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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 44245

April 5, 2010

Motion for Summary Judgment

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

JUDGES: Honorable Benjamin H. Settle

TITLE: Defendants' Motion For Partial Summary Judgment

TEXT: I. INTRODUCTION AND RELIEF REQUESTED

Plaintiffs are homeowners in Ryderwood, a retirement community established in 1953. They bring this claim under the Fair Housing Act ("FHA") but the harms they allege do not stem from any act of discrimination. Instead, they allege that Defendant Ryderwood Improvement and Service Association ("RISA") misled them by claiming it was compliant with the Housing for Older Persons Act ("HOPA"), an exemption to the FHA. They allege RISA was not compliant with HOPA in the past and, thus, cannot rely on the exemption today. Consequently, their "injury in fact" does not stem from any act of discrimination, it stems from their supposition that future families may successfully challenge Ryderwood's status as a retirement community and move to the town. These allegations do not support an FHA claim.

Defendant RISA moves for summary judgment on the following bases:

First, the Plaintiffs lack standing. Although they allege [*2] this as an FHA action, it is not. Their harms are theoretical. Even if assumed, they do not stem from any act of discrimination, they stem from the hypothetical belief

that RISA may not be able to defend against some future claim of discrimination brought by an unknown family. This is not injury in fact under the FHA, cannot be tied to any purpose of the FHA, and cannot be redressed by this Court.

Second, any claim made by the Plaintiffs is time barred under the FHA's two year statute of limitations. In their Complaint they allege they have lived in Ryderwood for at least five years and concede they were aware of these age restrictions when they moved to Ryderwood. Even if they could rely upon the "failure to comply with HOPA" as a cause of action under the FHA, the technical failures they cite were rectified by September, 2007, at least two and a half years before they filed their Complaint, at least six months after the statute of limitations ran. Plaintiffs' claims are barred.

Third, RISA is HOPA compliant. HOPA requires the intent to be and remain a retirement community. Ryderwood was founded in 1953 as a retirement community and actively promotes and protects that status. [*3] The age restrictions are in all deeds, in RISA's bylaws (which are recorded on each chain of title), and are heavily publicized. Ryderwood has signs and placards that inform prospective purchasers of its status as a "55+ community." And RISA actively updates its records to verify that it remains a 55+ community.

Plaintiffs have suffered no harm, Ryderwood complies with HOPA, and the time to file has passed. Summary judgment of Plaintiff's Fair Housing Act claim is appropriate.

II. FACTS

A. 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 DeBriae in Support of Opposition to Motion for Partial Summary Judgment and Motion for Summary Judgment (hereafter "DeBriae Dec."), Ex. A thereto (Ryderwood Plat Map).

[*4]

n2 DeBriae 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.*

[*5]

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 DeBriae Dec. Ex. C thereto (RISA Articles of Incorporation).

n6 DeBriae 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 DeBriae Dec., P 5.

B. RISA's [*6] 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 their right to enforce those restrictions against fellow homeowners. 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, [*7] such 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

n13 *Id.* P 8.

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

[*8]

n15 *Id.* P 9.

n16 *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* evidence they suffered discrimination or were harmed by any alleged act of discrimination. Nor do they offer any evidence that RISA discriminated against them.

The Weavers admit they knew of the age restrictions before they moved to Ryderwood in 2005. n17 Indeed, they admit they moved to Ryderwood *because* it was a retirement community. n18 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 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 [*9] addition, these requirements have been spelled out in the RISA By-Laws. n19

n17 Declaration of Richard D. Ross in Support of 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).

n18 *Id.*

n19 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." n20 Although Mr. Weaver alleges in the Complaint that he was forbidden from having his son live with him, he provides no evidence that he ever attempted to have his son live with him and provides no details about when this took place. n21 Further, it is not the basis for Plaintiffs' Complaint or this motion, the Plaintiffs do not [*10] bring this claim because of that alleged act, they allege harm because RISA misled them into believing this was a retirement community that restricted families from residing in the community.

n20 Ross Dec. P 4.

n21 Ross Dec. P 5;

In support of his motion for partial summary judgment in this matter, 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]." n22 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. n23

n22 See Declaration of Charles Weaver in Support of Motion for Partial Summary Judgment, PP 6, 13 & 14.
[*11]

n23 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. n24 Mr. Weaver advised the RISA board on legal matters outside of those suits, general matters of compliance, and was the point of contact between RISA and its outside counsel. n25 Mr. Weaver was also involved with RISA's decision to conduct the HOPA survey in 2005 and 2006. n26 Indeed, it was Mr. Weaver who originally suggested to RISA's board that it needed to conduct an official HOPA survey. n27 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. n28

n24 *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).

