



[View U.S. District Court Opinion](#)

[View Original Source Image of This Document](#)

RAYMOND T. BALVAGE and DEBORAH A. BALVAGE, husband and wife;  
CHARLES E. WEAVER and SUSAN M. WEAVER, husband and wife; JOYCE MARIE  
ADAMS; LUVERN HARLAND ALLEN; EDGAR AMES; JAMES ALVIN BAKER  
and DARLA JEAN BAKER, husband and wife; RALPH ALVIN BARFELL, JR.;  
SHARON MARIE BANTA; RAY BODINE and JANIE KAY BODINE, husband and  
wife; RICHARD ANTHONY BRAGA, JR. and MARGARET LOUISE BRAGA,  
husband and wife; CHARLES THOMAS CALDWELL and SANDI KAY CALDWELL,  
husband and wife; LAREN WILLBUR COLEMAN and PAMELA DENISE COLEMAN,  
husband and wife; ALVIN DEE COLPITTS and CORABELLE COLPITTS, husband and  
wife; BETTY GENE DONOGHUE; ELIZABETH ELAINE DUPREE; JOYCE ELAIN  
FISCHER; JEANNETTE H. HEADEN; GLENN RICHARD HUESTIS and CAROL  
NADINE HUESTIS, husband and wife; BARBARA JEAN JOY; MIRIAM MARGARET  
KENNEDY-ALLEN; GERALD BLAIR KOLB and ETHEL MAY KOLB, husband and  
wife; ALFRED WESLEY LEACH and GLORIA EILEEN LEACH, husband and wife;  
RAYMOND ERNEST MORRIS and CAROLYN L. MORRIS, husband and wife;  
ARNOLD NADEAU; KAREN CAMPBELL; BOB PISTONE and DORIS PISTONE,  
husband and wife; VERN POWELL and SHARON POWELL, husband and wife;  
EARLEEN M. RUTHERFORD; CHARLES JOHN SANTINEAU; BARBARA LOUISE  
PEPPER; LUCAS JOHN SHIMMIN; DON SMITH and DIANE SMITH, husband and  
wife; DONALD NEIL STROUD and SHARON LEE STROUD, husband and wife;  
WALTER GORDON WEST and JANET MARIE WEST, husband and wife; BEVERLY  
WHITE; BOB WHITE and DIANE WHITE, husband and wife, Plaintiffs, vs.  
RYDERWOOD IMPROVEMENT AND SERVICE ASSOCIATION, INC., a  
Washington non-profit corporation, Defendant.

CASE NO. C09-5409BHS

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

*2009 U.S. Dist. Ct. Motions 607230; 2010 U.S. Dist. Ct. Motions LEXIS 29393*

July 6, 2010

Motion for Injunction

**VIEW OTHER AVAILABLE CONTENT RELATED TO THIS DOCUMENT: U.S. District Court: Motion(s); Pleading(s)**

**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: Defendant's Opposition to Plaintiff's Motion For Preliminary Injunction**

**TEXT: I. INTRODUCTION AND RELIEF REQUESTED**

Plaintiffs ask this Court to issue an injunction that will bring Ryderwood's 57 year history to a close. The relief is not appropriate. A preliminary injunction is warranted only when it is manifest that the "normal legal avenues are inadequate, that there is a compelling need to give the plaintiff the relief sought, and the injunction will not wreak greater harm on the party enjoined." Plaintiffs cannot meet this standard. Their harms are not irreparable, the relief requested will not remedy the conundrums they claim as harm, and the balance of equities favors leaving this community at status quo until the merits of Plaintiffs' claims are finally determined.

If the Court decides that injunctive relief is appropriate, defendant requests: (1) that a bond be issued; (2) that more time be granted to comply with the requests; and (3) that the Order be stayed pending certification to the Court [\*2] of Appeals or until entry of final judgment. Such a stay is necessary in order to preserve the status quo until the question of compliance with HOPA can be appealed.

## II. FACTS

### A. The Age Restrictions Are Conditions Of Title, Not RISA Policies.

Plaintiffs' claim harm because RISA allegedly failed to comply with HOPA, not because of the 55 and older restrictions. No Plaintiff claims they were unaware of the 55 and older policy when they moved to Ryderwood. n1 Many admit they had actual notice. n2 All had constructive notice. The restriction is present on every owner's deed. n3 The restriction is reiterated in the bylaws and recorded on all properties. n4 The restrictions have been there since 1953, when Senior Estates recorded Ryderwood Plat No. 1 as a community for retirees and bona fide recipients of a pension.

n1 Declaration of Sally-Gene DeBriae in Support of RISA's Opposition to Motion for Preliminary Injunction ("DeBriae Dec.") P 4; *see also* Declaration of Richard D. Ross in Support of Opposition to Motion for Preliminary Injunction ("Ross Dec.") P 2 & Exh. A thereto (sample Senior Estates deed for predecessor owner of Balvage Plaintiffs' residence).

[\*3]

n2 Ross Dec. P 3 & Exh. B thereto (Plaintiff Resignation Letters).

n3 Dkt. 24 (DeBriae Dec. ISO RISA's Motion for Partial Summary Judgment) P 3, Exh. B thereto (Senior Estates Deed).

n4 *Dkt. 24 P 5*, Exh. D thereto (Original RISA Bylaws, enacted 1975)

RISA enforces the age restrictions for the benefit of Ryderwood's residents. n5 RISA does not make money by enforcing the age restrictions, it owns no homes in Ryderwood and is not a profit seeking entity. n6 Its officers and volunteers are all unpaid residents who offer their time as a service to their fellow homeowners. n7 RISA does not profit by enforcing the bylaws. n8 Its right to collect and assess dues relates solely to the ministerial community upkeep

aspects of its mission. RISA's primary role is to keep the streetlights on; to arrange for garbage to be collected; to maintain public buildings for resident's use, such as a pool room, a community hall, and a local park. n9

n5 DeBriac Dec. P 4.

n6 *Id.*

n7 *Id.* P 3.

