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BY \_\_\_\_\_  
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LOS ANGELES

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8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA

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11 FAIR HOUSING COUNCIL OF SAN )  
12 FERNANDO VALLEY; FAIR )  
13 HOUSING COUNCIL OF SAN )  
DIEGO, individually and on behalf of )  
the GENERAL PUBLIC, )

14 Plaintiffs,

15 v.

16 ROOMMATE.COM, LLC,

17 Defendant.

CASE NO. CV03-9386 PA (RZx)

**DEFENDANT'S  
SUPPLEMENTAL  
MEMORANDUM IN SUPPORT  
OF ITS MOTION FOR  
SUMMARY JUDGEMENT**

[Submitted pursuant to the Court's  
Order of September 14, 2004.]

Hearing date: September 13, 2004  
Time: 1:30 p.m.  
Place: Courtroom 15

Honorable Percy Anderson

Complaint filed: December 22, 2003  
Pre-trial Conf.: October 15, 2004  
Trial Date: November 9, 2004

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I.

**INTRODUCTION**

The Communications Decency Act of 1996, 47 U.S.C. § 230 ("CDA"), bars any claim by plaintiffs that Roommate violated section 12955(g) of the California Fair Employment and Housing Act ("FEHA"), because such a claim would conflict with the publisher immunity created by the CDA. Any possible claim by plaintiffs rests on the publication of third-party content, without review or alteration by Roommate, an interactive computer service. *See* 47 U.S.C. § 230(e)(3) (barring inconsistent state law claims).

Moreover, even apart from the immunity provided by the CDA, plaintiffs have no claim for aiding and abetting liability because they have not raised a triable issue of fact as to: (a) the occurrence (or attempt to commit) an underlying discriminatory act; (b) Roommate's intent; and (c) substantial assistance by Roommate in the commission of a discriminatory act. Accordingly, Roommate's motion for summary judgment should be granted, and plaintiffs' motion for summary judgment should be denied.

II.

**ROOMMATE IS NOT LIABLE UNDER SECTION 12955(g) FOR VIOLATIONS OF SECTION 12955(c)**

As an initial matter, there can be no liability under section 12955(g) of the California Government Code for aiding and abetting the commission of section 12955(c). The analysis is the same as that set forth in Roommate's opening and reply briefs in support of its motion for summary judgment and its opposition to plaintiffs' motion for summary judgment. Liability for violations of section 12955(g) is precluded by the CDA because the content that plaintiffs complain of is wholly the creation of the users, not Roommate. A claim under section 12955(g) that rests on the proposition that Roommate assists users in violating

1 subsection (c) fails for the same reason that the CDA bars a direct claim against  
2 Roommate under subsection (c) or the parallel federal statute, 42 U.S.C. 3604(c) –  
3 the content is entirely the responsibility of users, notwithstanding the formatting  
4 and use of multiple-choice questions for the collection and convenient use of  
5 information. *See Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1124-25 (9<sup>th</sup>  
6 Cir. 2003); *Gentry v. eBay, Inc.*, 99 Cal. App. 4<sup>th</sup> 816, 832-84, 121 Cal. Rptr. 2d  
7 703 (2002). The decisions to sign up for Roommates.com, to prepare a personal or  
8 household profile by answering the questionnaire, and to conduct searches for  
9 compatible roommates based on particular criteria are those of each user.<sup>1</sup>  
10 Imposing liability for third-party postings under aiding-and-abetting theory would  
11 be inconsistent with the immunity created by the CDA.

12  
13 **III.**

14 **ROOMMATE IS NOT LIABLE UNDER SECTION 12955(g) FOR**  
15 **VIOLATIONS OF SECTION 12955(a), (b), (d)-(f), (h)-(l)**

16 There is no aiding-and-abetting liability for violations of other subsections  
17 of section 12955, either. Plaintiffs have not raised a triable issue of fact as to three  
18 elements of a section 12955(g) claim that rests on subsections (a), (b), (c)-(f), (h)-  
19 (l): (a) an underlying unlawful act or an attempt to commit a discriminatory act;  
20 (b) intent by Roommate to assist in a discriminatory act; and (c) substantial  
21 assistance in the commission of a discriminatory act.

