

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

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,

v.

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

Defendant.

CASE NO. C09-5409BHS

ORDER DENYING  
DEFENDANT’S MOTION FOR  
PARTIAL SUMMARY  
JUDGMENT AND GRANTING  
IN PART AND DENYING  
IN PART PLAINTIFFS’  
MOTION FOR PARTIAL  
SUMMARY JUDGMENT

This matter comes before the Court on Defendant Ryderwood Improvement and Services Corporation’s (“RISA”) Motion for Partial Summary Judgment (Dkt. 25) and Plaintiffs’ Motion for Partial Summary Judgment Re: Defendant’s Violation of FHA and Non-Compliance with HOPA Exception (Dkt. 14). The Court has considered the pleadings filed in support of and in opposition to the motions and the remainder of the file and hereby denies RISA’s motion and grants in part and denies in part Plaintiffs’ motion for the reasons stated herein.

1 **I. PROCEDURAL HISTORY**

2 On July 8, 2009, Plaintiffs Raymond and Deborah Balvage and Charles and Susan  
3 Weaver filed a complaint against RISA. Dkt. 1. On November 10, 2009, Plaintiffs filed  
4 an Amended Complaint. Dkt. 11. Plaintiffs allege that RISA violated the Federal Fair  
5 Housing Act (“FHA”), 42 U.S.C. § 3604(c) *et seq.*, committed fraudulent concealment  
6 and/or non-disclosure, and violated the Washington Consumer Protection Act, RCW  
7 Chapter 19.86. Dkt. 1, ¶¶ 47–67.

8 On March 11, 2010, Plaintiffs filed a motion for partial summary judgment. Dkt.  
9 14. On March 29, 2010, RISA responded (Dkt. 17), and on April 1, 2010, Plaintiffs  
10 replied (Dkt. 20).

11 On April 1, 2010, RISA filed a motion for partial summary judgment (Dkt. 22),  
12 and then on April 5, 2010, filed a corrected version of their motion (Dkt. 25). On April  
13 26, 2010, Plaintiffs responded (Dkt. 29), and on April 30, 2010, RISA replied (Dkt. 37).

14 **II. FACTUAL AND STATUTORY HISTORY**

15 **A. Factual History**

16 Unless otherwise indicated, the following facts are undisputed:

17 Ryderwood is an area in Cowlitz County, Washington, that currently consists of  
18 approximately 270 single family homes. Dkt. 16, Exh. A at 10. In 1953, Senior Estates,  
19 Inc. platted this area as “Ryderwood No. 1.” Dkt. 24, Exh. A. The Ryderwood properties  
20 were devised by deeds and were subject to identical covenants and restrictions. *See id.*,  
21 Exhs. A and B. RISA submitted as evidence a deed that “accurately reflects the general  
22 language and conditions used by Senior Estates to devise properties in Ryderwood.” Dkt.  
23 24 at 2 ¶ 3 & Exh. B. The deed states that Senior Estates “has acquired and developed the  
24 real property known and platted as Ryderwood No. 1 . . . as a community to be occupied  
25 by and for the use and benefit of persons who are bona fide recipients of a pension or  
26 retirement annuity . . . .” Dkt. 24, Exh. B at 1. The deeds also provided Senior Estates  
27 with the right to enforce the provisions of the deed as well as transfer its right to enforce  
28

1 to RISA. *Id.* Finally, the deeds provided Senior Estates, and RISA as an assignee, the  
2 right to modify or terminate conditions in the deed by recording an instrument in the  
3 office of the County Recorder of Cowlitz County, Washington. *Id.*

4 In July of 1953, RISA was incorporated. Dkt. 24, Exh. C. In 1975, RISA  
5 amended its bylaws and recorded them at the office of the County Recorder of Cowlitz  
6 County. *Id.*, Exh. D. The revised bylaws stated that:

7 The qualifications for ownership or purchase of a home within  
8 [Ryderwood] are:  
9 Must be a bona-fide recipient of an annuity or a pension.  
10 Must not be less than fifty-five years of age  
11 Must have no additional, permanent occupants of the home, (other  
12 than the spouse) who do not meet the above requirements.

