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Honorable Benjamin H. Settle

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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

RAYMOND T. BALVAGE and DEBORAH
A. BALVAGE, husband and wife, *et. al.*,

Plaintiffs,

vs.

RYDERWOOD IMPROVEMENT AND
SERVICE ASSOCIATION, INC., a
Washington non-profit corporation,

Defendant.

NO. 3:09-cv-05409-BHS

DEFENDANT RYDERWOOD
IMPROVEMENT AND SERVICE
ASSOCIATION'S MOTION FOR
SUMMARY JUDGMENT RE:
RETALIATION CLAIMS

NOTED FOR CONSIDERATION:
MAY 10, 2013

ORAL ARGUMENT REQUESTED

DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT RE:
RETALIATION CLAIMS

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I. INTRODUCTION AND RELIEF REQUESTED

Plaintiffs’ Third Amended Complaint added claims of retaliation under 42 U.S.C. § 3617. In response to discovery requests propounded by RISA as to these claims, the Plaintiffs describe hundreds of alleged acts of retaliation committed by individual residents of Ryderwood. None suffice to make out a prima face case of retaliation by RISA. Consequently, RISA moves to dismiss Plaintiffs’ cause of action alleging retaliation.

II. FACTS¹

A. Procedural History²

On October 26, 2012, the Court granted Plaintiffs’ Motion to Amend the Second Amended Complaint to add an action for retaliation.³ On November 2, 2013, Plaintiffs filed and served their Third Amended Complaint, which alleges:

RISA and its representatives and members have wrongfully threatened, intimidated, inferred with and harassed Plaintiffs’ in the exercise of their Fair Housing Act rights.⁴

And further alleges:

RISA has caused others to wrongfully threaten, intimidate, interfere with and harass Plaintiffs and has failed to take appropriate actions to prevent its members from engaging in such actions.⁵

¹ For a more complete factual background, see the Court’s order issued June 4, 2010 (Dkt. 42 at 2-5) and the Ninth Circuit Court of Appeals opinion issued April 27, 2011 (Dkt. 108).

² As this Court noted in its July 20, 2012 Order on Summary Judgments “[t]he main issue remaining following the Ninth Circuit’s remand of this matter is whether RISA conducted a proper survey in 2007 sufficient to meet the verification requirements of 42 U.S.C. § 3607(b)(2)(C)(iii).² The scope of this case changed dramatically, however, after this Court granted Plaintiffs’ Motion to Amend to assert retaliation claims on October 26, 2012.

³ Dkt. 164.

⁴ Dkt. 169 ¶ 66.

⁵ *Id.*

1 **B. Alleged Acts of Retaliation.**

2 On November 12, 2012, RISA served each of the 47 Plaintiffs with discovery requests
3 specifically directed toward their alleged retaliation claims. This includes the specific acts of
4 retaliation claimed (Interrogatory No. 3), all facts showing RISA is responsible for the acts
5 claimed (Interrogatory No. 4), and all damages sustained as a result of these alleged acts of
6 retaliation (Interrogatories No. 8 and No. 10). 45 of the 47 Plaintiffs responded to RISA's
7 discovery requests.⁶

8 The 45 Plaintiffs who responded to those requests collectively allege hundreds of
9 distinct acts of retaliation.⁷ RISA has reviewed each and every one of those alleged acts and, as
10 further described in this Motion, RISA denies that any meet the requirements of 42 U.S.C. §
11 3617. Because Plaintiffs allege hundreds of individual retaliatory acts, Defendant does not
12 attempt to address each individually in this motion for summary judgment. To allow the Court
13 to meaningfully evaluate Plaintiffs' claims (and RISA's defenses to these claims), RISA has
14 grouped the allegations into five discrete categories and provided representative examples of
15 the types of allegations made:

16 **1. Alleged Retaliatory Acts by Neighbors or Third Parties.**⁸

17 This category contains acts allegedly perpetrated by persons who are not RISA officers
18 or board members. Examples of this type of allegation include:

- 19 • Meredith Zwiefelhofer member/owner of RISA during the
20 pendency of this case authored and posted an article in the

21
22 ⁶ Declaration of Alicia B. Pierce in Support of RISA's Motion for Summary Judgment
23 Re: Retaliatory Acts (hereafter "Pierce Dec.") ¶ 3. Plaintiffs' answers and responses to these
24 discovery requests are appended to the Pierce Declaration as Exhibits 1 through 29. See Pierce
25 Dec. ¶ 5 for an index of all discovery responses.

⁷ Pierce Dec. ¶ 6.

⁸ *Id.* ¶ 10.

1 Viewpointtdn.com/news/opinion on September 3, 2010 that
2 intimidated me.

- 3
- 4 • Faye Hoxit board member/owner of RISA during the pendency of
this case allowed her dog to several times threaten me and interfere
5 with my leaving the Ryderwood post office.
 - 6 • William Bowlby, Pastor of Ryderwood Community Church, and
RISA members/owners during the pendency of this case have
7 discriminated and interfered with our Freedom of Religion by
calling the residents involved in this case “Parasites!” during his
8 pulpit speeches, making it clear we are not welcome to attend
church services, preventing us from attending church in this
9 community.
 - 10 • Orv Renfer Member/Owner Ryderwood Improvement & Service
Association Jan. 2010 threatened me and call[ed] me a liar in Court
11 Lobby.

