr. Weaver abruptly resigned from his official role with RISA. n33 Then, in November, 2007, the Weavers filed suit against RISA in Cowlitz County Superior Court. n34 The allegations made there were identical to those alleged here. Their first cause of action alleged that RISA was not authorized to record and enforce the bylaws or Senior Estates deed conditions. Their second cause of action alleged that RISA's age-restrictions violated the FHA because RISA was not exempt under HOPA.

n33 DeBriac Dec, Ex. G (Weaver Resignation Letter).

n34 Ross Dec, Ex. E (Complaint in matter of *Weaver v. RISA*, Cowlitz County Sup. Ct. No. 07-2-02001-3 (2007)).

The Court ultimately granted summary judgment in favor of RISA. n35 In its oral ruling, the court found:

There was apparently always a requirement, which no one disputes, that in order to have ownership, you must be a bona fide recipient of an annuity or pension, which I think is another way of saying the same sort of thing that [*16] was intended by the 55 year restriction.

[T]he courts seem to accept that for the purpose of enforcing these restrictions, if they're not in the chain of title, they'll nevertheless be enforced if the purchaser had notice that everyone intended it to be a covenant and restriction, that it was intended to run with the land by predecessors in interest. I think that's clearly the case here.

Since 1975 everyone has apparently understood that one of the restrictions on ownership or the ability to purchase . . . was that you must be at least 55.

I don't think there's any question about the intent of forming the community was to have this restriction [of] 55 years of age or older. n36

n35 Ross Dec Ex. F (Excerpts from Oral Order on Motion for Summary Judgment).

n36 Ross Dec. Ex. F.

The Weavers have since appealed. At this time no decision had been entered.

E. Plaintiffs Allege Harm Because RISA Cannot Discriminate.

On November 10, 2009 this suit was filed. With respect to [*17] their Fair Housing Act claim, the Plaintiffs allege that RISA "misled" them into believing that Ryderwood was "HOPA compliant." Complaint, P 30. Specifically, they

allege that "RISA has wrongfully deceived Plaintiffs and Class members, at the time of the purchase of their homes and/or subsequently, that RISA is HOPA compliant and that RISA's age restrictions are legally enforceable and mandatory." *Id.* P 38. Plaintiffs do not allege harm from any act of familial status discrimination, they allege harm because, as a result of this alleged deception, "Plaintiffs ... purchas[ed] real property which they would not have purchased (or would have paid less) if they were told the correct facts ...". *Id.* In other words, their claim is not based on acts of discrimination, but on RISA's alleged misrepresentation that it was compliant with HOPA.

III. QUESTIONS PRESENTED

1. Can the Plaintiffs argue Fair Housing Act violations when they present no evidence they were within the subject class or subject to any type of discrimination?

2. Can the Plaintiffs argue hypothetical Fair Housing Act violations based on policies outside the two year statute of limitations?

3. Does the alleged [*18] failure to comply with HOPA in the year 2000 bar all subsequent efforts to comply with that defense?

IV. EVIDENCE RELIED UPON

This motion is based on the records and pleadings on file herein; the Declaration of Richard D. Ross in support, and all exhibits thereto; and the declaration of Sally-Gene Debraie, and all exhibits thereto.

V. LAW AND ANALYSIS

A. Standard of Review on Summary Judgment.

The Plaintiffs' claims are predicated solely on their allegation that RISA is not compliant with HOPA. But HOPA is not a cause of action, it is merely a defense to claims of discrimination brought under the FHA. *See 42 U.S.C. § 3607(b)(1)* ("No provision in this subchapter regarding familial status [applies] with respect to housing for older persons."). To establish a claim under the FHA, the Plaintiffs must prove, by a preponderance of the evidence, that RISA discriminated against them. *See McDonnell Douglas Corp. v. Green, 411 U.S. 792 802, 93 S.Ct. 1817, 1824, 36 L.Ed 2d 668 (1973)*. If this is shown, the burden shifts to RISA to rebut that claim, including via affirmative defenses such as HOPA. *United States v. City of Hayward, 36 F.3d 832, 837 (9th Cir. 1994)*. [*19] Unless and until the Plaintiffs show some actual act of discrimination upon which they can show standing, HOPA is merely an inchoate defense.