13 *Id.*, Exh. D. at 1.

14 In a letter dated December 30, 1992, the United States Department of Housing and  
15 Urban Development (“HUD”) responded to a request from Theda L. Williamson, a RISA  
16 board member, for information concerning RISA’s qualifications for an exemption from  
17 the FHA. Dkt. 15, Exh. A. The letter states that if RISA “fails to meet the requirements  
18 of the [FHA], any bylaws or deed restrictions which discriminate against persons based  
19 on familial status (i.e., presence of children) are unlawful.” *Id.* Further, the letter advises  
20 RISA to consult with an attorney or other person with experience in the area of fair  
21 housing to make sure that Ryderwood meets the requirements of the FHA. *Id.*

22 In a letter dated July 21, 1993, HUD responded to an additional request from Ms.  
23 Williamson regarding the applicability of HUD regulations and the Housing for Older  
24 Persons Act (“HOPA”) exception. Dkt. 15, Exh. B. The letter states that the FHA  
25 applies to private housing, regardless of how long such housing has been in existence, and  
26 that homeowners associations, and other similar organizations, must adhere to the FHA.  
27 *Id.* Further, in responding to Ms. Williamson’s third question of how RISA is affected by  
28 someone inheriting property in Ryderwood who is not fifty-five years old, HUD laid out  
the requirements of the HOPA exception and included with the letter a copy of the  
regulations that address the issue of housing for older persons. *Id.*

1 In a letter dated November 19, 1996, Ms. Williamson wrote to Mr. Swenson, a  
2 RISA board of directors candidate. The letter contains HUD regulations relating to  
3 housing for older persons including the duties of managers, “in this case our board.” Dkt.  
4 15, Exh. C. In the letter, Ms. Williamson adds phrases to the regulations, such as “Our  
5 By-laws” and “our board” to show how she interpreted the regulations to apply to RISA.  
6 See Dkt. 15, Exh. C. At the end of the letter, Ms. Williamson writes:

7 Keep in mind that if these regulations are not adhered to, anyone  
8 with a grudge against the community, or persons wishing to sell to anyone,  
9 can cont[a]ct H.U.D. stating that we do not fulfill the required conditions,  
10 and can very likely destroy our retirement community.

11 These conditions have not been adhered to by the present board  
12 because they assume it isn't in their domain. IF NOT THEM, WHO?

13 *Id.*

14 In September of 2005, RISA began conducting a survey to verify the ages of the  
15 residents in Ryderwood. Dkt. 16, Exh. A. The survey was completed in April of 2006.

16 *Id.* In a letter dated April 19, 2006, Les Mulkey, a RISA board member, resigned, stating:

17 I will always say that I do not agree with having HOPA involved  
18 with our corporation. Back in 1993 when our secretary inquired to our  
19 Government the board decision was made at that time we were not to be  
20 involved with HOPA. I will continue my beliefs but have reluctantly  
21 accepted our RISA board decision to follow HOPA.

22 Dkt. 15, Exh. E. In 2007, RISA conducted a second age verification survey. Dkt. 24,  
23 Exh. I. According to RISA, the survey established that Ryderwood had 273 available  
24 housing units, twenty-five of which were vacant, and 243 of which were occupied by one  
25 person who was at least fifty-five years of age. *Id.* at 1. Plaintiffs dispute the accuracy of  
26 the survey results. Dkt. 29 at 5-6.