12 **2. *Alleged Retaliatory Acts by Individual RISA Officers***
13 ***Acting Outside their Authority.*⁹**

14 Examples of this type of allegation include:

- 15
- 16 • Ronald Mueller board member/owner of RISA during the
pendency of this case in early summer of 2011 drove past me on
Morse Street suddenly made a U-turn, swerved off the road with
the intention to hit me, narrowly avoiding me.
 - 17 • Ronald Mueller member/owner RISA during the pendency of this
18 case intimidated and threatened me at the Ryderwood post office
when we were talking about him coming at me with his car.
 - 19 • Sally Gene DeBriac board member/owner of RISA during the
20 pendency of this case threatened and intimidated me during my
21 deposition.
- 22
- 23
- 24

25 ⁹ *Id.* ¶ 9.

3. *Alleged Retaliatory Acts By RISA and/or RISA Officers.*¹⁰

Examples of this type of allegation include:

- Sally Gene DeBriae and other members of the RISA Board filed improper liens on my real property without any legal authority and based on claims for services and benefits which were never performed or provided.
- RISA during the pendency of this case threatened me by sending a letter to Community Waste & Recycling telling them to stop picking up my garbage.
- Donald Barnes, Sally Gene DeBriae, Donald Zifka board members/owners posted a flyer TO THE RESIDENTS OF RYDERWOOD to harass and intimidate me.
- During the pendency of this case, RISA posted NO TRESPASSING RISA MEMBERS ONLY signs denying access to the common areas.

4. *Alleged Acts That Pre-Date Commencement of this Lawsuit.*¹¹

This category includes all claims that allege acts that took place prior to the date this lawsuit was commenced. Examples of this type of allegation include:

- Donna Chase, Mary Slagle members/owners RISA prior to this case signed their names to a posted flyer called HERE WE GO AGAIN!!! This was intimidating and slanderous. Inferred I have been on the "dole" most of my life and I am trying to get something for nothing.
- In May 2008 I received a threatening letter that I had children under 55 living in my home and needed to contact Ryderwood Improvement and Service Association's office. It was sent by Don Barnes, President/board member/owner of Ryderwood Improvement and Service Association.

¹⁰ Pierce Dec. ¶ 6.

¹¹ *Id.* ¶ 11.

- 1 • Prior to the pendency of this case, Ryderwood Improvement and
- 2 Service Association Board, because of the chaos they created,
- 3 deprived my husband and I of precious hours together, before his
- 4 untimely death in November of 2006.
- 5 • Ryderwood Improvement & Service Association prior to the
- 6 pendency of this case coerced me to have to take my grandchildren
- 7 out of town to catch their bus.

8 **5. *Miscellaneous Allegations That Fail to Specify a***
 9 ***Retaliatory Act or Identify the Alleged Perpetrator.***¹²

10 Examples of this type of allegation include:

- 11 • Unknown member/owners, RISA and members of the Ryderwood
- 12 Community Church, threatened and intimidated our freedom of
- 13 religion and worship.
- 14 • RISA member/owner unknown male, during the pendency of this
- 15 case, approached my 90 year old father and demanded he move his
- 16 truck. My father had pulled his truck in front of our house and the
- 17 unknown male (same man demanding we move our motor home)
- 18 told my father “you can NOT double park in front of this house”,
- 19 causing my father to be confused about what he “Could” do on our
- 20 property. At this point, my father began to talk about being a
- 21 burden to us and began frequently talking about HATING this
- 22 community. His behavior changed (no longer joyful) making us
- 23 wonder what other cruelty he experienced and did not share with
- 24 us.
- 25 • Unknown members/owner of RISA interfere with our quiet
- enjoyment of property and intimidate us as they ride past us on
- their bicycles.

The Declaration of Alicia Pierce includes all of the allegations of retaliatory acts alleged by Plaintiffs in their discovery responses, and is organized according to the categories above.

¹² *Id.* ¶ 12.

C. Plaintiffs Contributed To The Derisive Atmosphere Portrayed In Their Allegations.

In this dispute, Plaintiffs challenge: (a) Ryderwood’s its right to remain a 55 and older community; and (b) RISA’s right to enforce its bylaws against all residents. Although RISA is the Defendant in this lawsuit, the real party in interest in this dispute are the 200+ homeowners and residents who are not part of this litigation – the residents. The Plaintiffs’ lawsuit challenges individual residents’ longstanding beliefs about Ryderwood as well as their property and financial expectations in buying homes in Ryderwood. RISA took steps to encourage the amicable resolution of disputes within the community.¹³ Nevertheless, RISA does not dispute that some residents may have reacted emotionally or inappropriately.

RISA does not condone these actions but, in this regard, it should be noted that the Plaintiffs cannot dispute that they engaged in equally contentious actions directed toward Ryderwood residents. For example, Plaintiffs have sent derisive emails to non-plaintiff residents, such as Glenn Robertson, a former board member who resigned from RISA but chose not to join the Plaintiffs in this litigation.¹⁴ And the Plaintiffs erected a publicly viewable bulletin board upon which they post letters, notices, and comments to the Ryderwood community. Among the items posted: A drawing showing a bulldozer tearing down Ryderwood’s longstanding entrance sign; case law highlighting the sometimes exorbitant punitive damages awarded in Fair Housing Act cases; and notices threatening financial repercussions to the community, such as a sign that said:

The current membership of RISA will pay for RISA’s failure to understand.¹⁵

¹³ DeBraie Dec. Exhibit D (Jan. 2008 Ryderwood Reporter).

¹⁴ Declaration of Richard D. Ross (“Ross Dec.”) Exhs. A-C (Emails from Weaver to Robertson).

¹⁵ DeBraie Dec. Exhs. A-B.