[\*4]

n8 *Id.*

n9 *Id.* P 3.

The Court held that RISA failed to complete an official HOPA survey from 2000 until 2005. But RISA did survey and verify the ages of its residents during that time period, even if not per the standards of HOPA. It monitored home sales, verified that new residents were 55 or older, and informed prospective purchasers - when asked - that Ryderwood was a 55 and older community. n10 Once a year RISA volunteers walk door-to-door to update the community phone book. n11 While doing so, the volunteer notes if a resident is new. If so, the resident is informed that the bylaws required them to join RISA. When they joined, the membership certificate required them to attest that they would comply with all bylaws, including the age restriction. n12 After 1997, the membership certificate was amended to include a requirement that all residents attest to their date of birth. n13

n10 Dkt. 24 (DeBriac Dec. ISO RISA Opp. to Plaintiffs MSJ) PP 18-22, Exs. J & K.

n11 *Id.*

n12 *Id.* P 19.

[\*5]

n13 *Id.*

#### **B. The Plaintiffs Benefitted From RISA's Efforts.**

Until 2007, each of these Plaintiffs accepted the benefits of RISA's efforts. As stated above, the restrictions were present on all of the Plaintiffs' titles. None of the Plaintiffs objected to the age restrictions. n14

n14 DeBriac Dec. P4.

Many of the Plaintiffs admit they moved to Ryderwood *because* it was a 55 and older community. The Caldwells state that a 55 and older community was "just what we were looking for!" n15 They complain that RISA was not diligent enough in enforcing the age restrictions, saying "we have neighbors (the homeowners) that are under 55!" Mr. Kolb's resignation letter says he resigned because RISA was not sufficiently enforcing its age restrictions, noting that children were living in the community. n16 He states that he does not want to be bothered by children. n17 Deborah

Balvage complains "we thought that this was [\*6] a 55+ community with requirements and restrictions." n18

n15 Ross Dec. Exh. B (PLA562).

n16 *Id.*, (PLA 1213-14)

n17 *Id.*

n18 *Id.* (PLA357)

The Plaintiffs do not allege that the 55 and older criteria injures them. They allege that RISA's failure to comply with HOPA causes them harm. They cite HOPA only because they fear RISA's failure to keep HOPA may expose them to lawsuits. And most cite other reasons for resigning. The Powells, for example, resigned because "RISA kept raising the dues" and because they were required to pay dues on two houses they owned. n19 The Wests do not complain of the age restrictions, they complain that RISA improperly spent monies. n20 And Ms. Beverly White resigned because of exposure to lawsuits, because the store is no longer open and bus service is irregular. n21

n19 *Id.* (PLA1565-66)

n20 *Id.* (PLA2029)

n21 *Id.* (PLA2062)

[\*7]

### **C. Plaintiffs Actively Promoted RISA's Age Compliance Requirements.**

Many Plaintiffs helped enforce the age restrictions. Charles Weaver was formerly the Treasurer and legal liaison for RISA. n22 Joyce Adams served as an officer, from June, 2005 until April, 2007. n23 And Joyce Fisher served as an officer in 2007. n24 In addition to enforcing the bylaws and other age restrictions, all were actively involved in RISA's efforts to comply with HOPA. These three were the primary officers who led RISA's effort to comply with HOPA in 2006. n25

n22 Dkt. 24 PP 10-14; *id.* Exhs. E & F.

n23 *Dkt. 28 P 9*, Exh. H thereto.

n24 *Id.*

n25 DeBriar Dec. P 5.

Mr. Weaver's role went beyond mere compliance with HOPA. As legal liaison, Mr. Weaver advised RISA about how to comply with HOPA. In an email dated July 29, 2007, he informed the Board that RISA only needed to retain HOPA surveys for five years. n26 He asked that an Officer resign because he failed to understand HOPA requirements. n27 [\*8] And he enforced compliance, such as by erecting the signs that Plaintiffs now claim is causing their irreparable harm. n28 During an Executive Session, he reminded the Board that:

That's why all the yellow signs are here, they weren't here pre-Chuck, they were here post-Chuck. n29

n26 Ross Dec. Exh. C (Email to RISA Board Member Claudia Drake).

n27 *Id.* Exh. D (Email to Board requesting Mr. Mulkey's resignation).

n28 DeBriac Dec. P 6.

n29 *Dkt. 24 P 13*, Exh. F, p. 2.

As a result of their efforts and advice, RISA believed it was fully compliant with HOPA. Their basis for this belief came from counsel, their own understanding, and Mr. Weaver. n30 During a July, 2007 Board meeting he provided the officers with case law discussing the requirements of HOPA, stating "if members argued with you that you are not following the law, you can cite this that you are following the law." n31 In an email dated June 5, 2007, Mr. Weaver told a fellow Ryderwood homeowner that:

Today [\*9] we are a 55+ community . . . HOPA is an exception to [the] Fair Housing Act. Simply put HOPA allows certain communities to discriminate on age and family status providing [it] meets certain criteria *which we certainly do*. n32

n30 The Board's reliance was not unfounded. Mr. Weaver served as legal liaison and the sole conduit for information flowing from RISA's attorney, Frank Randolph. Ross Dec. P 6. Plaintiffs have also provided documents showing that Mr. Weaver "used to teach HOPA to retirement communities." *Id.* Exh. E. As an expert on the subject, it is questioned why he advised RISA to conduct the 2006 and 2007 HOPA surveys if for naught.

n31 *Dkt. 24*, Exh. F, p. 2.

n32 Ross Dec. Exh.F (Email to Joe Poor dated June 5, 2007), p. 2 (emphasis added).