27 Currently, RISA continues to take affirmative steps to inform residents,  
28 prospective purchasers, and the public at large, that Ryderwood is a community for  
residents fifty-five years of age and older. Dkt. 24 at 2 ¶ 7. RISA does this by “posting  
signs throughout the community stating that residency is restricted to those who are ‘55  
and older,’ disclosures to real estate agents that work in the area, disclosures to title  
agencies that contact RISA, and disclosure to prospective purchasers and visitors to

1 Ryderwood.” *Id.* RISA has enforced the restriction against residents under fifty-five  
2 years of age for the entire fifty-seven years of Ryderwood’s existence. Dkt. 24 at 2-3.

3 **B. History of Relevant Statutes and Regulations**

4 The FHA prohibits, among other things, discrimination based on familial status.  
5 42 U.S.C. § 3601 et seq. In 1988, Congress created an exception to the FHA’s  
6 prohibition that allows communities who meet certain requirements to qualify as housing  
7 for older persons and thus discriminate based on familial status. 42 U.S.C. § 3607(b)(1).  
8 This exception is commonly referred to as the HOPA. § 3607(b)(2)(C). The HOPA  
9 states that housing for older persons means, in relevant part, housing that is

10 intended and operated for occupancy by persons 55 years of age or older,  
11 and--

12 (i) at least 80 percent of the occupied units are occupied by at least  
13 one person who is 55 years of age or older;

14 (ii) the housing facility or community publishes and adheres to  
15 policies and procedures that demonstrate the intent required under this  
16 subparagraph; and

17 (iii) the housing facility or community complies with rules issued by  
18 the Secretary for verification of occupancy, which shall--

19 (I) provide for verification by reliable surveys and affidavits; and

20 (II) include examples of the types of policies and procedures relevant  
21 to a determination of compliance with the requirement of clause (ii). Such  
22 surveys and affidavits shall be admissible in administrative and judicial  
23 proceedings for the purposes of such verification.

24 *Id.*

25 In 1998, amendments were made to the FHA for the purpose of clarifying the  
26 requirements for complying with the HOPA exception. *See* 24 CFR 100.300 et seq. The  
27 amendments provided for a one-year transition period during which communities that  
28 sought to be housing for older persons, but were not compliant with HOPA at the time,  
could discriminate based on familial status in order to become compliant, as long as the  
community

(i) Has reserved all unoccupied units for occupancy by at least one  
person 55 years of age or older until at least 80 percent of the units are  
occupied by at least once person who is 55 years of age or older; and

(ii) Meets the requirements of §§ 100.304, 100.306, and 100.307.

1 § 100.305(e)(5). Section 100.304 states what type of housing may qualify for the HOPA  
2 exemption and states a definition for a housing facility or community. Section 100.306  
3 states the requirements for a community to show that it intends to operate as housing for  
4 older persons. Section 100.307 states the requirements for verification of occupancy:

5 (a) In order for a housing facility or community to qualify as housing for  
6 persons 55 years of age or older, it must be able to produce, in response to a  
7 complaint filed under this title, verification of compliance with § 100.305 through  
8 reliable surveys and affidavits.

9 (b) A facility or community shall, within 180 days of the effective date of  
10 this rule, develop procedures for routinely determining the occupancy of each unit,  
11 including the identification of whether at least one occupant of each unit is 55  
12 years of age or older. Such procedures may be part of a normal leasing or  
13 purchasing arrangement.

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

18 (d) Any of the following documents are considered reliable  
19 documentation of the age of the occupants of the housing facility or community:  
20 (a) Driver's license; (2) Birth certificate; (3) Passport; (4) Immigration card; (5)  
21 Military identification; (6) Any other state, local, national, or international official  
22 documents containing a birth date of comparable reliability; or (7) A certification  
23 in a lease, application, affidavit, or other document signed by any member of the  
24 household age 18 or older asserting that at least one person in the unit is 55 years  
25 of age or older.

26 (e) A facility or community shall consider any one of the forms of  
27 verification identified above as adequate for verification procedures required by  
28 this section.

(f) The housing facility or community must establish and maintain  
appropriate policies to require that occupants comply with the age verifications  
procedures required by this section.