D. RISA’s Authority to Enforce Bylaws

Finally, the remainder of Plaintiffs’ allegations relate to their claim that RISA is not authorized to enforce its bylaws. As explained in greater detail in Defendant’s Motion for Partial Summary Judgment Regarding Bylaws, all properties in Ryderwood are subject to RISA’s bylaws, which this Court upheld as covenants.¹⁶ The terms of those covenants state that all owners “[m]ust not be less than fifty-five years of age.”¹⁷ They also restrict owners from renting, leasing, or otherwise allowing anyone who is not fifty-five years of age from residing in the house:

Must have no additional, permanent occupants of the home, (other than the spouse), who do[es] not meet the above requirements.¹⁸

This has been the policy of Ryderwood since 1953. As previously described, all properties are subject to covenants that include a utility fee. Pertinent here is condition B-4, which states that each property owner shall pay an annual fee and that an unpaid fee becomes a lien on the land:

B-4. The Grantee, covenants that the property conveyed under this Deed shall be subject to an annual charge in such amount as will be fixed by the Grantor, its successors or assigns, not, however, exceeding the pro rata share of the actual cost thereof as to the property herein conveyed.

...

[S]uch charge shall on each such due date become a lien upon the land and shall continue to be such a lien until fully paid.

Such charge shall be payable to the Grantor, or its successors or assigns, and shall be devoted to the maintenance of the water system, sewer system, garbage disposal system, and to the furnishing of the services in connection therewith, and any and

¹⁶ Dkt. 100.

¹⁷ Ross Dec. Exh. B (Ryderwood Bylaws).

¹⁸ Ross Dec. Exh. B p. 1.

1 all similar services which may be deemed advantageous to the
2 land herein conveyed.¹⁹

3 Although this Court has already upheld these covenants as applicable to all properties in
4 Ryderwood, Plaintiffs continue to allege that RISA charged dues, filed liens, and otherwise
5 enforced the bylaws without authority as retaliatory acts.

6 **III. QUESTION PRESENTED**

7 Whether any genuine issues of material fact exist regarding Plaintiffs’ allegations that
8 RISA retaliated against them in violation of the Fair Housing Act, 42 U.S.C. § 3617.

9 **IV. EVIDENCE RELIED UPON**

10 This Motion is based upon the Declaration of Alicia Pierce in Support of Motion for
11 Summary Judgment, and all Exhibits thereto; the Declaration of Richard D. Ross in Support of
12 Motion for Summary Judgment, and all Exhibits thereto; the Declaration of Sally-Gene
13 DeBriac in Support of Motion for Summary Judgment, and all Exhibits thereto; the Declaration
14 of Michael Lutz in Support of Motion for Summary Judgment; Motions and Pleadings of
15 Record; and previous filings and Orders discussed herein.

16 **V. ARGUMENT**

17 **A. Burden Shifting Analysis of Retaliation Claims**

18 The Fair Housing Act makes it “unlawful to coerce, intimidate, threaten, or interfere
19 with any person in the exercise or enjoyment of, or on account of his having exercised or
20 enjoyed, or on account of his having aided or encouraged any other person in the exercise or
21 enjoyment of, any right granted or protected by” the Act. 42 U.S.C. § 3617. The U.S.
22 Department of Housing and Urban Development (“HUD”) has identified five non-exclusive
23 examples of the type of conduct prohibited under § 3617:

24 _____
25 ¹⁹ See Dkt. 78 (Exhibits A-E in Support of RISA Partial Motion for Summary Judgment)

- 1 (1) Coercing a person, either orally, in writing, or by other
- 2 means, to deny or limit the benefits provided that person
- 3 in connection with the sale or rental of a dwelling or in
- 4 connection with a residential real estate-related
- 5 transaction because of race, color, religion, sex, handicap,
- 6 familial status, or national origin.
- 7
- 8 (2) Threatening, intimidating or interfering with persons in
- 9 their enjoyment of a dwelling because of the race, color,
- 10 religion, sex, handicap, familial status, or national origin
- 11 of such persons, or of visitors or associates of such
- 12 persons.
- 13
- 14 (3) Threatening an employee or agent with dismissal or an
- 15 adverse employment action, or taking such adverse
- 16 employment action, for any effort to assist a person
- 17 seeking access to the sale or rental of a dwelling or
- 18 seeking access to any residential real estate-related
- 19 transaction, because of the race, color, religion, sex,
- 20 handicap, familial status, or national origin of that person
- 21 or of any person associated with that person.
- 22
- 23 (4) Intimidating or threatening any person because that
- 24 person is engaging in activities designed to make other
- 25 persons aware of, or encouraging such other persons to
- exercise, rights granted or protected by this part.
- (5) Retaliating against any person because that person has
- made a complaint, testified, assisted, or participated in
- any manner in a proceeding under the Fair Housing Act.

24 CFR § 100.400(c).

When examining retaliation claims, courts rely on the three-step burden shifting test established by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), to determine whether genuine issues of material fact exist.

(continued . . .)
Re: Bylaws).

DEFENDANT’S MOTION FOR
SUMMARY JUDGMENT RE:
RETALIATION CLAIMS

1 First, the Plaintiffs must establish a prima facie case of retaliatory conduct: (1) that the
2 Plaintiffs “engaged in a protected activity; (2) the defendant subjected [them] to an adverse
3 action; and (3) a causal link exists between the protected activity and the adverse action.”

4 *Walker v. City of Lakewood*, 272 F.3d 1114, 1128 (9th Cir. 2001).