B. The Plaintiffs Do Not Have Standing.

To demonstrate standing, Plaintiffs must show: (1) a concrete "injury in fact"; (2) a causal connection between the injury and the defendant's conduct; and (3) redressibility. *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)*. Standing "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." *Lujan, 504 U.S. at 561*.

The Plaintiffs cannot meet these elements. They provide no evidence that they suffered any injury, economic or otherwise. Nor do they offer any proof that *any* family suffered from any act of discrimination. They tie no harms to any alleged act by RISA and establish no nexus between their claims and any remedial intent of the FHA. And the remedy they seek (an order ending RISA's age restricted status) would not redress what they claim is their harm (the fact that [*20] RISA cannot discriminate on the basis of age).

1. The Plaintiffs Show No Injury In Fact.

Plaintiffs present no proof that they suffered from any act of discrimination. Nor do they provide proof that *any* family suffered from any act of discrimination. The sole basis for Plaintiffs' claim is that RISA must not have been "HOPA compliant" before 2006, otherwise it would not have conducted the survey, and, therefore, Ryderwood's age-restrictive covenants and bylaws "discriminated against families." *See* Complaint, pp. 7-13. The error in reasoning in this chain of causation is apparent: just because a policy might discriminate does not mean that any actual discriminatory act took place. But even if true, this is not an injury to them. To have standing, they must show they were harmed by some act of discrimination. They do not do so.

Plaintiffs bear the burden of proving injury in fact: "The litigant must clearly and specifically set forth facts sufficient to satisfy these Art. III standing requirements." *Whitmore v. Arkansas*, 495 U.S. 149, 156, 110 S.Ct. 1717, 1723 (1990). And while standing is broadly interpreted under the FHA, it still demands some proof [*21] of harm:

[The] injury, we have emphasized repeatedly, must be concrete in both a qualitative and temporal sense. The complainant must allege an injury to himself that is "distinct and palpable," as opposed to merely "[a]bstract," and the alleged harm must be actual or imminent, not "conjectural" or "hypothetical."

Whitmore, 495 U.S. at 155-56, 110 S.Ct. at 1723 (1990) (citations omitted).

Plaintiffs' bare allegation that they suffered from some incoherent and hypothetical act of discrimination against other persons simply does not suffice to show they suffered any injury in fact. Indeed, what they claim as harm is that RISA's failure to adopt HOPA will lead families to move to Ryderwood, an event they speculate will *reduce* property values. This idea is the very *antithesis* of fair housing act jurisprudence; courts have repeatedly rejected claims that opening housing to protected classes is harm. Furthermore it is not an injury that the FHA's familial status provision was enacted to redress.

Moreover, this allegation is the very essence of a "hypothetical injury." It is hypothetical from an evidentiary basis (they have produced nothing to [*22] show any family was discriminated against) and hypothetical on a causation basis. To arrive at an injury from this allegation, the Court must assume that a future family attempts to move to Ryderwood, is denied, files suit, proves Ryderwood is not HOPA compliant, obtains an order forcing RISA to cease all age restrictions, which lowers their property value.

This chain of hypotheses is not an injury in fact.

2. Plaintiffs Cannot Show A Causal Nexus Between Any Act Of Discrimination And Their Injuries.

Nor can the Plaintiffs tie any act of RISA to these theoretical claims. Although standing under the FHA is broad, it is not limitless. "In order to satisfy Art. III, the plaintiff must show that he personally has suffered some actual or threatened injury *as a result of the putatively illegal conduct of the defendant.*" *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 98, 99 S. Ct. 1601, 1607 (1979) (emphasis added); *see also* *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 208, 93 S.Ct. 364, 34 L.Ed.2d 415 (1972) (white tenants had standing as "aggrieved persons" in challenge to landlord's race discrimination due to "loss of important [*23] benefits from interracial associations."). Here Plaintiffs cannot meet this burden. Their claim rests entirely on the notion that RISA failed to comply with HOPA and, thus, may not be able to assert the defense in the future. Yet even this theory is merely hypothetical, it simply assumes that RISA did discriminate prior to 2006. There is no proof of this act.

Moreover, even if they did produce evidence of some act of discrimination, this would not be sufficient. The FHA provides that only "aggrieved person[s] may commence a civil action in an appropriate United States district court." 42 U.S.C. § 3613(a)(1)(A). The FHA defines an "aggrieved person" as one who:

(1) claims to have been injured by a discriminatory housing practice; or

(2) believes that such person will be injured by a discriminatory housing practice that is about to occur."