This is not a case where Mr. Weaver later learned he was wrong and informed the Board of his nascent understanding. As discussed in more detail at Section VI(C), *infra*, while he was advising the Board it was compliant with the law, he [\*10] was simultaneously gathering evidence to file suit against RISA; acquiring a body of documents he called his "Get Out Of Jail Free Card." n33 And his reason behind gathering that information was not to benefit families, it was solely to ensure that he would not "suffer a financial loss." n34

n33 *Id.* Exh. G.

n34 *Id.*

#### **D. Plaintiffs' Motion for Injunctive Relief.**

Plaintiffs ask the Court to enjoin RISA from enforcing HOPA. n35 They ask that all deed restrictions be removed, that RISA inform all real estate agents that it is no longer 55 and older, and that the signs Mr. Weaver demanded by erected be removed. In support, they offer a single declaration - that of Charles Weaver - who contends that these vestiges of Ryderwood's 57 year history are causing the Plaintiffs "irreparable harm." n36 Mr. Weaver says that an injunction is necessary so that Plaintiffs' homes can be put up for sale immediately as the prime buying season is the summer. He also states that all Plaintiffs want to move from Ryderwood. [\*11]

n35 Dkt. 48.

n36 Dkt. 49.

### III. EVIDENCE RELIED UPON

RISA's opposition to this Motion for summary judgment is based on the pleadings and motions of record; the Declaration of Richard D. Ross in Support, and all exhibits; and the Declaration of Sally-Gene DeBriac in Support, and all exhibits.

### IV. QUESTIONS PRESENTED

1. A preliminary injunction that modifies the status quo is inappropriate where it would render RISA's right to appeal moot.
2. A preliminary injunction should be denied where there is no evidence of irreparable harm and the relief requested would not remedy Plaintiffs' conundrums.
3. Age restrictions cannot constitute irreparable harm when all Plaintiffs agreed to the restrictions and many Plaintiffs helped enforce the restrictions.
4. If granted, the terms of the preliminary injunction must be feasible.
5. A preliminary injunction cannot be granted unless the moving party provides security.

### V. STANDARD OF REVIEW FOR PRELIMINARY INJUNCTION [\*12]

"A preliminary injunction is an extraordinary remedy never awarded as of right." n37 Plaintiffs must satisfy a four part test: (1) that they have suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction. n38

n37 *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. , 129 S.Ct. 365, 376 -377 (2008) (citing *Munaf v. Geren*, 553 U.S. 674, 128 S.Ct. 2207, 2218-19 (2008)).

n38 See, e.g., *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311-313, 102 S.Ct. 1798, 72 L.Ed.2d 91 (1982); *Amoco Production Co. v. Gambell*, 480 U.S. 531, 542, 107 S.Ct. 1396, 94 L.Ed.2d 542 (1987).

Courts "must balance the competing claims of injury and must consider the effect on each party [\*13] of the granting or withholding of the requested relief." n39 "In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." n40 Where a party seeks a mandatory injunction, as opposed to a prohibitory injunction, the Plaintiff is held to even higher scrutiny. n41

n39 *Id.* (citing *Amoco Production Co. v. Gambell*, 480 U.S. 531, 542, 107 S.Ct. 1396, 94 L.Ed.2d 542 (1987))

n40 *Id.*

n41 *Dahl v. HEM Pharmaceuticals Corp.*, 7 F.3d 1399, 1403 (9th Cir.1993).

## VI. ARGUMENT

### A. The Requested Relief Should Be Stayed Pending Final Judgment Or Appeal.

On June 4, 2010, the Court held that RISA may not rely on the HOPA defense. If the injunction is granted, and the Court declines to certify the question of RISA's compliance with HOPA for immediate appellate review, RISA's right to appeal at the close of trial may be rendered moot. Plaintiffs would be able to sell [\*14] their homes to anyone - not just families, but any purchaser - disrupting the homogenous character of this community before the Court of Appeals decides whether RISA complied with HOPA. To the extent that the Court believes the injunction is appropriate, RISA notes this is another reason why the Court should certify the question of RISA's right to rely on HOPA for immediate appellate review.

### B. The Public Consequences Of Injunctive Relief Outweigh Plaintiffs' Private Injuries.

#### 1. Plaintiffs Cannot Show Irreparable Harm.

Plaintiffs have not shown irreparable harm. Their claim rests solely on the notion that the age restrictions remain "conundrums" that hamper Plaintiffs' ability to sell their houses immediately. RISA contests that this is harm. Plaintiffs can sell the same title they obtained when they purchased their homes. But, if harm, it is not irreparable. An injury is irreparable when it involves the loss of a "unique opportunity," n42 will result in irreversible losses (such as the bankruptcy of a company), or causes emotional injuries, such as depression. n43 The age restrictions are only *irreparable* harm if the delay in obtaining relief will cause some injury [\*15] above and beyond their claims. As noted by *Wright & Miller*, the focus is not on the harm, but on the immediacy of the harm. The moving party must show it is "likely to suffer irreparable harm *before a decision on the merits can be rendered.*" n44

n42 *Quantum Communications Corp. v. Star Broadcasting, Inc.*, 382 F.Supp.2d 1362, 1366 (S.D.Fla., 2005).

n43 *See Chalk v. U.S. Dist. Court Cent. Dist. of California*, 840 F.2d 701, 709 (9th Cir. 1988).

n44 11A C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 2948.1, p. 139 (2d ed.1995).

Plaintiffs do not meet this standard.