22  
23  
24 <sup>1</sup> To the extent that plaintiffs contend that the questionnaires used by  
25 Roommate give rise to aiding and abetting liability, that theory fails for the same  
26 reasons discussed in Section III, below. Speech about housing in the abstract is  
27 not a violation of the fair housing laws; rather, there must be a transaction and,  
28 under aiding-and-abetting standards, the defendant must *assist* with the  
discrimination (or attempted discrimination) in that transaction. Further, imposing  
liability for the questionnaires would run afoul of First Amendment standards for  
incitement, discussed in Section IV, below.

1 **A. Standards for Aiding and Abetting A Violation of FEHA**

2 Section 12955(g) of FEHA makes it unlawful to "aid, abet, incite, compel,  
3 or coerce the doing of any of the acts or practices declared unlawful in [the  
4 housing discrimination section of FEHA], or to attempt to do so." Cal. Govt. Code  
5 § 12955(g). FEHA does not provide a definition of "aid" or "abet," and there is a  
6 dearth of case law construing these terms in connection with the housing  
7 discrimination provisions of FEHA. Some California courts have considered  
8 aiding and abetting in the context of the employment discrimination analog to  
9 section 12955(g). *See Zachlod v. California Public Utilities Commission*, 1995  
10 WL 848952, at \*9 n.2 (N.D. Cal 1995) (recognizing the nearly identical language  
11 of section 12955(g) and section 12940(i) (formerly (g)), which governs aiding and  
12 abetting employment discrimination). These courts have found it appropriate to  
13 apply the common law definition of aiding and abetting: "Liability may . . . be  
14 imposed on one who aids and abets the commission of an intentional tort if the  
15 person (a) knows the other's conduct constitutes a breach of duty and gives  
16 substantial assistance or encouragement to the other to so act or (b) gives  
17 substantial assistance to the other in accomplishing a tortious result and the  
18 person's own conduct, separately considered, constitutes a breach of duty to the  
19 third person." *Fiol v. Doellstedt*, 50 Cal App. 4<sup>th</sup> 1318, 1325-26, 58 Cal. Rptr. 2d  
20 308, 312 (1997); *see also Neilson v. Union Bank of California, N.A.*, 290 F. Supp.  
21 2d 1101, 1133-34 (C.D. Cal. 2003); *Wynn v. NBC, Inc.*, 234 F. Supp. 2d 1067,  
22 1114 (C.D. Cal. 2002); *Vernon v. California*, 116 Cal. App. 4<sup>th</sup> 114, 131-32, 10  
23 Cal. Rptr. 3d 121, 135-36 (2004); *cf. Saunders v. Superior Court of Los Angeles*,  
24 27 Cal. App. 4<sup>th</sup> 832, 846, 33 Cal. Rptr. 2d 438 (1994) (aiding and abetting  
25 generally). In other words, aiding and abetting occurs when one helps another  
26 *commit* an unlawful act, *see Vernon*, 116 Cal. App. 4<sup>th</sup> at 133, or *attempt to*  
27 *commit* an unlawful act.

28

1 This requires *intent* to assist in the commission of the unlawful act. "Under  
2 California law, *actual knowledge and intent* are required to impose aiding and  
3 abetting liability." Resolution Trust Corp. v. Rowe, 1993 WL 183512, \*5 (N.D.  
4 Cal. 1993) (emphasis added); *see also Perfect 10, Inc. v. Cybernet Ventures, Inc.*,  
5 2002 WL 731721 (C.D. Cal. 2002) (requiring plaintiff to show actual knowledge  
6 in order to prevail on unfair competition claim predicated on theory of aiding and  
7 abetting). An aider and abettor cannot formulate the requisite intent without actual  
8 knowledge of the tortious conduct. Resolution Trust Corp, 1993 WL 183512 at \*6  
9 ("Absent knowledge of the scheme, [defendant] could have no intent to further  
10 it."); Howard v. Superior Court, 2 Cal. App. 4th 745, 3 Cal. Rptr. 2d 575 (1992)  
11 (holding that liability for aiding and abetting "necessarily requires a defendant to  
12 reach a *conscious decision* to participate in tortious activity *for the purpose of*  
13 *assisting another in performing a wrongful act*") (emphasis added).