n25 DeBriac Dec. P 11.

n26 DeBriac Dec. P 14.

n27 *Id.*

n28 *Id.*

[*12]

Raymond and Deborah Balvage have been residents of Ryderwood since 2002. n29 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. n30 Ms. Balvage has also produced a document titled "my complaint," in which she describes her knowledge of the age restrictions:

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 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." n31

n29 Ross Dec. Ex. C thereto (Raymond Balvage "My Complaint" Letter).

n30 *Id.*

n31 Ross Dec. Ex. D thereto (Deborah Balvage "My Complaint" Letter).

As damages she claims that her [*13] 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 proof of harm, nor do they qualify as "familial status." n32

n32 Nor do they allege any FHA injuries in support of their motion for partial summary judgment. In support of that motion, the Plaintiffs relied upon 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' Prior Suit Against RISA.

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 [*14] 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. The Weavers did not Complain that they were personally injured by any act of discrimination. n35 Instead, they alleged harm because RISA misled them about its authority to lawfully discriminate against others:

The act of filing the RISA bylaws, which prohibit purchase and occupancies based on age and family status, on our property, without the right to do so, is a discriminatory act. Our injury is the result of RISA['s] [sic] claim that it has such a right when in fact it did not. Because RISA claimed this was a 55+ community and because they claimed they had a right to file their bylaws on property, which would maintain 55+ status, we invested our life savings in purchasing our home in the plat of Ryderwood No. 1. n36

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)).

n35 *See id.* Ex. E, pp. 2-3 of Complaint.

[*15]

n36 Ross Dec. Ex. A, Plaintiffs' Answer to Interrogatories, p. 5, no. 21.

On December 16, 2008, RISA moved for summary judgment. n37 As here, RISA argued that its policies met the HOPA exemption and that Weavers could show no harm because they voluntarily chose to move to a retirement community. n38 The Weavers opposed, arguing that HOPA was not shown because RISA did not vote to become a "HOPA community" and that the survey conducted - under his watch - was insufficient. n39

n37 Ross Dec. Ex. F (RISA Motion for Summary Judgment).

n38 *Id.*

n39 Ross Dec. Ex. G (Weaver Opposition to Summary Judgment)

In addition - for the first time - Mr. Weaver alleged that RISA discriminated against him by refusing to allow his son to live with him. n40 In response to this final factual allegation, RISA argued that this allegation was improper as it was never previously mentioned, was not pled in his Complaint, [*16] and that no facts were provided in support of this contention. n41

n40 *Id.*, p. 7.

n41 Ross Dec. Ex. H (RISA Rebuttal to Opposition to Motion for Summary Judgment), pp. 12-13; *see also id.* Ex. A, Plaintiffs' Answers to Interrogatories, p. 5, no. 21 (Weavers do not disclose this as an allegation or element of damage); *see also id.* Ex. E (no allegation made in Complaint regarding this allegation).

On March 11, 2009, the Court granted summary judgment, holding:

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 was intended by the 55 year restriction.

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 [*17] [of] 55 years of age or older. n42

n42 Ross Dec. Ex. I (Excerpts from Oral Order on Motion for Summary Judgment), pp. 148:10-151:11.

The Court did not immediately grant judgment on the HOPA claim, instead it provided the Weavers with an additional 90 days to investigate the results of the survey and note discrepancies. n43 The Weavers did not do so. Instead, they moved for reconsideration. In response, the Court issued an order that clarified its oral ruling of April 20, 2009, again providing the Weavers with an additional 90 days to show RISA violated the FHA:

The question of whether [Ryderwood] is in violation of the Fair Housing Act or is allowed by the Housing for Older Pe[rsons] Act depends upon compliance with that act. The plaintiffs may show that Ryderwood is not in compliance with HOPA by conducting their own survey. n44

n43 *Id.* Ex. I. p. 153:9-13.

n44 Ross Dec. Ex. J (Court's Ruling on Plaintiffs' Motion for Reconsideration of Summary Judgment Order), p. 2.