5 Second, if a plaintiff establishes a prima facie case, the defendant has the burden to
6 produce a legitimate non-retaliatory reason for its action. *Id.*

7 Third, if the defendant meets its burden of production, the burden of persuasion shifts
8 back to the plaintiff to show that the defendant’s proffered reason is not worthy of credence or
9 that the reason is mere pretext for a retaliatory action. *Id.*; see also *Reeves v. Sanderson*
10 *Plumbing Prods., Inc.*, 530 U.S. 133, 143 (2000). If Plaintiff offers credible proof showing the
11 claimed legitimacy of the action taken is not legitimate, then a question of fact exists for the
12 trier of fact to decide.

13 RISA concedes that filing a Fair Housing Act claim is a protected activity. However,
14 Plaintiffs cannot meet their burden to establish a prima facie case on the second and third
15 elements. But even if Plaintiffs can establish a prima facie case for any given claim, RISA
16 meets its burden to show a legitimate non-retaliatory reason for such actions.

17 **B. Plaintiffs Do Not Meet Their Burden to Establish a Prima Facie Case on the**
18 **Required Elements of An Adverse Action Claim.**

19 ***I. Plaintiffs Fail to Show RISA Subjected Them To Any***
20 ***Adverse Action***

21 To establish a § 3617 retaliation claim, Plaintiffs must prove RISA committed an
22 adverse action in order to coerce, intimidate or interfere with a Plaintiff’s exercise of a
23 protected right. 42 U.S.C. § 3617. An action is only adverse if it is sufficiently harmful to
24 deter a reasonable person in the plaintiff’s circumstances from engaging in the protected
25 activity. *Cf. Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 68 (2006).

1 Importantly, and clearly overlooked by Plaintiffs here, the adverse action must have been
2 committed *by the Defendant*. See *Walker*, 272 F.3d at 1128.

3 Although Plaintiffs claim that RISA “acted wrongfully and unlawfully . . . by causing or
4 allowing others to take actions, and/or in not preventing or dissuading others from taking
5 actions to retaliate against Plaintiffs[.]”²⁰ there is no legal or factual support for the allegation
6 that RISA is liable for the actions of residents of the Ryderwood community, third parties, or
7 for the actions of RISA board members acting outside the scope of their authority.

8 *a. RISA is Not Liable for the Actions of*
9 *Ryderwood Residents or Third Parties*

10 Plaintiffs claim that RISA, as an entity, is liable for alleged acts taken by third parties.
11 This includes acts committed by (i) residents of Ryderwood; (ii) third-parties, such as the
12 community pastor, the garbage collector, and postal employees; and (iii) unidentified persons,
13 such as the Balvage Plaintiffs claim that “[u]nknown members/owner of RISA interfere[d] with
14 our quiet enjoyment of property and intimidate[d] us as they r[o]de past us on their bicycles.”²¹
15 Plaintiffs have presented no evidence to show that RISA is responsible for these actions. In
16 each and every allegation under these categories, the alleged wrongdoer was not an agent or
17 employee of RISA and therefore there is no basis to hold RISA responsible for these alleged
18 acts.

19 Under principles of agency law, a master is liable for the acts of a servant committed
20 within the scope or course of the servant's employment. *Sung v. Mission Valley Renewable*
21 *Energy, LLC*, CV-11-5163-RMP, 2013 WL 1193087 (E.D. Wash. Mar. 22, 2013) (citing
22 *Bratton v. Calkins*, 73 Wash. App. 492, 498, (1994)). Although an employer or principal in an
23 agency relationship can be vicariously liable for the acts of its employees, no such agency

24 _____
25 ²⁰ Dkt.169 ¶ 79.

1 relationship exists between RISA and the residents of Ryderwood. Nor is there any agency
2 based principle holding RISA responsible for the acts of non-residents.

3 In light of the large number of these allegations, RISA cannot address each claim
4 specifically. Each claim in these categories has been set forth in the Pierce Declaration, which
5 cites to the specific discovery response where each claim was made. Nevertheless, to give the
6 Court some understanding of the tenor of these claims, RISA points to the following examples.

7 Many Plaintiffs allege that a sign prohibiting SWIFFT members from entering the
8 Ryderwood café was retaliatory conduct by RISA.²² The “sign” according to Plaintiffs’ own
9 exhibits, is actually writing on a chalkboard. There is no evidence that any Board member
10 wrote the comment on that chalkboard. Indeed the Board was not even aware of it.²³ Further,
11 the café is open to all Ryderwood residents and anyone could have written it. Finally, it could
12 not have been there long as no Board members even saw it.²⁴ RISA cannot be liable for such
13 conduct.

14 Plaintiffs Bob and Diane White claim they are losing their home as a result of this
15 litigation.²⁵ The Whites do not provide any facts showing why RISA is responsible for the loss
16 of their home. Furthermore, the Whites have admitted that they are losing their home because
17 it is being foreclosed upon but fail to note that the foreclosure was initiated by SWIFFT, the
18 group formed by the Plaintiffs to pursue the FHA claims of its members in this litigation.²⁶
19 According to the Complaint filed by SWIFFT, its members agreed to contribute their pro-rata
20

21 _____
22 (continued . . .)

23 ²¹ See, e.g., Pierce Dec. p. 29 & *id.* p. 54.

24 ²² See, e.g., Pierce Dec. p. 7.

25 ²³ DeBraie Dec. ¶ 18.

²⁴ DeBraie Dec. ¶ 17; Declaration of Michael Lutz, ¶ 3-4.

²⁵ Pierce Dec. p. 37.

²⁶ Ross Dec. Exh. D (White Foreclosure Complaint).

1 share of the litigation costs and the Whites failed to pay.²⁷ RISA cannot be liable for the acts of
 2 other Plaintiffs seeking to obtain attorneys' fees owed as a result of this litigation.