14 Mere knowledge that a tort is being committed and the failure to prevent it  
15 does not constitute aiding and abetting. Fiol, 50 Cal. App. 4th at 1326. Rather,  
16 the defendant must have "*substantially assisted*" in the commission of a tort.  
17 Saunders, 27 Cal. App. 4th at 846. California courts have held that "substantial  
18 assistance" requires actual participation in the discriminatory conduct. *See Wynn*,  
19 234 F. Supp 2d at 1113. In determining a defendant's liability, the court will  
20 consider "the nature of the act encouraged, the amount of assistance given by the  
21 defendant, his presence or absence at the time of the tort, his relation to the other  
22 and his state of mind." Orser v. Vierra, 252 Cal. App. 2d 660, 60 Cal. Rptr. 708  
23 (1967). Absent an independent duty, a party will not be liable for aiding and  
24 abetting as a result of silence or inaction. *See In re Gap Stores Securities*  
25 Litigation, 457 F. Supp. 1135, 1145 (1978) (holding that defendant corporate  
26 officer was not liable for aiding and abetting violation of section 10(b) for failing  
27 to disclose deceptive representations in prospectus).

28



1 **B. Plaintiffs Present No Evidence of An Unlawful Act or Attempted**  
2 **Unlawful Act**

3 Nowhere in their First Amended Complaint do plaintiffs allege an unlawful  
4 act of discrimination on the part of Roommate that violated subsections (a), (b),  
5 (d)-(f), or (h)-(l) of section 12955. Indeed, plaintiffs apparently concede that  
6 roommate selection is not subject to the fair housing laws;<sup>2</sup> they are contending in  
7 this lawsuit that Roommate and those who use Roommates.com are not permitted  
8 to *speak* about the selection criteria that people who share living quarters are  
9 *lawfully* permitted to use. (*See, e.g.*, Pls. Opp. Mot. Summ. Jgmt. at 21.)

10 Plaintiffs fail to point to any specific housing transaction that has implicated  
11 these subsections, or even an attempt by someone to act in violation of these  
12 subsections. There can be no aiding-and-abetting liability where no act of  
13 discrimination, or attempted discrimination, is alleged. Otherwise, liability might  
14 be improperly imposed for statements unrelated to the decisional process –  
15 something the fair housing laws do not reach. Harris v. Itzhaki, 183 F.3d 1043,  
16 1055 (9th Cir. 1999); *see also* EEOC v. Watergate at Landmark Condominium, 24  
17 F.3d 635, 639 & n.4 (4<sup>th</sup> Cir. 1994); Merrick v. Farmers Ins. Group, 892 F. 2d  
18 1434, 1438 (9<sup>th</sup> Cir. 1990). Here, in the context of a motion for summary  
19 judgment, plaintiffs were obligated to raise a triable issue of fact as to the  
20

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21  
22 <sup>2</sup> Even if the Court believes that Plaintiffs have not made this concession, the  
23 Court must hold that the users of Roommates.com are entitled to choose  
24 roommates on whatever basis they want. The California Constitution recognizes a  
25 right of privacy that includes the right to share living quarters with any other  
26 person without interference by the government. *See* California Const., Art. I, § 1;  
27 City of Santa Barbara v. Adamson, 27 Cal.3d 123, 164 Cal. Rptr. 539 (1980)  
28 (reversing preliminary injunction against residents who violated zoning statute on  
the grounds that the statute limiting the number of unrelated persons in a single-  
family house improperly abridged the right to privacy); accord Coalition  
Advocating Legal Housing Options v. City of Santa Monica, 88 Cal. App. 4th 451,  
105 Cal. Rptr. 2d 802 (2001).

1 occurrence of a discriminatory act (or an attempt), and Roommate's substantial  
2 assistance in the accomplishment of that act. Plaintiff has not done this, and, for  
3 that reason alone, any section 12955(g) claim fails.