The sole basis for Plaintiffs' claim is the Declaration of Mr. Weaver, who says more homes sell in the summer and that all 35 Plaintiffs want to list their homes for sale now. n45 Even if true (Mr. Weaver is not a real estate agent), and Mr. Weaver could testify as to the intent of all plaintiffs, which he cannot, this is not "irreparable harm." At best it shows Plaintiffs want relief [\*16] today. Every plaintiff in every case would like immediate relief. That alone does not make it irreparable harm. n46 Nor is it substantiated. Mr. Weaver is not competent to attest that all Plaintiffs want to list their homes immediately. And the Plaintiff declarations he cites to - submitted in support of Plaintiff's Opposition to RISA's Motion for Partial Summary Judgment - say only that each "would like to sell my home and list it on the market as available for sale to anyone." n47 In other words, they want to be able to list their houses for sale without restrictions; none say they want to list their homes now or move immediately. n48

n45 Dkt. 49 (Motion for Preliminary Injunction), p. 5.

n46 *See Arcamuzi v. Cont'l Air Lines, Inc.*, 819 F.2d 935, 938 (9th Cir.1987) ("temporary economic loss alone generally is not a basis for injunctive relief").

n47 *See* Dkt. 32.

n48 Furthermore, counsel for RISA requested that Plaintiffs supplement their discovery responses to provide evidence showing each wants to list their homes for sale immediately. The only Plaintiff documents provided were from Plaintiffs Robert and Doris Pistone, which state they listed their home for sale in 2009 and received no offers. Ross Dec. Exh. .

[\*17]

Furthermore, the injunction would not remedy their injury. It is axiomatic that an injunction is not justified unless the relief will prevent the alleged irreparable harm, e.g., "that irreparable injury is likely in the *absence* of an injunction." n49 Their proposal will not accomplish this. The Plaintiffs don't claim to have a moral qualm with the age restrictions, their concern is about misrepresenting conditions - restricted or not - to prospective buyers. What Plaintiffs claim as harm is the conundrum posed by the uncertain legality of the current age restrictions, that is:

I am concerned about listing my home to sale to Older Persons *only* because I worry that doing so will expose me to liability for wrongful discrimination or liability for misrepresentations being made in the sale of my house.

n49 *Winter, 129 S.Ct. 365, 375 -376 (2008)* (citations omitted); *see also Blackman v. District of Columbia, 454 F.Supp.2d 1, 3 (D.D.C., 2006)* (discussing fact that injunctive relief was denied because the relief proposed was "ineffective and impractical").

[\*18]

*This injunction will not remedy this fear.* Per Washington State's disclosure laws, material facts must be disclosed to all purchasers. n50 Whether granted or not, the conundrum will remain until this suit is fully complete. If the injunction is denied, Plaintiffs must disclose this lawsuit. If the injunction is granted, Plaintiffs must *still* disclose this lawsuit. The injunction will not remedy their conundrums one iota. If anything, removing the restrictions and signage will only make the Plaintiffs' concerns more concrete. Today the age restrictions are obvious. If removed, the age restrictions will be concealed. This will put the onus on the Plaintiffs to disclose this litigation as well as to accurately disclose the potential pitfalls for buyers if the age restrictions are ultimately allowed to be reinstated. With no signs or covenants of record, such restrictions would become concealed facts "not reasonably ascertainable to the buyer." n51

n50 Failure to disclose a material fact, where there is a duty to disclose, is fraudulent. *Obde v. Schlemeyer, 56 Wn.2d 449, 353 P.2d 672 (1960).*

[\*19]

n51 *See Alexander Myers & Co. v. Hopke, 88 Wn.2d 449, 565 P.2d 80 (1977)* (holding that seller has a duty to disclose material facts that are concealed).

## 2. RISA Will Be Irreparably Harmed.

Injunctive relief should be granted "sparingly." The policy against imposing injunctive relief before the merits of the suit are adjudicated becomes more pronounced when the burden on the defendant exceeds the benefit to the moving party. When balancing equities, the court must weigh the disadvantages to the enjoined party versus the benefits



provided the moving party. n52 If "the burden of an interlocutory injunction (is) all out of balance with the benefit to be obtained by the plaintiff," the injunction must be denied. n53 This is especially so where the injunction will change the status quo - as here - since mandatory relief "should not be granted except in rare instances in which the facts and law are clearly in favor of the moving party." *Miami Beach Fed. Savs. & Loan Ass'n v. Callander*, 256 F.2d 410, 415 (5th Cir. 1958).

n52 *Hamilton Watch Co. v. Benrus Watch Co., Inc.*, 206 F.2d 738, 743 (2d Cir. 1953); *Coffee Dan's, Inc. v. Coffee Don's Charcoal Broiler*, 305 F.Supp. 1210, 1216 (N.D.Cal.1969).

[\*20]

n53 *Alpha Distributing Co., Inc. v. Jas. Barclay and Co., Ltd.*, 215 F.2d 510, 511 (9th Cir. 1954).

The benefit sought by Plaintiffs by virtue of this injunction would be negligible, if beneficial at all. By contrast, the impact on Ryderwood will be substantial. By removing all age restrictions permanently, including those on properties that do not belong to the Plaintiffs, the injunction will terminate the 57 year history of Ryderwood as a retirement community. Once lost, that status will be virtually impossible to regain. Plaintiffs will be free to sell their homes to anyone, potentially mooted any order by an appellate court. In other words, Plaintiffs will achieve, by injunction, what even the Court of Appeals may not be able to undo: they will bring Ryderwood to an end.

Plaintiffs may respond to this argument by claiming that discriminatory conduct should not be balanced against the conduct of a wrongdoer. But there is no suggestion that RISA was operating out of a bad faith desire to discriminate against families, it was merely upholding the private contractual obligations [\*21] that have existed for 57 years. All Plaintiffs willingly moved to Ryderwood because it was a 55 and older community and all accepted and endorsed RISA's efforts to maintain that status. They believed they were compliant, as did Mr. Weaver, Ms. Adams and Ms. Fisher (if not, why did they shepherd the 2006 and 2007 HOPA surveys?).