3 Plaintiffs Deborah and Ray Balvage claim that RISA damaged a bulletin board on their
 4 property, but provide no evidence of who caused the damage.²⁸ The RISA board did not
 5 authorize such action and no board member took any action to damage the bulletin board.²⁹
 6 Even if the bulletin board was in fact damaged, RISA is not responsible for the conduct of an
 7 unknown individual.

8 All told, all claims that RISA is responsible for the actions of third-parties (or unknown
 9 parties) suffer from the same flaw – on their face the claims do not allege that the alleged
 10 retaliatory action was perpetrated by RISA or taken at RISA's direction. Although RISA's
 11 bylaws grant RISA the authority to enforce certain restrictions on homeownership and
 12 community maintenance, RISA has no control over or responsibility for the words or actions of
 13 its individual members.³⁰ There is also no legal or factual support for Plaintiffs' argument that
 14 RISA "caused" others to take actions or had a duty to "dissuade" third parties from taking
 15 actions.³¹

16 To the extent Plaintiffs' neighbors or third parties have taken harmful actions against
 17 them, Defendant is not the proper party against whom to seek redress. All of Plaintiffs'
 18 allegations of retaliatory acts that occurred after their filing of this lawsuit by Ryderwood
 19 residents, third parties, and unnamed or unknown individuals should be dismissed.³²
 20

21
 22 ²⁷ *Id.* ¶ 8-9.

²⁸ Pierce Dec. p. 9 at ¶ 7 (allegation no. 31).

²⁹ DeBraie Dec. ¶ 6.

³⁰ DeBraie Dec. ¶ 4.

³¹ DeBraie Dec. ¶ 2.

³² Pierce Dec. ¶ 10, pp. 28-37 (listing allegations from Plaintiffs' discovery responses of
 25 retaliatory acts by Ryderwood residents or other third parties), ¶ 12, pp. 52-58 (listing

b. *RISA is Not Liable for the Actions of Board Members Acting Outside of the Scope of Their Authority*

Under this category of claim, the Plaintiffs allege that an officer or board member of RISA engaged in some act. In each instance, the Plaintiffs allege that RISA is responsible for these actions solely because the act was committed by the Board Member. RISA denies each and every one of these allegations and further denies that any fit the definition of a retaliatory act under 42 U.S.C. § 3617. More pertinently, there is no proof that any of the alleged acts in this group were taken at the direction of RISA, the defendant in this suit.

A corporation “acts through its officers, agents or employees and is liable for the actions of such persons acting within the scope of their agency.” *S.E.C. v. Jenkins*, 718 F. Supp. 2d 1070, 1075 (D. Ariz. 2010). The principal will not be liable for the agent’s acts unless the agent is acting on the principal’s behalf. *Scott v. Ross*, 140 F.3d 1275, 1280 (9th Cir. 1998) (holding that this rule also applies to agents who are volunteers). To determine whether an employee acted within the scope of employment courts ask “whether the employee was engaged in the performance of duties provided for in his employment contract, was acting by specific direction of his employer, or ‘whether he was engaged at the time in the furtherance of the employer’s interest.’” *Sung v. Mission Valley Renewable Energy, LLC*, 2013 WL 1193087 (E.D. Wash. Mar. 22, 2013) (citing *Dickinson v. Edwards*, 105 Wash. 2d 457, 467 (1986)). An employer can defeat a claim of vicarious liability by showing that the employee’s conduct was “(1) intentional or criminal and (2) outside the scope of employment.” *Id.* (citing *Robel v. Roundup Corp.*, 148 Wash. 2d 35, 53 (2002)). Although this inquiry often presents a question for the trier of fact, the “issue may be resolved on summary judgment when there can be only

(continued . . .)
 allegations from Plaintiffs’ discovery responses of retaliatory acts by unnamed or unknown

1 one reasonable conclusion from the undisputed facts.” *Rahman v. State*, 170 Wash. 2d 810,
2 815-16 (2011) (citing *Breedlove v. Stout*, 104 Wash. App. 67, 70 n. 5 (2001)).

3 RISA is a non-profit corporation and its board of trustees and officers are volunteers.
4 The duties and powers of the RISA board and officers are clearly laid out in the bylaws.³³ The
5 authority of RISA board members and officer to act as agents of RISA is limited to those duties
6 and powers delineated in the bylaws. While some Plaintiffs allege actions that could be within
7 the scope of a Board Members agency duties – such as filing a lien against Plaintiff properties –
8 the acts at issue under this category are not.³⁴

9 As an example, Plaintiff Joyce Adams claims that Ronald Mueller (RISA board
10 member at the time) drove past her on Morse Street and then “swerved off the road with the
11 intention to hit” her.³⁵ Even if this accusation were true, such intentional or criminal conduct
12 would not have been within the scope of Mr. Mueller’s authority as a member of the RISA
13 board, and therefore RISA is not liable for such conduct.

14 Plaintiff Adams also claims that Mr. Mueller “plac[ed] his hands around [her] neck and
15 shoulders and sh[ook her]” at Charles Weaver’s deposition.³⁶ Again, RISA denies such an act
16 occurred but, even if true, such an action is clearly outside of the scope of Mr. Mueller’s
17 authority, and not done in furtherance of RISA’s interest. RISA cannot be liable for such
18 alleged conduct.

19 Once again, space prohibits RISA from addressing each and every one of these
20 allegations here but, as to each, the acts alleged in this category of claim are not within the
21

22 _____
(continued . . .)
23 individuals).

24 ³³ Ross Dec. Exh. B p. 5-8.

25 ³⁴ Pierce Dec. ¶ 9, pp. 27-28 (listing allegations from Plaintiffs’ discovery responses of
retaliatory acts by board members acting outside the scope of their authority).