4 **C. Roommate Lacks the Necessary Intent**

5 Roommate does not edit or review the postings of any users of  
6 Roommates.com. It also does not monitor or participate in the communications  
7 and dealings of users relating to housing. Roommate therefore cannot possibly  
8 have the actual knowledge of discriminatory conduct that is required to establish  
9 intent as an element of aiding-and-abetting liability. *Cf. Carafano v. Metrosplash,*  
10 *Inc.*, 207 F. Supp. 2d 1055 (C.D. Cal. 2002) (no constitutional actual malice or  
11 reckless disregard by website operator where postings were automated), *aff'd on*  
12 *other grounds*, 339 F. 3d 1119 (9<sup>th</sup> Cir. 2003). Plaintiffs therefore cannot establish  
13 that Roommate intended to further a violation of FEHA, and for this additional  
14 reason, any claim under section 12955(g) fails.

15 **D. Roommate Has Not Substantially Assisted An Unlawful Act**

16 Roommate has not provided substantial assistance in any alleged  
17 discriminatory conduct in violation of the FEHA. As discussed above, plaintiffs  
18 appear to concede that the actual selection of a roommate based on preferences  
19 does not run afoul of the federal and state housing laws. But, even if it is, any  
20 discriminatory act is that of *users* who use the website. Roommate merely  
21 provides a neutral location where people can look for suitable living companions.  
22 No one is required to use the site or provide any information. Roommate does not  
23 have any interest in, or control over, any housing. The choices that users make –  
24 in the contents of their postings and any decisions relating to the selection of a  
25 roommate – are theirs alone.

26 Indeed, the searching of the Roommates.com database for potential  
27 roommates can be done with *no preference*; no one compelled or encouraged by  
28 Roommate to select a roommate based on unlawful criteria (even if it is assumed

1 for the sake of argument that roommate selection is subject to the fair housing  
2 laws, which plaintiffs concede is *not* the case). The only "participation" that  
3 Roommate might have, in any respect, is permitting users to post, without review  
4 or alteration, preferential statements. And *that* activity is mere *publication* by an  
5 interactive computer service of *third-party content* that is immunized by the CDA.

6  
7 **IV.**

8 **ANY CLAIM UNDER SECTION 12955(g) FAILS UNDER THE**  
9 **FIRST AMENDMENT**

10 There is no evidence that Roommate engaged in any discrimination in the  
11 sale or rental of housing. Therefore, any claim under 12955(g) would rest on  
12 speech, and there can be no liability under that subsection unless plaintiffs' claim  
13 meets First Amendment standards – which it cannot.

14 **A. Any Section 12955(g) Claim Cannot Meet The Requirements Of The**  
15 **Incitement Doctrine**

16 To the extent that plaintiffs are contending that the Roommates.com website  
17 will encourage the violation of FEHA, this would be akin to an "incitement"  
18 theory. But there can be no liability for speech resulting in a harmful act unless it  
19 meets the requirements of Brandenburg v. Ohio: "Constitutional guarantees of  
20 free speech and free press do not permit a state to forbid or proscribe advocacy of  
21 the use of force or of law violations except where such advocacy *is directed to*  
22 *inciting or producing imminent lawless action and is likely to incite or produce*  
23 *such action.*" 395 U.S. 444, 447 (1969) (emphasis added).

24 As discussed above, plaintiffs have not alleged, or presented any evidence  
25 of, actual discriminatory conduct. A section 12955(g) claim rests, then, on the  
26 notion that Roommate is culpable for merely allowing others to make preferential  
27 statements. This does not meet the Brandenburg standard; the indication of a  
28 preference for particular living companions does not incite or produce imminent

1 lawless action – particularly here, where the selection process itself is protected by  
2 the constitutional right of intimate association. Moreover, there are no cases that  
3 suggest that the owner of a location where inciteful speech occurs is liable for the  
4 speech of others.