Id. § 3602(I).

The Plaintiffs would not meet this showing even if they were to offer some proof of past discrimination. Their argument would still depend upon some future act of discrimination that results in a suit in which a future court holds that RISA abandoned its right to assert HOPA. This [*24] is not a causal nexus to a concrete and tangible act of discrimination.

Nor is this suit brought to vindicate discrimination against others. Although courts have recognized that plaintiffs may - in certain circumstances - bring suit for violations suffered by others, Plaintiffs must show they: "(1) suffer[ed] actual injury as an ancillary effect of present or imminent discrimination against a protected class member; and (2) challenge[] the discriminatory policy on behalf of that class member." *Wasserman v. Three Seasons Ass'n No. 1, Inc.*, 998 F. Supp. 1445, 1446-47 (S.D. Fla. 1998). Neither element is shown. The first element fails for the same reason they are not aggrieved parties: their theoretical harms do not flow from any present or imminent act of discrimination. The second element fails because these claims are not brought to vindicate the rights of any person with familial status. The Plaintiffs offer no argument that they hope for a greater stock of family housing. In fact, they argue that a greater stock of family housing as the basis for their harm.

An example of the tie required to assert third-party standing is *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 208, 93 S.Ct. 364, 34 L.Ed.2d 415 (1972). [*25] There, the Supreme Court held that white tenants had standing to challenge a landlord's race-based discrimination against others because the white tenants suffered loss of social benefits of an integrated community, missed business and professional advantages, and stigmatization. No such stigmatizing impact is alleged here. On the other hand, in *Wasserman v. Three Seasons Ass'n No. 1, Inc.*, 998 F. Supp. 1445, 1447-48 (S.D. Fla. 1998), the court held that a childless couple who refused to sign a promise to vacate an apartment if they became pregnant could not assert standing, even on behalf of others, because they could not identify any actual person that suffered familial status discrimination. As the *Wasserman* court held: "[s]tanding requires a sufficient nexus between a plaintiff's injury and the allegedly illegal actions of a defendant." *Wasserman*, 998 F. Supp. at 1446-47.

The point of these decisions is that although Plaintiffs may contend that this claim is brought to right some FHA wrong, that *ipse dixit* is not enough. They must be able to tie some actual injury in fact to some actual act of discrimination. As the *Wasserman* court held: [*26]

If the Court were to find that Plaintiffs had standing as "aggrieved persons," it would have to come to the overbroad conclusion that philosophical disagreement with a policy alone confers standing to challenge the policy, or the unlikely conclusion that the potential to become members of a protected class gives standing to challenge discrimination against that class, in the absence of any evidence of actual discrimination against class members.

The leading cases on standing as "aggrieved persons" under the FHA make clear that the non-class member must have a sufficient stake in or nexus with the controversy and that a stake in the controversy is demonstrated when the non-class member suffers an ancillary injury as a result of the defendant's tangible discrimination against protected class members.

While the Court is cognizant that Defendant's policy might one day have the effect of discriminating on the basis of familial status, Plaintiffs' injury simply does not have a sufficient nexus with any actual discrimination, and thus Plaintiffs lack the standing to prevent such a contingency from occurring.

Wasserman, 998 F. Supp. at 1448 (emphasis [*27] added).

The Plaintiffs do not meet this standard. They do not cite any actual act and cannot tie their injuries to any tangible

act of discrimination. Indeed, theirs is not even a "philosophical disagreement" with RISA's age restrictions, it is a claim that RISA may not be allowed to assert HOPA in the future, thus causing them harm. *See* Complaint P 38 ("RISA has wrongfully deceived Plaintiffs [into believing] that RISA is HOPA compliant and that RISA's age restrictions are legally enforceable and mandatory."). This is not an FHA claim.

3. Plaintiffs Harms Are Not Redressable.

Finally, Plaintiffs must show a "substantial likelihood" that the requested relief will remedy the alleged injury in fact." *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000). Plaintiffs cannot meet this standard. As redress, Plaintiffs seek an order terminating RISA's right to enforce HOPA. While this would theoretically rectify an injury in fact caused by RISA's act of discrimination, this is not what Plaintiffs claim caused them harm. Plaintiff's "injury in fact" is the diminution in home value they allege will result if families move [*28] to Ryderwood. Thus, what they seek as their "remedy" will, in fact, perfect their claim for damages. *See Steel Co.*, 523 U.S. at 107, 118 S.Ct. at 1019 ("Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement."). Summary judgment is appropriate.