[*18]

Again, the Weavers did not do so. On July 20, 2009, the court entered judgment. n45 After another unsuccessful attempt to move for reconsideration of the Court's Order, the Weavers appealed. The Court of Appeals has not yet issued a decision.

n45 Ross Dec. Ex. K (Order on Motion for Entry of Final Judgment).

E. Plaintiffs Allege Harm Because RISA Cannot Discriminate.

On November 10, 2009 the Plaintiffs filed this suit. With respect to their Fair Housing Act claim, the Plaintiffs allege that RISA "misled" them into believing that Ryderwood was "HOPA compliant." Complaint, P 30. For example, 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 . . . [*19] . 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. Do the Plaintiffs have standing to assert Fair Housing Act violations when they present no evidence they were within the subject class and do not claim harm from any act of discrimination?
2. Are the Plaintiffs barred from arguing Fair Housing Act violations where they were aware of the facts that give rise to their claim at least two-and-a-half years prior to filing suit?
3. Does RISA's 2007 survey satisfy the requirements of HOPA?

IV. EVIDENCE RELIED UPON

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

V. LAW AND ANALYSIS

A. Burden of Proof Under the Fair Housing Act.

The Plaintiffs' claims are predicated solely on their allegation that RISA is not compliant with HOPA. But HOPA is not a cause [*20] 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)*. 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 [*21] 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*.

1. The Plaintiffs Show No Injury In Fact.

Plaintiffs present no proof of any Fair Housing Act injury. They contend they will suffer harm by virtue of their theoretical belief that RISA failed to comply with HOPA in the past, and thus may lose its right to remain a retirement community in the future. This is not proven. Nor is it the type of harm the FHA was enacted to redress.

The burden to prove injury falls on the Plaintiffs: "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 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, [*22] " 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 were "harmed" because of RISA's alleged deception is not a palpable injury in fact. What they claim as "harm" is the notion that allowing families to move to Ryderwood will actually 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.

It is also purely theoretical. It is theoretical from an evidentiary basis (they have produced nothing to support this alleged reduction in value), and it is theoretical from a basis of logic. 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. n46

n46 Nor can Plaintiffs base their claim on RISA's alleged refusal to allow Mr. Weaver to have his son live with him. Plaintiffs have produced no documentary evidence of this allegation and do not base their claim on this failure. *See, e.g.*, Plaintiffs' Motion for Partial Summary Judgment (do not allege that Mr. Weaver was denied the right to have his son live with them). Moreover, this is antithetical to their claim for relief. As noted, the basis for their suit is that they were "misled" into believing that they were moving to a retirement community, not that they suffered damage because of discrimination.

[*23]

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

The harms alleged by Plaintiffs are not causally connected to any prohibited act under the FHA. 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 benefits from interracial associations."). Here Plaintiffs cannot meet this burden. 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 statute defines an "aggrieved person" as any person who:

- (1) claims to have been injured by a discriminatory housing [*24] practice; or
- (2) believes that such person will be injured by a discriminatory housing practice that is about to occur."

42 U.S.C. § 3602(I).

The Plaintiffs do not meet either of these criteria. To satisfy the FHA, what they claim as harm must bear some causal nexus to a concrete and tangible act of discrimination. But their alleged harms flow from their hypothetical belief that RISA cannot discriminate, not from any present or imminent "discriminatory housing practice." What they claim as harm are damages flowing because they were "misled" to believe that RISA was exempt from the FHA. Whether that allegation might state a viable claim under some other theory is unknown but irrelevant.

Nor do they have standing in a third-party capacity. 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). [*25] Neither element is shown. First, what they claim as harm is because they were

misled into believing RISA was exempt from the FHA, thus it is not discrimination that leads to their harm but the inability to discriminate. 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). The Supreme Court held that white tenants had standing to challenge a landlord's race-based discrimination because they 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 [*26] apartment if they became pregnant could not assert standing because they could not identify any actual person that suffered familial status discrimination. As *Wasserman* 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:

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 [*27] 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 added).

The Plaintiffs do not meet this standard. Their harms do not flow from the fact that RISA discriminated, they flow from their allegation that RISA cannot do so. *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.").

There is no causal nexus between their alleged injuries and any purpose of the FHA.