\* \* \*

(i) A summary of occupancy surveys shall be available for inspection upon  
reasonable notice and request by any person.

*Id.* Section 100.305 states that the transition period would expire one year from the  
effective date of the final regulation. The effective date of the final regulation was April  
2, 1999; thus, the transition period ended on May 3, 2000. *Id.*

In 2006, HUD issued a memo ("2006 HUD Memo") to all its regional directors to  
address the question of whether an existing community may become HOPA compliant  
after May 3, 2000, the expiration date of the transition period contained in § 100.305(e).  
2006 HUD Memo, Dkt. 16, Exh. D. The memo states that its purpose is to provide

1 clarification on how communities that did not convert to “housing for older  
2 persons” by May 3, 2000, can become housing for older persons. There are  
3 two ways to establish housing for older persons after the transition period:  
4 conversion and new construction.

5 First, an existing community or facility can convert to “housing for  
6 older persons” if 80 percent of its occupied units become occupied by at  
7 least one person 55 years of age or older. Unlike during the transition  
8 period, housing providers cannot discriminate against families with children  
9 in order to achieve 80 percent occupancy by persons 55 or older. In other  
10 words, a community or facility cannot reserve unoccupied units for persons  
11 55 or older, advertise itself as housing for older persons, or evict families  
12 with children in order to reach the 80 percent threshold. . . . If the  
13 community or facility achieves the 80 percent threshold, *without*  
14 *discriminating against families with children*, it may then publish and  
15 adhere to policies and procedures that demonstrate an intent to provide  
16 housing for persons 55 years or older and comply with verification of  
17 occupancy rules.

18 *Id.* (emphasis in original).

### 19 III. DISCUSSION

#### 20 A. Summary Judgment Standard

21 Summary judgment is proper only if the pleadings, the discovery and disclosure  
22 materials on file, and any affidavits show that there is no genuine issue as to any material  
23 fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).  
24 The moving party is entitled to judgment as a matter of law when the nonmoving party  
25 fails to make a sufficient showing on an essential element of a claim in the case on which  
26 the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323  
27 (1985). There is no genuine issue of fact for trial where the record, taken as a whole,  
28 could not lead a rational trier of fact to find for the nonmoving party. *Matsushita Elec.*  
*Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (nonmoving party must  
present specific, significant probative evidence, not simply “some metaphysical doubt”).  
*See also* Fed. R. Civ. P. 56(e). Conversely, a genuine dispute over a material fact exists if  
there is sufficient evidence supporting the claimed factual dispute, requiring a judge or  
jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477  
U.S. 242, 253 (1986); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d  
626, 630 (9th Cir. 1987).

1 The determination of the existence of a material fact is often a close question. The  
2 Court must consider the substantive evidentiary burden that the nonmoving party must  
3 meet at trial – e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477  
4 U.S. at 254; *T.W. Elec. Serv., Inc.*, 809 F.2d at 630. The Court must resolve any factual  
5 issues of controversy in favor of the nonmoving party only when the facts specifically  
6 attested by that party contradict facts specifically attested by the moving party. The  
7 nonmoving party may not merely state that it will discredit the moving party’s evidence at  
8 trial, in the hopes that evidence can be developed at trial to support the claim. *T.W. Elec.*  
9 *Serv., Inc.*, 809 F.2d at 630 (relying on *Anderson, supra*). Conclusory, nonspecific  
10 statements in affidavits are not sufficient, and missing facts will not be presumed. *Lujan*  
11 *v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 888-89 (1990).