Finally, it is relevant that Plaintiffs ask the Court to grant affirmative relief that would modify the status quo. The basic function of a preliminary injunction is to *preserve* the status quo pending a determination of the action on the merits. n54 Plaintiffs' ask for the status quo - which has existed for 57 years - to change. As the 9th Circuit Court of Appeals held in *Stanley v. University of Southern California*, where "a mandatory preliminary injunction is requested, the district court should deny such relief unless the facts and law clearly favor the moving party." n55 Such orders are disfavored, particularly where they will permanently impact the enjoined party's rights, as here. n56

n54 *Chalk v. U.S. Dist. Court Cent. Dist. of California*, 840 F.2d 701, 704 (9th Cir. 1988) (citations omitted).

[\*22]

n55 *Stanley v. University of Southern California*, 13 F.3d 1313, 1320 (9th Cir.1994) (quoting *Martin v. International Olympic Committee*, 740 F.2d 670, 675 (9th Cir.1984).)

n56 *Id.* (holding "[a] mandatory injunction 'goes well beyond simply maintaining the status quo pendente lite [and] is particularly disfavored'")(citing *Anderson v. United States*, 612 F.2d 1112, 1114 (9th Cir.1979).

All told, the balance of equities favors RISA. As noted in the case of *Dorfmann v. Boozer*, "even where denial of a

preliminary injunction will harm the plaintiff, the injunction should not be issued where it would work a great and potentially irreparable harm to the party enjoined." n57 This injunction will work an irreparable harm. And it will only serve the private motives of persons for whose benefit RISA acted.

n57 *Dorfmann v. Boozer*, 414 F.2d 1168, 1173 (D.D.C. 1969).

[\*23]

### 3. Public Interest Favors Denial Of This Injunction.

The public's interest in this injunction is also relevant. Courts define public interest "by reference to the policies expressed in legislation." *People of State of Cal. ex rel. Van De Kamp v. Tahoe Regional Planning Agency*, 766 F.2d 1319, 1324 (9th Cir. 1985) (citing *Virginian Ry. Co. at 551-52*, 57 S.Ct. at 601- 602). Here, the legislative policies show two competing public interests: senior housing versus family housing. Both are worthy of protection. See Cong. Rec. H4360 at H4360 (Rep. Canady) ("[t]he legislation strikes a reasonable compromise - protecting the rights of families with children and the security and peace of mind of senior citizens."). But only one of the litigants seeks to promote one of these objectives: RISA.

RISA's goal is to protect Ryderwood as a retirement community. The Plaintiffs' goal, on the other hand, is to protect their property rights. Property rights are important but each owner willingly agreed to these provisions when they moved to town. Nor will opening this up to all comers benefit families. Plaintiff's injunction does not ask for the Court to limit the [\*24] holding to persons 55 and older and families, it asks for all age restrictions to be removed. In essence, Plaintiffs' goal is to remove a condition of title they believe hinders the market for their homes. There is no public policy goal here. As the Supreme Court held in the matter of *Yakus v. U.S.*: "[W]here an injunction is asked which will adversely affect a public interest for whose impairment, even temporarily, an injunction bond cannot compensate, the court may in the public interest withhold relief until a final determination of the rights of the parties, though the postponement may be burdensome to the plaintiff." n58

n58 *Yakus v. U. S.*, 321 U.S. 414, 440, 64 S.Ct. 660, 675 (1944).

This factor bolsters RISA's argument that a stay or immediate appeal is appropriate. Although the Court held that RISA cannot rely on HOPA, this case presents novel issues never considered by any Court before that directly impacts the public interest of protecting senior housing. This community should [\*25] be allowed to remain at status quo until the Court of Appeals has issued its decision in this matter.

### 4. The Court's Ruling Does Not Necessarily Require The Restrictions Be Removed Permanently.

The final element considered is likelihood of success on the merits. RISA concedes that the relief sought arguably flows from the Court's Order. But that does not necessarily mean Plaintiffs' proposal are appropriate. The Court held that RISA's past failures preclude reliance today, but not forever. As noted by the Court in *Massaro v. Mainlands*, past failures to comply with HOPA do not mean a community is "permanently enjoined from enforcing" HOPA. *Massaro v. Mainlands Section 1 & 2 Civic Ass'n, Inc.*, 3 F.3d 1472, 1482, fn. 35 (11th Cir. 1993). Whether - and how - RISA can rely on HOPA in the future is an open question that remains. The following questions remain:

1. Are all residents required to remove the age restrictive covenants and conditions from their title documents?
2. How long do the age restrictions need to be removed for?

3. Can RISA impose restrictions against persons not protected by the familial status provision, e.g. residents who [\*26] do not meet the definition of a "family" under the FHA?

4. Are the covenants that restrict age enforceable by fellow residents?

In light of these questions, and the pending request that this matter be certified for appeal, RISA does not believe Plaintiffs have shown they are more than likely to obtain the requested relief.

### **C. RISA's Actions Were Done For Plaintiffs' Benefit.**

As an equitable doctrine, the Court must also consider inherent justice. Plaintiffs focus on RISA's failure to comply without considering the entire picture. The facts show that all Plaintiffs moved to Ryderwood knowing it was an age restricted community; that RISA enforced the restrictions for the benefit of all residents (including the Plaintiffs); that the Plaintiffs benefitted from RISA's acts; and that at least three Plaintiffs actively assisted RISA by enforcing those acts as well.

"It is a settled and ancient maxim that, 'He who comes into equity must come with clean hands.'" n59 Describing the clean hands doctrine, the 5th Circuit Court of Appeals held:

This maxim is far more than a mere banality. It is a self-imposed ordinance that closes the doors of a court of equity to one [\*27] tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of defendant.