³⁵ Pierce Dec. p. 27.

1 scope of the powers and duties delineated in the bylaws Plaintiffs can offer no evidence to
 2 show that such acts, if true, were done to further RISA's interests. Therefore, RISA is not
 3 liable for such acts and these claims should be dismissed.³⁷

4 c. *Statements of Third Parties and RISA Board*
 5 *Members are Protected by the First*
 6 *Amendment*

7 Finally, dismissal of these categories of claims is also warranted by the First
 8 Amendment. Even if the Court believes there are questions of fact regarding RISA's
 9 responsibility for the acts of individuals, § 3617 is not so broad as to restrict the First
 10 Amendment rights of those individuals. The "courts have recognized that a speaker's advocacy
 11 of his views, however 'ill-advised, uninformed, and even distasteful,' can amount to a violation
 12 of § 3617 of the FHA only in the event that the advocacy is directed to inciting or producing
 13 imminent violence and is likely in fact to do so." *White v. Lee*, 227 F.3d 1214, 1230 (9th Cir.
 14 2000); *Michigan Protection & Advocacy Serv., Inc. v. Babin*, 799 F.Supp. 695, 720
 15 (E.D.Mich.1992), *aff'd*, 18 F.3d 337 (6th Cir.1994). For example, many of the alleged
 16 retaliatory acts are statements made, flyers posted, or articles written by Ryderwood residents
 17 about the community or the litigation.³⁸ Allegations regarding statements made by Pastor
 18 Bowlby to his congregation also fall into this category of protected speech.³⁹

19 Although Plaintiffs may be offended by such statements, none rise to the level of being
 20 likely to incite or produce imminent violence, and therefore do not constitute adverse actions
 21 under § 3617 of the FHA.

22 (continued . . .)

23 ³⁶ Pierce Dec. p. 27.

24 ³⁷ Pierce Dec. ¶ 9, pp. 27-28 (listing allegations from Plaintiffs' discovery responses of
 25 retaliatory acts by board members acting outside the scope of their authority).

³⁸ See, e.g., Pierce Dec. pp. 28-29.

³⁹ See, e.g., Pierce Dec. p. 31.

2. ***Plaintiffs Fail to Show that Alleged Retaliatory Acts were Motivated by Their Participation in this Lawsuit***

In order to make out a prima facie § 3617 retaliation claim, Plaintiffs must be able to show a causal link between the protected activity and the alleged adverse action by the Defendant. *See Walker*, 272 F.3d at 1128. Here, Plaintiffs must show that Defendant’s alleged retaliatory actions were motivated by Plaintiffs’ filing of, or participation in, this lawsuit. *See DuBois v. Ass'n of Apartment Owners of 2987 Kalakaua*, 453 F.3d 1175, 1180 (9th Cir. 2006). Plaintiffs have offered no such evidence in their responses to the discovery requests.

a. ***There Can Be No Casual Link for Alleged Retaliatory Acts Prior to the Filing of this Lawsuit***

Actions taken before Plaintiffs engaged in a protected activity cannot be motivated by that activity, and therefore cannot be retaliatory under § 3617. *DuBois*, 453 F.3d at 1180 (holding that evidence of acts that predated the FHA complaint “was completely irrelevant to the retaliation claim.”). Many of the retaliatory acts alleged by Plaintiffs occurred before Plaintiffs filed their lawsuit, and in some cases the alleged acts occurred many years earlier.

For example, the Powells allege that RISA prevented a school bus from picking up their grandchildren.⁴⁰ RISA granted the Powells permission to have their grandchildren live with them more than ten years ago, and any issues related to the school bus routes, if true, occurred long before the Powells were Plaintiffs in this case.⁴¹ Another example is that a majority of Plaintiffs allege that RISA included their names on a list of individuals who had “resigned”

⁴⁰ Pierce Dec. p. 50.

⁴¹ DeBraie Dec. ¶ 13.

1 from RISA membership.⁴² This list was posted prior to the lawsuit and included non-
2 Plaintiffs,⁴³ and therefore could not have been motivated by Plaintiffs’ filing of this lawsuit.

3 Plaintiffs’ claims of alleged retaliatory acts that occurred prior to their filing of this
4 lawsuit should be dismissed.⁴⁴

5 *b. Plaintiffs Fail to Show that RISA Practiced*
6 *Selective Enforcement of Its Bylaws or that*
7 *RISA’s Enforcement of Its Bylaws was*
8 *Motivated by this Lawsuit*

9 Although many Plaintiffs allege that RISA’s enforcement of its bylaws—filing liens on
10 their property, sending them bills for dues, interfering with garbage collection, and interfering
11 with the sale of their homes—constitute retaliatory acts, they have offered no evidence to show
12 that RISA’s actions were motivated by their filing of this lawsuit. As discussed above, all
13 properties in Ryderwood are subject to RISA’s bylaws, which this Court upheld as covenants.
14 In fact, enforcement of RISA’s bylaws is necessary to be HOPA compliant. 42 U.S.C. §
15 3607(b)(2)(C).⁴⁵ RISA’s covenants require all owners to join RISA and abide by the age
16 restrictions. RISA’s bylaws also grant the board of trustees the power to “[s]uspend the voting
17

18 ⁴² Pierce Dec. p. 37.

19 ⁴³ Ross Dec. Exh. C.

20 ⁴⁴ Pierce Dec. ¶ 11, pp. 37-52 (listing allegations from Plaintiffs’ discovery responses of
21 retaliatory acts which occurred prior to July 2009).