## 12 **B. RISA’s Motion for Partial Summary Judgment**

### 13 **1. Standing**

14 “In *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982), the Supreme  
15 Court reaffirmed that ‘Congress intended standing under the FHA to extend to the full  
16 limits of Article III and that courts accordingly lack the authority to create prudential  
17 barriers to standing in suits brought under that statute.’” *Walker v. City of Lakewood*, 272  
18 F.3d 1114, 1123 (9th Cir. 2001) (quoting *Havens*, 455 U.S. at 372 (internal quotation  
19 marks omitted)). Accordingly, the sole requirement for standing to bring a suit under the  
20 FHA is Article III’s “minima of injury in fact: that the plaintiff allege that as a result of  
21 the defendant’s actions he has suffered a distinct and palpable injury.” *Havens*, 455 U.S.  
22 at 372 (internal quotation marks omitted).

23 In *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), the Supreme Court  
24 established the three requirements for a party to have standing under Article III:

25 First, the plaintiff must have suffered an injury in fact—an invasion of a  
26 legally protected interest which is (a) concrete and particularized, and (b)  
27 actual or imminent, not conjectural or hypothetical. Second, there must be  
28 causal connection between the injury and the conduct complained of—the  
injury has to be fairly traceable to the challenged action of the defendant,  
and not the result of the independent action of some third party not before



1 the court. Third, it must be likely, as opposed to merely speculative, that  
2 the injury will be redressed by a favorable decision.

3 *Id.* at 560-61 (internal quotation marks and citations omitted). When the issue of standing  
4 is brought up in the form of a motion for summary judgment, a plaintiff may not rest on  
5 mere allegations of injury resulting from the defendant’s conduct, but must “set forth by  
6 affidavit or other evidence specific facts, which for purposes of the summary judgment  
7 motion will be taken to be true.” *Lujan*, 504 U.S. at 561 (internal quotation marks and  
8 citations omitted).

9 RISA argues that it is entitled to summary judgment on the issue of standing  
10 because: (1) Plaintiffs present no proof of any FHA injury; (2) the harms alleged by  
11 Plaintiffs have no causal connection to any act prohibited under the FHA; and (3)  
12 Plaintiffs cannot show a substantial likelihood that the relief they request will redress the  
13 alleged harms. Dkt 25. at 12-16. Plaintiffs maintain they have met the three requirements  
14 laid out in *Lujan* to have standing under Article III. Dkt. 29 at 12-15. In deciding RISA’s  
15 motion for summary judgment on the issue of standing, the Court takes as true the facts  
16 set forth in the evidence by Plaintiffs. *Lujan*, 504 U.S. at 561.

17 First, Plaintiffs have alleged an “injury in fact” in that they are unable to list their  
18 homes for sale to the general public and thus, are unable to sell their homes without  
19 complying with a policy they believe to be unlawfully discriminatory. Dkt. 32, Exhs. A-  
20 I; Dkt. 33 at 3-4. This injury is “concrete and particularized” and “actual and imminent”  
21 in that real estate agents refuse to list Plaintiffs’ homes for sale to the general public and  
22 Plaintiffs do not want to be held responsible for unlawful discrimination for listing their  
23 homes as available only to those fifty-five years of age and older. *Id.* Further, even if  
24 Plaintiffs agreed to the restricted listing, those individuals who wanted to purchase a  
25 home in a community exclusively for older persons may hesitate based on the unsettled  
26 status of Ryderwood as such a community. *Id.* Next, Plaintiffs allege injuries resulting  
27 from retaliation by RISA because of their complaints of the alleged unlawful  
28 discrimination. Dkt. 32, Exhs. A-I; Dkt. 33 at 1-3. Moreover, Plaintiff Weaver has

1 alleged an injury in that he was prohibited from allowing his minor son to live with him in  
2 Ryderwood. Dkt. 33 at 3. All of these injuries are the type of “concrete and  
3 particularized” and “actual and imminent” harms that are sufficient to meet the first  
4 standing requirement.