D. Plaintiffs Claim Injuries From Acts Outside The Statute of Limitations.

Plaintiffs also cannot point to when their theoretical acts of discrimination took place, asserting that they happened only at some point between 2000 and 2006. In any event, the FHA provides that any claim must be brought "not later than 2 years after the occurrence or the termination of any alleged discriminatory housing practice." 42 U.S.C. § 3613(a)(1)(A). This Complaint was filed on November 10, 2009. Thus, any acts committed in that time frame - even if assumed - do not satisfy the statute of limitations.

Nor can Plaintiffs rely on their premise that they were "misled" because RISA claimed the right to rely on HOPA. For one, they offer no proof to show that RISA misled them by contending it was "HOPA compliant." And [*29] two, even if they did, this would not state a claim under the FHA. FHA claims redress discrimination. HOPA is merely a defense to actionable claims. Here, any knowledge necessary to prove an FHA claim was known by both the Weavers (who moved to Ryderwood in 2005) and the Balvages (who moved to Ryderwood in 2002) well before the statute of limitations expired. Indeed, both couples admit they were aware of the alleged discriminatory behavior when they moved to the town. Thus both were on notice of the conduct that would form the basis for their FHA claim.

E. RISA Is Exempt Under HOPA.

Finally, Plaintiffs interpretation of HOPA is simply wrong. Their theory that the failure to comply with HOPA in 2000 negates any future right is unsupported and illogical.

1. The History of HOPA.

HOPA was passed by Congress at the same time as the familial status provision was added to the Fair Housing Act, 1988. In 1995 Congress amended the Act in order to prevent excessive litigation and "protect senior housing." 64 Fed. Reg. 16325. n37 The legislative history to the amendment reflects Congress's belief that both senior housing and family housing were worthy of protection, [*30] "[t]he legislation strikes a reasonable compromise - protecting the rights of families with children and the security and peace of mind of senior citizens." Cong. Rec. H4360 at H4360 (Rep. Canady). Taken together, the FHA and HOPA "protect families with children while still 'fully protect[ing] the rights of senior citizens who live in retirement communities, and ... allow[ing] those communities to exclude families with children if they so choose.'" *Taylor v. Rancho Santa Barbara*, 206 F.3d 932, 936 (9th Cir. 2000) (citing 134 Cong. Rec. H4603 at *H4607 (daily ed. June 22, 1988).)

Although exemptions to the FHA are generally interpreted narrowly, Courts recognize that HOPA should be interpreted more broadly to comport with Congress's concerns to "protect retirement communities." As noted in *Deer Hill Arms II Ltd. v. Planning Comm'n of City of Danbury*, 239 Conn. 617, 625, 686 A.2d 974 (1996), "the legislative history [*31] is replete with expressions of congressional concern on protecting choice of living in housing of older persons ...". Thus a "flexible fact specific inquiry must be made to determine whether the exemption is applicable so that these legislative goals may be achieved." *Id.* at 625-26. In this regard, whether a community is in compliance must focus on the "intent" of the community, rather than on rote adherence to strictly delineated criteria and timelines. *See Massaro v. Mainlands Section 1 & 2 Civic Ass'n, Inc.*, 3 F.3d 1472, 1477 (11th Cir. 1993). As the *Massaro* court noted:

As Judge Learned Hand stated, statutes 'should be construed, not as theorems of Euclid, but with some imagination of the purposes which lie behind them.'

Id. (citing *Lehigh Valley Coal Co. v. Yensavage*, 218 F. 547, 553 (2d. Cir. 1914).

Plaintiffs' interpretation violates that edict. It places form over substance by asking this Court to hold that a 57 year old retirement community should cease to be by virtue of a strained interpretation that furthers no goal of either HOPA or the FHA. This is not warranted.

2. *The Transition Period Does* [*32] *Not Bar Subsequent Efforts To Rely On The HOPA Defense.*

Plaintiffs argue that RISA cannot rely on HOPA because it failed to show compliance as of the year 2000. *See, e.g.*, Complaint PP 33-34 (Plaintiffs do not contest that RISA met the 80% requirement). While they admit that HUD guidelines expressly permit a community to become compliant after the transition period passes, they allege that RISA cannot do so because it engaged in unspecified "acts of discrimination." This is baseless.