That doctrine is rooted in the historical concept of court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith. This presupposes a refusal on its part to be 'the abettor of iniquity.' n60

n59 *Washington Capitols Basketball Club, Inc. v. Barry*, 304 F.Supp. 1193, 1199 (D.C.Cal. 1969) (citing *Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co.*, 324 U.S. 806, 814, 65 S.Ct. 993, 997, 89 L.Ed. 1381 (1944)).

n60 *New York Football Giants*, 291 F.2d 471, 473-474 (C.A.5 1961) (citing *Loughran v. Loughran*, 292 U.S. 216, 229 (54 S.Ct. 684, 689, 78 L.Ed. 1219 (1934)) & *Bein v. Heath*, 6 How. 228, 247, 12 L.Ed. 416 (1848)) (other citations omitted).

To the extent that RISA's hands are "dirty," the Plaintiffs' are as well. [\*28]

*First*, all Plaintiffs agreed to the conditions and restrictions. The restrictions at issue were not imposed by RISA, they are conditions of title that have existed since 1953. Every Plaintiff was aware of the restrictions when they purchased in Ryderwood; every Plaintiff agreed to abide by the age restrictions; every Plaintiff endorsed those restrictions by joining RISA; most of the Plaintiffs moved to Ryderwood *because* of those age restrictions; and many of the Plaintiffs actively enforced those conditions for many years.

*Second*, RISA's actions - if inequitable - must be placed in context. RISA did not enforce age restrictions for the purpose of discriminating, it enforced the age restrictions to benefit the expectations of *each and every resident of Ryderwood*. Plaintiffs do not argue RISA should not have enforced the age restrictions, they argue it should have complied with HOPA. Not one complained about the age restrictions before bringing this suit.

Finally, *third*, each resident owed their fellow residents a duty to benefit one another, not themselves. This is

particularly so for the former officers of RISA: Charles Weaver, Joyce Adams and Joyce Fisher. All [\*29] served as Board members during the times at issue; all stated they would help RISA comply with the laws; and all were directly involved in orchestrating RISA's effort to comply with HOPA.

Plaintiff Charles Weaver's actions are particularly noteworthy. What Mr. Weaver cites as "harm" are the direct results of his actions (or inactions). Mr. Weaver told RISA how to conduct the survey. Mr. Weaver told RISA it was compliant with HOPA. *Mr. Weaver told the Board to erect the signs.* At minimum, it is equitable to require him to live with his recommendations and decisions until final judgment.

More pertinently, if there is confusion about the Plaintiffs' legal rights, the source is Mr. Weaver. Mr. Weaver served as legal liaison until he resigned from RISA on **September 22, 2007**. n61 But while he was representing the interests of RISA, the facts show he was plotting to exploit information learned in that position to file suit:

n61 *Dkt. 24 P 15*, Exh. F.

On **June 4th, 2007** he wrote a private [\*30] email stating that the Board lacked the "professional skills" necessary to "steer this ship through this legal morass." n62 But "[b]ecause I did my homework, I know where most of the dead bodies are buried in Ryderwood and as such Susan and I and our little investment are protected." n63 He also wrote:

It's [the] Board that [] needs to worry and do its homework, or it is the Board and more important the members who will lose. n64

n62 Ross Dec. Exh. H.

n63 *Id.*

n64 *Id.*

On **June 5th, 2007** he wrote "RISA really has it all hung out over a limb and as fast as they can the RISA board is cutting off the limb." n65 The same day he wrote that:

Today we are a 55+ community . . . HOPA is an exception to [the] Fair Housing Act. Simply put HOPA allows certain communities to discriminate on age and family status providing [it] meets certain criteria *which we certainly do.* n66

n65 Ross Dec., Exh. E.

[\*31]

n66 *Id.*

On **July 17, 2007** he advised the Board it was compliant with HOPA. n67

n67 Dkt. 24, Exh. F, p. 2.

On **July 29, 2007**, he informed the Board that RISA only needed to retain HOPA surveys for five years. n68

n68 Ross Dec., Exh. C.

On **August 28th, 2007**, he sent an email titled "CYA Documents" to a fellow resident. n69 In that email he states: "If things get worse here in Ryderwood, these documents should bring quick relief and quick sale of your house. The first is HUD informing RISA that they are required to be HOPA compliant [in 1993]. The second is a letter sent by RISA to their attorney wit[h] a list of questions followed by his reply on the bylaw." n70

n69 *Id.*, Exh. I.

[\*32]

n70 *Id.*

On **August 29th, 2007**, he sent the same items to three other residents - Jan Bigley, Glenn Robertson and Plaintiff Joyce Fisher - stating that "[s]hould you ever wish or need to leave Ryderwood, these documents in the hands of even a third year law student would ensure that if you left you would not suffer a financial loss." n71 The title of this email was "Get out of Jail Free Card."

n71 *Id.*, Exh. G.

On **August 29th, 2007**, he followed up that email with a personal email to Glenn Robertson. Mr. Robertson wrote that he wanted "those SOBs" - RISA and its Board - "to end their miserable, wretched lives in solitary confinement on a diet of bread and water, or better yet, skinned alive, rolled in salt and impaled on a burning stake." n72 Mr. Weaver responds that the documents "won't achieve solitary confinement or bread and water but *they will pay in ways no one could imagine.*" n73

n72 *Id.*

[\*33]

n73 *Id.*

Throughout that time, he continued to claim the mantle of legal liaison, representing that he had RISA's best interests at heart. Throughout August and September, he continued to communicate with RISA's attorney - Frank Randolph - providing input on legal questions and relaying advice to the Board. n74 Those emails are privileged and have not been submitted to the Court. That said, counsel has reviewed those emails and can attest that, if produced, the topics of discussion include a conversation on **September 5th, 2007** in which Mr. Weaver and Mr. Randolph discussed and debated the merits of proposed amendments to RISA's bylaws. On **September 6th, 2007**, Mr. Weaver advised Mr. Randolph that he believes RISA should move for recognition as a metropolitan corporation. Again on the same day he

wrote Randolph that Ryderwood could be incorporated as a "HOPA community."

n74 Ross Dec. P 6.