3. Plaintiffs Harms Are Not Redressable.

Finally, Plaintiffs must show a "substantial likelihood" that the requested [*28] 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. Plaintiffs' "injury in fact" is the diminution in home value they allege will result if families move 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. The Plaintiffs' Claims Are Barred By The Applicable Statute Of Limitations

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 [*29] was filed on November 10, 2009. The Weavers moved to Ryderwood in 2005. The Balvages moved to Ryderwood in 2002. Both couples admit they were aware of the alleged discriminatory behavior when they moved to the town. And neither claims to have suffered from any act of discrimination. What they allege as harm, instead, is the allegation that RISA "misled" them into claiming it was HOPA compliant. Because such actions must have taken place, if at all, on or before the date that they purchased their homes, such discrete acts are barred by the two year statute.

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 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 [*30] 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, their claims regarding RISA's non-compliance with HOPA are simply wrong. RISA *is* HOPA compliant. To rely upon the defense, a retirement community must show three things:

- (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 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).

As of the September, 2007 survey, RISA met the 80% threshold, had policies and procedures in place to remain a 55+ community, and can verify compliance. n47

n47 By this argument RISA does not concede or admit that it was not compliant prior to this date, it cites the September, 2007 survey specifically because that was the most recent survey completed before Plaintiffs' alleged claims arose. RISA incorporates by reference its arguments made in Opposition to Plaintiffs' motion for summary judgment, filed with this Court on March 29, 2010.

[*31]

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. n48 The legislative history to the amendment reflects Congress's belief that both senior housing and family housing were worthy of protection, "[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).)

n48 Ross Dec., Ex. M (HUD Implementation Guidelines).

[*32]

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 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)). [*33]

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. *Ryderwood Meets The 80% Requirement*

The HOPA survey completed on September 27, 2007 found there were 273 available total housing units in Ryderwood. n49 25 of those units were vacant or unverifiable. n50 Although HOPA does not require a party to count units that are vacant, RISA included those units as "not occupied by persons aged 55 and older" since 100% of the 248 housing units that could be surveyed were occupied by at least one person aged 55 years or older. Even without counting the vacant and unverifiable units, the result reveals that over 92% of the available units were occupied by persons 55 years of age and older on that date.

n49 DeBriae Dec. Ex. I (September, 2007 survey).

n50 See *id.*; see also Ross Dec. Ex. M (HUD Regulations Interpreting HOPA) (Note that per HUD Regulation 100.305, vacant units are generally not counted, although temporarily vacant units are counted).

[*34]

3. *Policies and Procedures.*

The second element analyzes whether the community had the requisite intent to operate as housing for persons aged 55 and over. *See* 24 C.F.R. § 100.306. n51 HUD regulation 100.306 lists seven non-exclusive factors relevant to determine whether a community has that requisite intent. Those are: (1) The manner in which the housing facility of community is described to prospective residents; (2) Any advertising designed to attract prospective residents; (3) Lease provisions; n52 (4) Written rules, regulations, covenants, deeds or other restrictions; (5) The maintenance and consistent application of relevant procedures; (6) Actual practices of the housing facility or community; and (7) Public posting in common areas of statements describing the facility or community as housing for persons 55 years [or older]. n53 As HUD notes in the commentary section of its regulations, a community is not required to comply with all seven criteria. The focus of the inquiry is on whether the community intends to operate as a 55+ community.

Intent is judged based on the common understanding of the word and whether the community or facility has established through [*35] various means whether they intend to operate housing for persons who are 55 years of age or older. n54

Here that intent is clear.

n51 Plaintiffs argue that RISA fails to meet this factor because it did not elect to be a "HOPA community." This misstates the rule. HOPA is not an election, it is a defense. There is no procedure in HUD regulations for a community to become "HOPA complaint."

n52 This factor is not generally considered relevant where the provisions are maintained by groups such as a homeowners association because they are of limited use in such cases. *See Massaro v. Mainlands Civic Assn.*, 3 F.3d 1472, 1478 (11th Cir. 1993)

n53 Ross Dec. Ex. M (24 C.F.R. § 100.306)

n54 *Id.* Ex. M (commentary to HUD Regulations at 64 *Fed. Reg.* 16327).

Ryderwood was formed in 1953 as a community for seniors. Each home at issue was conveyed subject to deeds that reserved occupancy to "bona fide retirees and pensioners." The RISA bylaws were amended [*36] 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.

RISA stringently enforces these policies. Since at least 1996, all new residents are required to attest to their age when signing the certificate of membership with RISA. n55 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 spouses). 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.

n55 Note that this step is not necessary to bind the properties since all owners are subject to the terms of the deed (which limits residency to bona fide recipients of annuities and pensions) and the terms of the bylaws (which are recorded as a condition to ownership).