Nothing in the FHA, HOPA, or the HUD guidelines states that the HOPA defense is lost to entities that fail to comply at some point in the past. Indeed, the statute expressly authorizes later compliance and holds that past failures outside the statute of limitations period are irrelevant. As set forth in HUD's Question and Answers Regarding HOPA, a community is entitled to rely on the exemption if in compliance as of the date of the alleged act of discrimination:

Question 31: If an individual files a complaint based on familial status and the housing community/facility claims the exemption as a defense, who has the burden of proving, that the community/facility is in compliance with HOPA [*33] requirements?

Answer: The community/facility housing provider has the burden of proving that it was in compliance with HOPA ***requirements on the date of occurrence of the alleged act or incident of discrimination?***
n38

n38 Ross Dec. Ex. H (HUD Q&A).

To support their argument, the Plaintiff cite to the transition period authorized by HUD; arguing that the failure to comply within that time frame forbids any future compliance. This extrapolates why the transition period was enacted: to allow communities that were not then 80% comprised of persons aged 55 and older to discriminate in order to reach that threshold. *See* 100 C.F.R. 308 & 64 *Fed. Reg.* 16326. Per that provision, even if a community did not become compliant by the end of that period, its otherwise discriminatory actions were privileged. *Id.* The provision mentions

nothing about communities that are otherwise compliant but modify their programs to ensure compliance.

The sole support Plaintiffs cite to for their [*34] position is a March 6, 2006 HUD letter discussing HOPA *conversion*. Whether this letter constitutes "authority" is questionable. But in any event, it is not apropos to this case. As the letter makes clear, conversion takes place when a community below the 80% threshold reaches that level, e.g., once "80 percent of its units are occupied by at least one person 55 years of age or older" the community can adopt HOPA. *See* March 6, 2006 letter, p.2. This does not support the Plaintiffs' position. All that this letter states is that an otherwise non-compliant community that was, for example, 78% populated by 55 and older, cannot convert to compliance by evicting families or denying them housing.

This is not what is at issue. Here, Plaintiffs do not allege that Ryderwood was below that threshold, they only argue that RISA failed to meet the intent and verification elements of HOPA. *See* Complaint PP 33-34 (alleging that RISA failed to comply with HOPA under the "intent" and "verification" elements). Nor would such an argument be reasonable, when Ryderwood conducted its 2007 survey, the results showed it was 100% compliant when vacant and non-verifiable homes were excluded and 92% [*35] compliant when those homes were counted as "non-compliant." Instead, what Plaintiffs complain of are the evidentiary aspects of HOPA, verification and age certification. These are not elements of discrimination, they are elements of proof relevant to show compliance with HOPA. This is not a "conversion" issue, it is a compliance issue.

Moreover, to rely upon this document leads to absurd results. If Plaintiffs argument is correct, a previously non-compliant community can enact HOPA policies once it happens to reach the 80% threshold yet Ryderwood can never assert HOPA because it corrected deficiencies in its verification process. This is not justified.

RISA bears the burden to show compliance when an actual act is committed. It does not have any duty to show compliance at all times in the past, particularly where the Plaintiffs do not even allege any actual act of discrimination. This type of formalistic interpretation of the statute is not supported by the law or any regulation. Nor should it be. Their theory exalts form over substance and relies on layers of speculation all to attain an end that runs directly counter to the reason why HOPA was adopted: to "protect retirement communities. [*36] "

3. Ryderwood's Pre-2006 Policies Complied With HOPA.

Finally, the Plaintiffs are simply wrong. Although Mr. Weaver recommended that RISA adopt more stringent policies in 2006 to comply with HOPA, this alone does not lead to the inference that RISA was non-compliant before that date. RISA's records show that it met the spirit and intent of the rule well before that 2006 survey.

80% Occupied By Persons Aged 55 and Older. Plaintiffs do not contest that Ryderwood was at least 80% occupied by persons aged 55 and up before 2006. Indeed, the result of the 2006 survey was that Ryderwood was 92% occupied by persons aged 55 and over. *Intent To Operate As A Retirement Community.* HUD regulations specify seven criteria to show whether a community has the requisite intent to operate as "housing for older persons." The focus of those factors is on the community's intent, e.g., whether it intends to operate as a 55+ community. *See e.g., 64 Fed. Reg. 16327* ("HUD does not intend to impose any rigid requirements on indicating intent. Section 100.306 only speaks to relevant factors to be considered and the examples simply illustrate what could satisfy the requirement. [*37] Intent is judged based on the common understanding of the word and whether the community or facility has established through various means whether they intend to operate housing for persons who are 55 years of age or older.").