5 Second, the injuries alleged by Plaintiffs are causally connected to the prohibited  
6 acts of RISA. Plaintiffs’ allegations are that RISA’s unlawfully discriminatory policy  
7 directly affects their ability to sell their homes and Weaver’s ability to have his son live  
8 with him. Dkt. 32, Exhs. A-I; Dkt. 33 at 1-4. Further, Plaintiffs maintain that RISA,  
9 through its members, is responsible for unlawful retaliation against Plaintiffs stemming  
10 from their complaints about RISA’s discriminatory policy. Dkt. 32, Exhs. A-I; Dkt. 33 at  
11 1-3.

12 Third, the relief sought by Plaintiffs will redress the alleged harms. Plaintiffs seek  
13 damages resulting from RISA’s unlawful discrimination, as well as declaratory and  
14 injunctive relief to enjoin RISA from discriminating in the future. Dkt. 1 at 11-17. If  
15 Plaintiffs are successful in proving their claims of discrimination and retaliation and  
16 rebutting RISA’s affirmative defenses, then the relief they seek may be granted and their  
17 harms will be redressed.

## 18 **2. Statute of Limitations**

19 “The Supreme Court has held that ‘where a plaintiff, pursuant to the Fair Housing  
20 Act, challenges not just one incident of conduct violative of the Act, but an unlawful  
21 practice that continues into the limitations period, the complaint is timely when it is filed  
22 within [the statutory period, running from] the last asserted occurrence of that practice.’”  
23 *Garcia v. Brockway*, 503 R.3d 1092, 1096-97 (9th Cir. 2007) (quoting *Havens*, 455 U.S.  
24 at 380-81 (footnote omitted)). Following the decision in *Havens*, Congress codified this  
25 continuing violation doctrine at § 3613(a)(1)(A). Now, under the FHA, “[a]n aggrieved  
26 person may commence a civil action in an appropriate United States district court or State  
27  
28

1 court not later than 2 years after the occurrence or the termination of an alleged  
2 discriminatory housing practice . . . .” *Id.*

3 Plaintiffs claim injuries resulting from an alleged unlawfully discriminatory  
4 housing practice which RISA admits is ongoing. Dkt. 24 at 2-3. Although Plaintiffs cite  
5 to specific incidents in which they have been injured by RISA’s practice, they also allege  
6 ongoing injuries caused by RISA’s policies and retaliation. Dkt. 32, Exhs. A-I; Dkt. 33.  
7 Thus, the Court concludes that Plaintiffs’ claims are not barred by the statute of  
8 limitations. *See* § 3613(a)(1)(A). Moreover, the specific incidents alleged by Plaintiffs  
9 are within the two-year statutory period. *See id.* Although Plaintiffs’ allegations  
10 regarding Weaver’s son living with him originated when Weaver moved to Ryderwood in  
11 2005, Plaintiffs’ position is that RISA continues to not allow Weaver’s son to live with  
12 him. Dkt. 33. Therefore, RISA’s motion for summary judgment on this issue is denied.

### 13 **3. The HOPA Exception**

14 The FHA prohibits discrimination based on familial status. Under the HOPA, a  
15 community can qualify for an exemption from this prohibition if it meets certain  
16 requirements. 42 U.S.C. § 3607(b). These requirements include: (1) ensuring that eighty  
17 percent of the occupied units are occupied by at least one person fifty-five years or older;  
18 (2) publishing policies and procedures that demonstrate the community’s intent to provide  
19 housing for persons fifty-five and older; (3) developing a process to verify the ages of  
20 occupants on a regular basis (at least every two years); and (4) maintaining proof of the  
21 age verification process and results. *Id.*; 24 C.F.R. §§ 100.306-100.307. A community  
22 that intended to be housing for older persons but did not meet these requirements by May  
23 3, 2000, must cease discriminating on the basis of familial status until all requirements are  
24 met. 2006 HUD Memo, Dkt. 16, Exh. D. If the community seeking HOPA compliance  
25 “achieves the 80 percent threshold, *without discriminating against families with children,*  
26 it may then publish and adhere to policies and procedures that demonstrate an intent to  
27 provide housing for persons 55 years or older and comply with verification of occupancy  
28

1 rules.” *Id.* (emphasis in original). These rules governing verification of occupancy are  
2 found at § 100.307 of the regulations and establish very specific things that a community  
3 is required to do in order to comply with the HOPA. § 100.307; *see infra* Section II.B.