[*37]

Finally, the most direct items of evidence come from the named Plaintiffs themselves. 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 told, RISA engages in a wide variety of methods, acts and practices to show its intent to remain a 55+ community.

4. RISA Properly Verified Its Status

The third and final factor requires the community to adopt steps and procedures to ensure that it complies with the intent and age requirements on an ongoing basis. *Massaro, 3 F.3d at 1478*. HUD regulations state that proof of age be verified by one of the following documents: (1) Drivers license; (2) Birth Certificate; (3) Passport; (4) Immigration Card; (5) Military Identification; (6) Any other government issued identification card; or (7) a Certification in a lease, application, [*38] affidavit or other document. n56 HOPA also allows signed statements that at least one occupant is over 55 years of age. It further demands that the community "survey its files" at least every two years to ensure that the community remains in compliance and has the appropriate documentation. Both elements of this final factor are met.

n56 Ross Dec. Ex.M (24 C.F.R. § 100.307(d))

RISA's age verification process was sufficient to meet HUD regulations. To complete that survey, RISA conducted a comprehensive survey of all residents and homes in the summer of 2007. n57 This included door belling to determine that its files accurately reflected the identity of residents and a request for each resident to show they met the 55+ condition by providing a drivers license, birth certificate, passport, and/or a state identification card. n58 In addition to the affidavit showing compliance, RISA prepared and produced a checklist for each home in Ryderwood that cross-referenced the residences with identification provided. [*39] n59

n57 DeBriar Dec. Ex. I, pp. 2 *et. al.*

n58 *Id.*

n59 *Id.*

These were the verification procedures used in 2007 but, prior to that time, RISA engaged in less formalized processes that were equally effective. 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." Since 1975 every home in Ryderwood has been subject to the bylaws and deed conditions [*40] that require all owners to abide by the 55 and over provision. This is a type of "self-certification" that HUD regulations specifically endorse as sufficient. n60 Furthermore, in 1996, RISA's membership form was modified to require each new resident to attest to his or her age. n61 This form of self-attestation of age is specifically authorized as sufficient to comply with HOPA's age requirements as well. n62

n60 Ross Dec. Ex. M (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"]).

n61 DeBriac Dec., Ex. H (Weaver membership certificates).

n62 Ross Dec. Ex. M (commentary to HUD Regulations at *64 Fed. Reg. 16327* ["[a] self certification of his or her age by an individual will be adequate to meet this [age verification] standard."]).

RISA also took steps to ensure that [*41] all residents were 55+. This included regularly updating a rolodex of all families, updating its annual neighborhood phone book (including doorbelling homes to verify residents were correctly listed), and by notice from Ryderwood homeowners, who actively monitor the community to ensure that it remains 55 and older. n63 This multi-faceted process of verification was complimentary to the covenants and bylaws, which 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. n64

n63 DeBriac Dec. P 9.

n64 Ross Dec. Ex.M (Appendix to Regulation 100.307(e), Example 2)

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

VI. CONCLUSION

Plaintiffs' claims are deeply flawed. They cannot show they have been harmed, their claims are time barred, and what they claim as violations of the FHA are nothing more than their incorrect interpretations of a statute that does not provide for a private right of action. Because their grievances have *nothing* to do with the Fair Housing Act, summary judgment should be granted.

DATED this 1st day of April, 2010.

BETTS, PATTERSON & MINES, P.S.

By /s/ Steven Goldstein
Steven Goldstein, WSBA #11042
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Attorneys for Defendant

Certificate of Service

I hereby certify that on this 1st day of April, 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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NOTICE OF MOTION RE-NOTED

Defendants' filed a Motion for Summary Judgment in this matter on April 1, 2010 Dkt. No. 22. The initial motion was noted for April 23, 2010 and was entitled "Defendants' Motion for Summary Judgment." Defendants' wish to **re-note** their motion to **April 30, 2010** and **re-name** their motion "Defendants' Motion for Partial Summary Judgment." Defendants' attach hereto the "corrected" Motion for Partial Summary Judgment. with the only changes being the noting date and the title of the document.

DATED this 5th day of April, 2010.

BETTS, PATTERSON & MINES, P.S.

By */s/ Steven Goldstein*

Steven Goldstein, WSBA #11042

Richard D. Ross, WSBA #34502

Attorneys for Defendant

Certificate of Service

I hereby certify that on this 5th day of April, 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/ Gayle Neligan

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