On **September 14, 2007**, [\*34] Mr. Weaver cut contact with Mr. Randolph. After a long string of emails discussing legal matters - including soliciting Mr. Randolph's opinion on RISA's need to comply with HOPA - he abruptly informed Mr. Randolph that further communications could be a "conflict of interest as Susan and I are weighing our options as we both want out of Ryderwood and both hold RISA responsible." n75

n75 *Id.*, Exh. J (Partially redacted to omit all statements made by counsel).

On **September 26th, 2007**, Mr. Weaver resigned from RISA and notified the Board that he intended to sue, alleging that the bylaws were *ultra vires* and that it failed to comply with HOPA. n76

n76 *Id.*, Exh. M (September 22, 2007 Resignation Email).

If Plaintiffs are in a conundrum, RISA is as well. As a volunteer community staffed solely by residents, RISA relies upon its [\*35] residents to act in its best interests, not to use positions of confidence as a means to build a case against it. The evidence shows that Mr. Weaver willfully misled RISA for his own gain. The evidence also shows that his motivation is money, not families. And it shows why his declaration - the sole source of support for Plaintiffs' claim that all 35 want to move immediately - should not be trusted.

"He who seeks equity must do equity." n77 The Plaintiffs have not. They willingly agreed to the age restrictions yet now disclaim them as "discrimination." And, for three, they failed to take the actions for which they now hold RISA blameworthy. Justice is not served by granting the relief requested.

n77 *HC Dalmoreproduct v. Kogan, 1998 WL 231108, 2 (9th Cir. 1998)*.

#### **D. The Relief Is Not Feasible.**

RISA also asks that the injunction be modified to provide it with sufficient time to carry out the actions demanded.

*First*, Plaintiffs' propose three days for RISA to mail letters to all real [\*36] estate agents, title companies, and escrow officers in a 50 mile vicinity. Plaintiffs also propose that notice be mailed by all residents within three days. RISA respectfully submits that it cannot complete either of these tasks within three days. RISA is a community of senior volunteers. It has no budget to hire employees to assist with this effort. At minimum, RISA asks for a reasonable time of 30 days to complete this task. n78

n78 *See DeBria Dec, PP 7-8.*

*Second*, Plaintiffs propose that RISA amend its bylaws within fourteen days. This is not feasible either. RISA does not have the authority to *sua sponte* amend its bylaws. RISA must provide notice to all residents and obtain a quorum before the bylaws can be amended. Even so, amendment is by vote and RISA cannot ensure that sufficient residents will

attend and approve this vote. RISA seeks guidance on this issue but believes fourteen days is not sufficient. n79

n79 *Id.*

[\*37]

#### **E. Security Is Mandatory**

Finally, if granted today, FRCP 65(c) mandates that the moving party secure any losses by bond. *See* Fed. R. Civ. Proc. 65(c). While the Court has discretion to determine the amount of the bond, the Rule provides that the bond should be sufficient to ensure that "the costs and damages sustained by any party found to have been wrongfully enjoined or restrained" are paid for. *Id.*

Here, the potential loss to the community and the 240 residents whose purchase expectations may be impinged are massive. If this relief is granted today, then the Order is subsequently reversed on appeal, the impact to Ryderwood will be incalculable. Theoretically, the homogenous character of the community as 55 and older will be lost, which may preclude reliance on HOPA even if the Court holds that RISA complied with the law. At minimum, RISA suggests that the starting point to evaluate the scope of that loss should be \$ 5,000 per home. Consequently, RISA asks this Court to require Plaintiffs to post a bond in the amount of \$ 1.2 million.

#### **VI. CONCLUSION**

As the Court in *Dorfmann v. Boozer* held: "[t]he great equitable power to enjoin a party pendente lite [\*38] should not be exercised unless it is manifest that the normal legal avenues are inadequate, that there is a compelling need to give the plaintiff the relief he seeks, and that the injunction will not wreak greater harm on the party enjoined." n80 Plaintiffs have not met this standard. The injunction should be denied.

n80 *Dorfmann*, 414 F.2d at 1173-1174.

DATED this 6th day of July, 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 the 6th day of July, 2010, I electronically filed the document(s) described as Defendant's Opposition to Plaintiff's Motion for Preliminary Injunction 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:

**Counsel for Plaintiff:** [\*39]  
Joseph E. Lynam, WSBA# 12728  
Lane Powell PC

1420 Fifth Avenue, Suite 4100  
Seattle, WA 98101-2338

By /s/ Shane Kangas  
Shane Kangas  
Legal Assistant  
Betts, Patterson & Mines, P.S.  
701 Pike Street, Suite 1400  
Seattle, WA 98101-3927  
Phone: (206) 292-9988  
Fax: (206) 343-7053  
Email: skangas@bpmlaw.com

**DECLARATION OF RICHARD D. ROSS IN SUPPORT OF OPPOSITION TO MOTION FOR  
PRELIMINARY INJUNCTION**

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

1. I am counsel for the Defendant in this matter, the Ryderwood Improvement and Service Association. I am familiar with the facts set forth herein and the documents appended to this Declaration.

2. I have reviewed all discovery produced by Plaintiffs in this matter and determined that each residence contained either the original Senior Estates deed restrictions or the deed restrictions are referenced as conditions of title in the purchase and sale documents. Attached hereto at Exhibit A are true and correct copies of deeds provided by the Balvages showing the original Senior Estates deed restrictions at PLA274, lines 8-9. [\*40]

3. Documents provided by the Plaintiffs indicate that many moved to Ryderwood because it was a 55 and older community. Attached hereto at Exhibit B are various complaint letters and resignation letters provided by Plaintiffs to RISA describing why each decided to resign. The documents are organized by Bates number and referenced by the same in the Opposition Brief.