4 “When Congress has ‘explicitly left a gap for an agency to fill,’ . . . any ensuing  
5 regulation is binding in the courts unless procedurally defective, arbitrary or capricious in  
6 substance, or manifestly contrary to the statute.” *U.S. v. Mead Corp.*, 533 U.S. 218, 227  
7 (2001) (quoting *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467  
8 U.S. 837, 843-44 (1984)). This principle is commonly referred to as *Chevron* deference.  
9 *See generally Mead*, 533 U.S. 218. Although an agency’s internal memorandum is not  
10 entitled to “*Chevron* deference,” it is entitled to “a measure of deference because it  
11 interprets the agencies’ own regulatory scheme.” *Coeur Alaska, Inc. v. Southeast Alaska*  
12 *Conservation*, 129 S. Ct. 2458, 2473 (2009) (citing *Auer v. Robbins*, 519 U.S. 452, 461  
13 (1997)). This “measure of deference” is defined in *Auer*, where the Supreme Court held  
14 that an agency’s interpretation of its own regulation is controlling unless “plainly  
15 erroneous or inconsistent with the regulation.” *Id.* at 461.

16 Here, RISA is seeking summary judgment on its affirmative defense that it is  
17 compliant with the HOPA and therefore entitled to an exemption from the FHA’s  
18 prohibition of discrimination based on familial status. Dkt. 25 at 17-24. RISA admits  
19 that it has governed Ryderwood as a retirement community for persons fifty-five and over  
20 for over fifty-seven years. Dkt. 24 at 2-3. RISA admits that it has limited, and continues  
21 to limit, occupants of Ryderwood homes to persons aged fifty-five and over, with the  
22 exception of spouses. *Id.* Assuming all facts in favor of RISA, the record is clear that  
23 RISA did not attempt to comply with the HOPA until at least 2005. *Id.* at 14. The 2006  
24 HUD Memo, an internal memorandum issued by HUD to its Regional Directors,  
25 interprets the agency’s own regulations found at 24 C.F.R. § 100.303 et seq. Dkt. 16,  
26 Exh. D. The memo is clear that under the regulations, once the transition period ended in  
27 May of 2000, any existing community seeking to comply with the HOPA is required to  
28

1 cease discrimination during the period of gaining compliance. Dkt. 16, Exh. D. The  
2 Court finds that this interpretation is neither plainly erroneous nor inconsistent with  
3 HUD's regulations.

4 In attempting to comply with the HOPA requirements, RISA admits that it has  
5 never ceased discriminating against persons under the age of fifty-five. *Id.* at 2-5.  
6 Therefore, the Court concludes that RISA is not entitled to summary judgment on its  
7 affirmative defense that it is compliant with the HOPA.

## 8 **C. Plaintiffs' Motion for Partial Summary Judgment**

### 9 **1. Discrimination**

10 The FHA prohibits discrimination on the basis of familial status. § 3604(a)-(e).  
11 Section 3602(k) defines familial status as:

12 one or more individuals (who have not attained the age of 18 years) being  
13 domiciled with –

14 (1) a parent or another person having legal custody of such  
15 individual or individuals; or

16 (2) the designee of such parent or other person having such custody,  
17 with the written permissions of such parent or other person.