22 ⁴⁵ HOPA elements are:

- 23 (i) at least 80 percent of the occupied units are occupied by at least one
24 person who is 55 years of age or older;
- 25 (ii) the housing facility or community publishes and adheres to policies and
procedures that demonstrate the intent required under this
subparagraph; and
- (iii) the housing facility or community complies with rules issued by the
Secretary for verification of occupancy, which shall—
 - (I) provide for verification by reliable surveys and affidavits; and
 - (II) include examples of the types of policies and procedures relevant to a
determination of compliance with the requirement of clause (ii).

1 rights and services to any member during any period in which such member shall be in default
2 in the payment of any assessment levied by the Association.”⁴⁶

3 Plaintiffs allege, for example, that they were prohibited from entering certain RISA
4 property due to the posting of “members only” signs.⁴⁷ RISA, however, has not prohibited
5 Plaintiffs from using RISA property.⁴⁸ In fact it is RISA’s position that all residents of
6 Ryderwood are members of RISA, including Plaintiffs; the Board does not recognize
7 “resignations” from RISA. RISA informed residents of that position before this lawsuit
8 began.⁴⁹ Any such signs posted on RISA property are not applicable to Plaintiffs who are
9 residents as they are members of RISA by virtue of them living in the community. The signs
10 were posted to inform the general public that such property was private property for the use of
11 Ryderwood residents, which includes Plaintiffs who are residents. To the extent any plaintiff is
12 not a resident, they are treated the same as any other non-resident, they do not have a right to
13 use RISA property.

14 Several Plaintiffs also allege that RISA’s removal of such signs from the library was
15 evidence of discrimination against “non-members.”⁵⁰ However, RISA removed the library
16 signs in order to open the library to the general public and maintain its tax-exempt status.⁵¹ The
17 library at all times was open to Plaintiff residents as RISA considers them members of RISA.

18 In one allegation related to such “members only” signs, Plaintiff Raymond Ernest
19 Morris claims that RISA board member Sally-Gene DeBraie threatened to have him arrested
20

21
22 ⁴⁶ Ross Dec. Exh. B, p. 6, ¶ 8.

23 ⁴⁷ *See, e.g.*, Pierce Dec. p. 38.

24 ⁴⁸ DeBraie Dec. ¶ 8.

25 ⁴⁹ DeBraie Dec. ¶ 8, Exh. C and D.

⁵⁰ *See, e.g.*, Pierce Dec. p. 14.

⁵¹ DeBraie Dec. ¶ 9, Exh. E.

1 for using the Ryderwood Park.⁵² Ms. DeBraie states that she did not threaten to have him
 2 arrested, but that she did tell him that the park was for Ryderwood residents.⁵³ Although Mr.
 3 Morris owned property in Ryderwood, he did not live in Ryderwood and therefore was not a
 4 resident.⁵⁴ Plaintiffs have not offered any evidence to show that this statement was motivated
 5 by Mr. Morris's participation in this lawsuit.

6 Plaintiffs also allege that the posting of a list of names of Ryderwood residents who
 7 owed dues and the amounts owed was a retaliatory act.⁵⁵ Posting the names of nonpaying
 8 residents has nothing to do with HOPA or its protections. Indeed, this list included non-
 9 Plaintiffs.⁵⁶ Further, it was removed one day after it was posted due to a complaint from a
 10 resident.⁵⁷ Plaintiffs have not offered any evidence to show that this action was motivated by
 11 their filing of this lawsuit.

12 Another common allegation by Plaintiffs is that RISA interfered with the collection of
 13 their garbage.⁵⁸ The monthly dues paid by Ryderwood residents go towards services such as
 14 garbage collection, and the bylaws specifically allow the board to suspend services to members
 15 who are delinquent in paying their dues.⁵⁹ Plaintiffs have not shown that RISA actions related
 16 to garbage collection services were motivated by their filing of this lawsuit.

17 Several Plaintiffs also allege that RISA selectively enforced its bylaws by filing liens,
 18 sending bills for dues, or enforcing age restrictions against Plaintiffs but not against other
 19

21 ⁵² Pierce Dec. p. 21.

22 ⁵³ DeBraie Dec. ¶ 15.

23 ⁵⁴ *Id.*

24 ⁵⁵ *See, e.g.*, Pierce Dec. p. 8.

25 ⁵⁶ DeBraie Dec. ¶ 3.

⁵⁷ *Id.*

⁵⁸ *See, e.g.*, Pierce Dec. p. 12-13.

⁵⁹ Ross Dec. Exh. B, p. 6, ¶ 8.

1 residents.⁶⁰ RISA enforces these rules against all residents, not just Plaintiffs. RISA has filed
 2 liens against and attempted to collect unpaid dues from non-Plaintiffs during the pendency of
 3 this lawsuit in the same manner as it has with Plaintiffs.⁶¹

4 Plaintiffs have not shown that any of RISA's actions were motivated by anything other
 5 than its desire to enforce its bylaws and collect dues owed. Therefore all such claims should be
 6 dismissed.⁶²

7 *c. Plaintiffs Fail to Show a Causal Link to this*
 8 *Lawsuit for Any Alleged Retaliatory Acts*

9 Plaintiffs allege a variety of additional retaliatory acts by RISA, but fail to provide any
 10 evidence that such acts, if true, were motivated by Plaintiffs' filing of or participation in this
 11 lawsuit. For example, several Plaintiffs allege that letters RISA sent them informing them of
 12 complaints by other residents, such as a letter to Ralph Barfell and Sharon Banta, were
 13 retaliatory acts.⁶³ Plaintiffs have not shown that such letters were sent for any reason other than
 14 in response to resident complaints. In another allegation, Plaintiff Vern Powell claims that
 15 RISA board member Sally-Gene DeBraie told residents of Ryderwood not to hire him for his
 16 handyman services.⁶⁴ Ms. DeBraie states that she actually gave positive reviews of his work
 17 and did not tell anyone not to hire him.⁶⁵ Even if Ms. DeBraie had told residents not to hire
 18 Mr. Powell, she would not have been acting within the scope of her authority as a member of
 19 the board, and Plaintiffs have not offered any evidence to show that such a statement, if made,
 20 was motivated by Mr. Powell's participation in this lawsuit.