This intent has been clear since Ryderwood was formed. Ryderwood was created as a retirement community subject to deeds that reserved occupancy to "bona fide retirees and pensioners." The RISA bylaws were amended in 1975 to further restrict occupancy to those at least 55 years of age and older. Those bylaws are recorded with the County and appear in every owner's chain of title. When homes in the community are sold, these restrictions appear on their title reports and disclosures. When they move in, new owners are required to sign a membership form, which requires them to agree to abide by all RISA bylaws and policies. Since 1996, all new residents are required to attest to

their age when signing the certificate of membership with RISA, along with abide by those age restrictive policies. While HUD regulations permit up to 20% of the homes to be occupied by persons under the age of 55, RISA has long maintained a stringent 100% policy of compliance (except for [*38] spouses). RISA has produced correspondence from the 1970's, 80's, 90's and 00's showing that it strictly enforces that policy. The age restrictions are disseminated to local real estate agents who regularly cite that fact on the multiple listing service. Signs posted throughout the property state that residency is limited to those 55 and over.

Finally, documents presented by the Plaintiffs show that these elements were well disseminated. As noted above, Charles Weaver signed a declaration attesting that: "Ryderwood has always been a residential area for retirees, fifty-five years and older." Deborah Balvage states in her declaration that, before she purchased her home, "we thought that this was a 55+ community with requirements and restrictions." And Raymond Balvage attests that he and his wife "were told by the real estate agent Clarine Meeks that Ryderwood was a "55+ community." All of these persons moved to Ryderwood during the period in question.

Age Identification. Plaintiffs allege that RISA did not adopt provisions necessary to certify the ages of its residents until 2006. This is false. Every home in Ryderwood is subject to the bylaws and deed conditions that require [*39] all owners to abide by the 55 and over provision. This is a type of "self-certification" that HUD regulations specifically endorse as sufficient. *See* Appendix to 100 C.F.R. 307(d)(7), Example 1 ("all new leases, new purchase agreements, or new applications contain a provision directly above the signatory line . . . asserting that at least one occupant of the dwelling will be 55 years of age or older"). Furthermore, in 1996, RISA's membership form was modified to require each new resident to attest to his or her age. n39 This form of self-attestation of age is specifically authorized as sufficient to comply with HOPA's age requirements as well. *See 64 Fed. Reg. 16327* ("[a] self certification of his or her age by an individual will be adequate to meet this [age verification] standard.").

n39 DeBriae Dec, Ex. H (Weaver membership certificates).

Verification of Compliance. Plaintiffs also allege that RISA did not comply with HUD's age verification requirements until 2006. This is not [*40] accurate. HOPA regulations do not demand that the community conduct a "HOPA survey," they merely require that the community regularly update its records in order to ensure that the homes are not occupied by new residents. As Regulation 100.307(b) states:

(c) The procedures described in paragraph (b) of this section must provide for regular updates, through surveys *or other means*, of the initial information supplied by the occupants of the housing facility or community. Such updates must take place at least once every two years.

Although RISA adopted Mr. Weaver's suggestions regarding more stringent compliance documentation, the regulation make clear that verification can be made by "other means." Well before Mr. Weaver's advice was taken, RISA engaged in a litany of other policies and procedures designed to ensure that Ryderwood remained at least 80% 55 and older. This included regular upkeep of an active rolodex listing the residents of all homes, an annual neighborhood phone book update done by a RISA volunteer who doorbelled each home to ensure that the residents matched up with RISA's records, and by notice provided by Ryderwood homeowners, who actively monitor [*41] the community to ensure that it remains 55 and older. n40 This multi-faceted process of verification was complimentary to the covenants and bylaws, which also ensured that all residents met the age restrictions. Indeed, that step alone is listed by HUD regulation as an example of what steps are necessary in order to verify the age requirements are met:

Example 2: A homeowners association amends its [CC&R's], and records them at the appropriate government recording office. The amendments require applicants to state whether at least one occupant is 55 years of age or older.

Appendix to Regulation 100.307(e), Example 2.

n40 DeBriac Dec. PP 18-21; see also Exs. J (sample rolodex card) & K (2006 Ryderwood phone directory).