4. Attached hereto at Exhibit C is a true and correct copy of an email sent by Plaintiff Charles Weaver to RISA Board member Claudia Drake on July 29, 2007.

5. Attached hereto at Exhibit D is a true and correct copy of an email sent by Plaintiff Charles Weaver to RISA Board member Sally-Gene DeBriac on or about April 5, 2006 discussing his demand that Board Member Lester Mulkey resign.

6. Email correspondence provided by Plaintiffs includes privileged materials sent by RISA counsel Frank Randolph to Charles Weaver as RISA's legal liaison. The correspondence has not been provided but RISA can provide these materials at the Court's request. Counsel has reviewed those emails and can attest that they show Mr. Randolph was providing RISA legal advice through Mr. Weaver up until September, 2007, when Mr. Weaver informed Mr. [\*41] Randolph that he was considering filing suit against RISA. *See* Exhibit J, *infra*. The topics of discussion include a conversation on **September 5th, 2010** in which Mr. Weaver and Mr. Randolph discussed and debated the merits of proposed amendments to RISA's bylaws. On **September 6th**, Mr. Weaver advised Mr. Randolph that he believes RISA should move for recognition as a metropolitan corporation. Again on the same day he wrote Randolph that Ryderwood could be incorporated as a "HOPA community."

7. Attached hereto at Exhibit E is a true and correct copy of an email sent by Plaintiff Charles Weaver to Ryderwood resident Bob White on December 31, 2007 describing Mr. Weaver's past history of teaching HOPA compliant to retirement communities.



8. Attached hereto at Exhibit F is a true and correct copy of an email sent by Plaintiff Charles Weaver to Ryderwood resident Joe Poor on June 5, 2007 wherein he states that Ryderwood meets all criteria for HOPA.

9. Attached hereto at Exhibit G is a true and correct copy of an email sent by Plaintiff Charles Weaver to Glenn and Marie Robertson, Janice Bigley, and Lloyd and Joyce Fisher dated August 29, 2007 entitled "Get Out Of Jail [\*42] Free Card." Page 2 shows the response sent by Mr. Robertson.

10. Attached hereto at Exhibit H is a true and correct copy of an email sent by Plaintiff Charles Weaver to Ryderwood resident Joe Poor dated June 4, 2007.

11. Attached hereto at Exhibit I is a true and correct copy of an email sent by Plaintiff Charles Weaver to Ryderwood residents Ed and Doris Ritzman dated August 28, 2007

12. Attached hereto at Exhibit J is a partially redacted copy of a true and correct email sent by Plaintiff Charles Weaver to RISA attorney Frank Randolph dated September 14, 2007.

13. On June 25th, 2010, I sent a letter to counsel for the Plaintiffs, requesting promised supplementation to discovery responses and additional information regarding the new Plaintiffs added on June 4, 2010. Specifically with respect to this factual aspect of RISA's Opposition, counsel provided two emails titled "prior sales efforts."

14. The first is an email from Charles Weaver dated February 24, 2008 to a local real estate agent, Maruta Heigel. In that email he accuses Ms. Heigel of "perpetuating the lie" that Ryderwood is a 55 and older community. He further informs her that her license and her broker's license are [\*43] "on the line." A true and correct copy of that email is attached hereto at Exhibit K.

15. The second are documents provided by Plaintiffs Robert and Doris Pistone, attesting that each listed their home for sale in 2009 but received no offers. A true and correct copy of those materials is attached at Exhibit L.

16. Attached hereto at Exhibit M is a true and correct copy of Charles Weaver's resignation email sent to the RISA Board on September 26, 2007.

17. Attached hereto at Exhibit N is a document provided by Plaintiffs on July 6, 2010, showing that HOPA Age Verification was an "action item" assigned to Plaintiff Joyce Fisher. The document also shows that Plaintiff Charles Weaver was a Board member at the time. Mr. Weaver has previously attested to this Court that he was never an officer of RISA. *See Dkt* 15, p. 2.

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

/s/ [Signature]  
Richard D. Ross

Executed this 6th day of July, 2010,  
at Seattle, Washington.

#### **CERTIFICATE OF SERVICE**

I hereby certify that on the 6th day of July, 2010, I electronically filed the document(s) described as Declaration of [\*44] Richard Ross in Support of Opposition to Motion for Preliminary Injunction 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:

**Counsel for Plaintiff:**

Joseph E. Lynam, WSBA# 12728  
Lane Powell PC  
1420 Fifth Avenue, Suite 4100  
Seattle, WA 98101-2338

By /s/ Shane Kangas  
Shane Kangas  
Legal Assistant  
Berts, Patterson & Mines, P.S.  
701 Pike Street, Suite 1400  
Seattle, WA 98101-3927  
Phone: (206) 292-9988  
Fax: (206) 343-7053  
Email: skangas@bpmlaw.com

[SEE EXHIBIT A IN ORIGINAL]

[SEE EXHIBIT B IN ORIGINAL]

[SEE EXHIBIT C IN ORIGINAL]

[SEE EXHIBIT D IN ORIGINAL]

[SEE EXHIBIT E IN ORIGINAL]

[SEE EXHIBIT F IN ORIGINAL]

[SEE EXHIBIT G IN ORIGINAL]

[SEE EXHIBIT H IN ORIGINAL]

[SEE EXHIBIT I IN ORIGINAL]

[SEE EXHIBIT J IN ORIGINAL]

[SEE EXHIBIT K IN ORIGINAL]

[SEE EXHIBIT L IN ORIGINAL]

[SEE EXHIBIT M IN ORIGINAL]

[SEE EXHIBIT N IN ORIGINAL]

[SEE DECLARATION OF SELLY-GENE DEBRIAE IN SUPPORT OF OPPOSITION TO MOTION FOR  
PRELIMINARY INJUNCTION IN ORIGINAL] [\*45]