21 _____
 22 ⁶⁰ See, e.g., Pierce Dec. p. 8.

23 ⁶¹ DeBraie Dec. ¶ 2.

24 ⁶² Pierce Dec. ¶ 8, pp. 6-27 (listing allegations from Plaintiffs' discovery responses of
 25 retaliatory acts by RISA or RISA board members post litigation).

⁶³ Pierce Dec. p. 12; Ross Dec. Exh. E.

⁶⁴ Pierce Dec. p. 23.

⁶⁵ DeBraie Dec. ¶ 11.

1 In another allegation, Plaintiff Betty Gene Donoghue claims that Ms. DeBraie tried to
 2 “intimidate her” by preventing her partner from participating in a community event.⁶⁶ Ms.
 3 Donoghue’s partner, James Taylor, is not a Plaintiff in this case or a Ryderwood resident and
 4 Ms. DeBraie states that she only commented to Mr. Taylor that he should not participate in
 5 community events while intoxicated.⁶⁷ Her comment had nothing to do with Ms. Donoghue’s
 6 participation in this litigation, and Plaintiffs have not offered any evidence to show otherwise.

7 Plaintiffs have failed to meet their burden to show that any of the alleged retaliatory
 8 acts, if they occurred, were motivated by the Plaintiffs’ filing of or participation in this lawsuit,
 9 and therefore they have failed to make out a prima facie case of retaliation.⁶⁸

10 **C. RISA has Legitimate Non-Retaliatory Reasons for Its Actions**

11 If a plaintiff establishes a prima facie case, the defendant has the burden to produce a
 12 legitimate non-retaliatory reason for its action. *Walker*, 272 F.3d at 1128. As discussed above,
 13 Plaintiffs have not established a prima facie case of retaliation for any of their many claims.
 14 Many of the retaliatory acts alleged by Plaintiffs occurred prior to the filing of this lawsuit and
 15 many are attributed to Ryderwood residents and other third parties for whose actions RISA is
 16 not liable. For the remaining alleged retaliatory acts which Plaintiffs attribute to RISA or to a
 17 RISA board member, Plaintiffs have failed to put forward any evidence to show that RISA was
 18 motivated to take such action by Plaintiffs’ filing of this lawsuit.

19 In the event that Plaintiffs have made out a prima facie case as to any post-litigation
 20 allegations against RISA, the majority are claims that RISA’s enforcement of its bylaws

22 ⁶⁶ Pierce Dec. p.17.

23 ⁶⁷ DeBraie Dec. ¶ 14.

24 ⁶⁸ Pierce Dec. ¶ 10, pp. 28-37 (listing allegations from Plaintiffs’ discovery responses of
 25 retaliatory acts by Ryderwood residents or other third parties), ¶ 12, pp. 52-58 (listing
 allegations from Plaintiffs’ discovery responses of retaliatory acts by unnamed or unknown
 individuals).

1 constituted retaliatory acts. As discussed above, RISA’s bylaws have been upheld as covenants
2 by this Court and RISA must enforcement them in order to be compliant with HOPA. RISA
3 has the authority to enforce age restrictions, assess dues, file liens, and restrict services to those
4 residents who are not current on their dues.⁶⁹ After this litigation was filed RISA continued to
5 enforce its bylaws in the same manner that it always had, and Plaintiffs’ many similar pre- and
6 post-litigation claims prove that point.⁷⁰

7 **VI. CONCLUSION**

8 Although Plaintiffs allege an enormous number of retaliatory acts, they fail to make out
9 a prima facie case of retaliation as to any of them because they fail to show that Defendant
10 RISA is responsible for such alleged retaliatory acts, and in the event Defendant is responsible,
11 Plaintiffs fail to show that such acts were motivated by Plaintiffs’ participation in this lawsuit.
12 Therefore, all of Plaintiffs’ retaliation claims should be dismissed.

13 DATED this 18th day of April, 2013.

14 BETTS, PATTERSON & MINES, P.S.

15
16 By s/ Steve Goldstein
17 Steven Goldstein, WSBA #11042
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19 Attorneys for Defendant
20
21

22 _____
23 ⁶⁹ Ross Dec. Exh. B.
24 ⁷⁰ Pierce Dec. ¶ 8, pp. 6-27 (listing allegations from Plaintiffs’ discovery responses of
25 retaliatory acts by RISA or RISA board members post litigation), ¶ 11, pp. 37-52 (listing
allegations from Plaintiffs’ discovery responses of retaliatory acts which occurred prior to July
2009).

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of April, 2013, I electronically filed the foregoing document, Defendant Ryderwood Improvement and Service Association’s Motion for Summary Judgment Re: Retaliation Claims, with the Clerk of the U.S. District Court for the Western District of Washington using the CM/ECF system, which will send notification of such filing to The Honorable Benjamin H. Settle and all counsel of record and *pro se* Plaintiffs White:

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DEFENDANT’S MOTION FOR
SUMMARY JUDGMENT RE:
RETALIATION CLAIMS

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