5 And plaintiffs have not presented *any evidence* that the statements on  
6 Roommate had any effect (or even raised the real possibility of affecting) any  
7 housing transaction subject to the fair housing laws. Statements in the abstract do  
8 not give rise to liability under Brandenburg. *See, e.g., Olivia N. v. National*  
9 Broadcasting Co., 126 Cal. App. 3d 488, 178 Cal. Rptr. 888 (1992) (rejecting  
10 claim that minors were incited to rape 9-year-old by television show); McCollum  
11 v. CBS, Inc., 202 Cal. App. 3d 989, 249 Cal. Rptr. 187 (1988) (rejecting claim that  
12 teenager was driven to suicide by Ozzy Osbourne); *cf. Eimann v. Soldier of*  
13 Fortune Magazine, 880 F.2d 830, 837 (1989) (finding that imposing liability  
14 whenever something could reasonably be interpreted as an offer to engage in  
15 illegal activity creates too great a burden because it opens the door to  
16 indeterminate liability).

17 **B. Any Section 12955(g) Also Fails for the Same Constitutional Reasons As**  
18 **Plaintiffs' Other Claims**

19 Again, given that Roommate's only involvement in the alleged wrongdoing  
20 asserted by plaintiffs is the publication of statements by others, any claims under  
21 12955(g) are barred by the First Amendment. Plaintiffs would be seeking to  
22 impose liability for disfavored speech based on content and viewpoint. (*See* Defs.  
23 Mot. Summ. Jgmt. at 13-17.) The government has no compelling interest in  
24 punishing the operators of a website simply because the website allows others to  
25 post statements that some might consider objectionable – particularly when the  
26 only harm alleged is psychic injury (which plaintiffs appear to concede, and which  
27 the United States Supreme Court has *rejected* as a compelling government interest  
28 justifying the regulation of speech). Plaintiffs seek to shut down Roommates.com

1 by imposing a crushing monitoring and censorship burden. Further, there are  
2 alternatives available that do not restrict or punish speech, including (assuming for  
3 the moment that roommate selection is subject to nondiscrimination laws)  
4 enforcing the laws against those who unlawfully discriminate.

5 Even under the intermediate scrutiny used for commercial speech, use of  
6 section 12955(g) to restrict speech on Roommates.com would run afoul of the  
7 First Amendment. Plaintiffs are seeking to punish Roommate for speech about  
8 lawful conduct. There is no substantial government interest in punishing such  
9 speech and, even if there was, the remedy sought by plaintiffs does not advance  
10 that interest. Indeed, it inhibits community diversity by handcuffing those who  
11 would share their homes with others if permitted to freely choose compatible  
12 living partners, and by restricting the free flow of information that would result in  
13 shared homes. (*See* Defs. Mot. Summ. Jgmt. at 17-25.) The interest in diversity in  
14 housing is advanced by education and by enforcing laws that apply to those who  
15 control housing stock, not by punishing those who provide a forum for speech  
16 about matters that are constitutionally protected, such as the choice of living  
17 companions.

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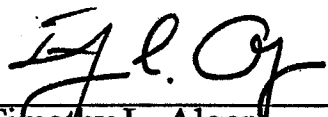
IV.

**CONCLUSION**

For the forgoing reasons, Roommate respectfully requests that the Court grant summary judgment in its favor, deny plaintiffs' motion for summary judgment, and dismiss the action in its entirety.

DATED: September 27, 2004

QUINN EMANUEL URQUHART  
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By   
\_\_\_\_\_  
Timothy L. Alger  
Attorneys for Defendant  
Roommates.com, LLC

**PROOF OF SERVICE**

1013A(3) CCP Revised 5/1/88

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is: QUINN EMANUEL URQUHART OLIVER & HEDGES, LLP, 865 South Figueroa Street, 10th Floor, Los Angeles, California 90017.

On September 27, 2004, I served the foregoing document(s) on interested parties in this action described as: **DEFENDANT'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

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Law Offices of Gary W. Rhoades  
834 1/2 S. Mansfield Ave.  
Los Angeles, CA 90036  
Telephone: (323) 937-7095  
Fax: (775) 640-2274**

Executed on September 27, 2004, at Los Angeles, California.

     (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

     **X** (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

     Carol R. Austin  
Type or Print

       
Signature