What this history shows is that RISA and Ryderwood had the requisite intent to be a retirement community. That is all that is required. *See 42 U.S.C. § 3607(b)(1)* (exemption applies to "housing for older persons" as defined by the statute). [*42]

V. CONCLUSION

Although phrased as FHA claims, Plaintiffs' allegations are anything but. Their theories violate nearly all potential elements of an FHA claim for a simple reason: they did not suffer any act of discrimination. Plaintiffs' motion should be denied.

DATED this 29th day of March, 2010.

BETTS, PATTERSON & MINES, P.S.

By */s/ Steven Goldstein*
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Certificate of Service

I hereby certify that on this 29th day of March, 2010, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all parties of record and to The Honorable Benjamin H. Settle.

/s/ Richard D. Ross
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DECLARATION OF RICHARD D. ROSS [*43] IN SUPPORT OF RISA'S OPPOSITION TO MOTION FOR PARTIAL SUMMARY JUDGMENT AND MOTION FOR SUMMARY JUDGMENT

I, Richard D. Ross, am competent to testify to the matters set forth herein and make this declaration of my own personal knowledge and belief.

1. I am an attorney with Betts, Patterson & Mines, P.S. and one of the primary attorneys in charge of representing the Defendant in this matter, the Ryderwood Improvement and Service Association ("RISA").

2. Attached hereto at Exhibit A is a true and correct copy of Discovery responses provided by the Weavers in the matter of *Weaver v. RISA*, Cowlitz County Superior Court No. 07-2-02001-3(2007).

3. Attached hereto at Exhibit A is a true and correct copy of the Declaration of Charles Weaver filed in the matter of *Weaver v. Bichler*, Cowlitz County Superior Court No. 05-2-01301-1 (2005).

4. I have reviewed all discovery provided by Plaintiffs in this matter. Neither the Weavers nor the Balvages provide any evidence that they were discriminated against on any basis protected under the FHA.

5. In their Complaint, the Plaintiffs allege that Mr. Weaver's son was denied the right to live with them. This same allegation was made in the prior [*44] State court matter. No documents have been provided describing this allegation, nor have any documents been provided showing his son's name, date of birth, or whether the Weavers have custody.

6. Attached hereto at Exhibit C is a true and correct copy of Plaintiff Raymond Balvage's letter entitled "My Complaint," provided by Plaintiffs in response to discovery requests and numbered PLA292.

7. Attached hereto at Exhibit D is a true and correct copy of Plaintiff Deborah Balvage's letter entitled "My Complaint," provided by Plaintiffs in response to discovery requests and numbered PLA320.

8. Attached hereto at Exhibit E is a true and correct copy of the Complaint filed by the Weavers in matter of *Weaver v. RISA*, Cowlitz County Sup. Ct. No. 07-2-02001-3 (2007).

9. Attached hereto at Exhibit F is a true and correct copy of the excerpts from the Court's oral ruling in response to RISA's motion for summary judgment in the matter of *Weaver v. RISA*, Cowlitz County Sup. Ct. No. 07-2-02001-3 (2007).

10. Attached hereto at Exhibit G is a true and correct copy of Housing and Urban Development Implementation Guidelines Re: HOPA.

11. Attached hereto at Exhibit H is a true and correct [*45] copy of Housing and Urban Development Questions and Answers Regarding HOPA Compliance.

12. I declare the foregoing to be true and accurate to the best of my knowledge under penalty of perjury.

/s/ [Signature]
Richard D. Ross

Executed this 29th day of March, 2010, at Ryderwood, Washington.

[SEE EXHIBIT A IN ORIGINAL]

[SEE EXHIBIT B IN ORIGINAL]

[SEE EXHIBIT C IN ORIGINAL]

[SEE EXHIBIT D IN ORIGINAL]

[SEE EXHIBIT E IN ORIGINAL]

[SEE EXHIBIT F IN ORIGINAL]

[SEE EXHIBIT G IN ORIGINAL]

[SEE EXHIBIT H IN ORIGINAL]

[SEE DECLARATION OF SALLY-GENE DEBRIAE IN SUPPORT OF RISA'S OPPOSITION TO MOTION FOR PARTIAL SUMMARY JUDGMENT AND MOTION FOR SUMMARY JUDGMENT IN ORIGINAL]

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