18 Plaintiffs are seeking summary judgment that RISA unlawfully engaged in  
19 discrimination on the basis of familial status. Dkt. 14 at 7-8. First, in their motion for  
20 partial summary judgment, Plaintiffs cite generally to RISA's policy that limits occupants  
21 of Ryderwood homes to those persons fifty-five and over. *Id.* In their reply to their own  
22 motion and in their opposition to Defendant's motion for partial summary judgment,  
23 Plaintiffs cite specifically to: (1) their inability to list their homes for sale to the general  
24 public; (2) allegations that RISA retaliated against them for complaining about RISA's  
25 wrongful discrimination; and (3) RISA's alleged prohibition of Weaver's minor son  
26 living with him in Ryderwood. Dkt. 20 at 8-11; Dkt. 29 at 13-15.

27 Having reviewed the record submitted in support of these claims and taking the  
28 facts in the light most favorable to RISA, the Court concludes that RISA has failed to  
raise a material question of fact as to Plaintiffs' injuries involving the sale of their homes  
resulting from RISA's discriminatory policy.

1 Plaintiffs claim injuries resulting from the inability to sell their homes to the  
2 general public. Dkt. 29 at 13-15. In support of their claims, Plaintiffs submitted  
3 declarations in which they explain their attempt to list their homes with local real estate  
4 agents and the agents' refusal to list the homes for sale to the general public. Dkt. 32 at  
5 Exhs. A-II. Plaintiffs argue that RISA's discriminatory policy leaves them in this  
6 "conundrum" in which they are forced to choose between complying with a policy they  
7 believe to be unlawfully discriminatory or not selling their homes. Dkt. 29 at 13-14.  
8 RISA does not dispute that it enforces a discriminatory policy based on familial status.  
9 Dkt. 24 at 2-3; Dkt. 17 at 5. However, RISA argues in its opposition to Plaintiffs'  
10 motion, that Plaintiffs do not have standing to bring their claims based on this  
11 discriminatory policy. Dkt. 17 at 11-16. As discussed above, the Court concludes that  
12 Plaintiffs do have standing to survive summary judgment. *See supra* Section III.B.1. In  
13 its reply to its own motion for summary judgment, RISA argues that Plaintiffs have no  
14 proof of their injuries related to the sale of their homes. Dkt. 37 at 2. However, RISA  
15 has produced no evidence to support its assertions, and, without more, such assertions are  
16 insufficient to defeat Plaintiffs' summary judgment motion. *T.W. Elec. Serv., Inc.*, 809  
17 F.2d at 630 (stating that, for purposes of summary judgment, a nonmoving party may not  
18 merely state that it will discredit the moving party's evidence at trial, in the hopes that  
19 evidence can be developed at trial to support the claim).

20 Accordingly, Plaintiffs are entitled to summary judgment on their claims resulting  
21 from their inability to list their homes for sale to the general public. The Court concludes  
22 that RISA has raised material questions of fact with regard to Plaintiffs' specific  
23 allegations of retaliation and discrimination against Weaver based on his inability to live  
24 with his son.

## 25 **2. The HOPA Exception**

26 As explained above in the section denying summary judgment in favor of RISA  
27 on this issue, the Court agrees with Plaintiffs that the 2006 HUD Memo is entitled to  
28

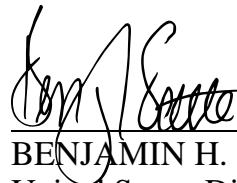
1 deference in its interpretation of the regulations, the appropriate application of the  
2 “transition period,” and compliance with the HOPA after such period ended. *See supra*  
3 Section III.B.3. Therefore, the Court concludes that RISA is not entitled to the HOPA  
4 exception because it has not shown compliance with the regulations governing it. *See id.*

5 **IV. ORDER**

6 Therefore, it is hereby

7 **ORDERED** that RISA’s motion for partial summary judgment (Dkt. 25) is  
8 **DENIED** and Plaintiffs’ motion for partial summary judgment (Dkt. 14) is **GRANTED**  
9 **in part and DENIED in part.**

10 DATED this 4th day of June, 2010.

11   
12 \_\_\_\_\_  
13 BENJAMIN H. SETTLE  
14 United States District Judge  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28